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THE
IRISH JURIST.

VOL. VII.—MISCELLANEOUS.

CONTAINING

ARTICLES ON LEGAL SUBJECTS, RULES AND ORDERS OF THE SEVERAL
COURTS, AND OTHER USEFUL LEGAL INFORMATION.

FOR THE YEAR 1854—1855.

WITH AN

INDEX OF THE MATTER CONTAINED THEREIN.

DUBLIN :
EDWARD J. MILLIKEN, 15 COLLEGE GREEN.
1855.

Rec. Sept. 24, 1873

THE

IRISH JURIST.

No. 306.—VOL. VII. NOVEMBER 11, 1854. PRICE, per Annum; £1 10s.

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DUBLIN, NOVEMBER 11, 1854.

WE, this day, commence the Seventh year of our literary existence, and trust that we shall experience the auspicious influence of the mystic number. Comparatively feeble, as have been the results of our labours as legal journalists, these have not been the less strenuous or sincere, and we trust progressively to earn the confidence of our friends.

A vast revolution in law procedure has taken place since this journal was first set on foot, which indeed, at that time, was little anticipated; and we have done, and shall continue to do, our best to make known, through our reporting columns, the details of this new practice, according as they are settled by judicial interpretation.

As we have already remarked, we are the only existing medium, in the line of the Press, for communicating the feelings and views of the Irish Legal Public, in relation to their profession. We have heartily endeavoured to advocate whatever we regard as calculated to promote their interests, between which and those of the public at large there ought to be no conflict. We are, however, free to

admit that many subjects deserving of comment may have escaped our observation, but our columns are ever open to the insertion of remonstrances against grievances and suggestions for their amelioration, and we earnestly invite our friends freely to come forward, and avail themselves of the opportunity which our Miscellaneous pages present for the discussion of such topics.

We shall continue to use our best exertions to give timely and speedy information of new Rules and Orders, contemplated changes in the law, and in short of whatever is calculated to be of professional interest.

Having said thus much, it appears to be superfluous to add more, as we are not about to launch on a new and untried undertaking, wherein pledges given at random, and copious self-laudation, might be in degree excusable. The plan of our work is already practically understood, and we believe we may say appreciated, and it will therefore suffice for us to say that we hope to progress uninterruptedly, and, by the favour of our friends, successfully, in the present direction of our labours.

WE have been obliged frequently to observe on the hasty and negligent manner in which Acts of Parliament are prepared and passed by the Legislature of this enlightened nation; and whilst our respected and able cotemporary, *The English Jurist*, has written forcibly and well on the necessity of a codification of the laws; and whilst a commission of learned men has been appointed to systematize the law, and render the same accessible to, and intelligible by the population who are to be governed by it, yet, we humbly think that so long as the current legislation of the kingdom is carried on in a slovenly and careless manner, the codification of the general law would be comparatively useless; and that it would be more important, and of more pressing and practical utility, as well as more easy of execution, to provide for careful and plain legislation in matters respecting the growing necessities of the state, than even to reduce (if possible) the existing law to a uniform code.

The consideration of the Procedure Act, passed in the last session of Parliament has more particularly given rise to these reflections, and we conceive that that Act, in itself, affords an eminent proof of the neglect, if not the contempt of our senators, for the first duty of legislators: the promulgation of their edicts.

The Act we allude to is 17 and 18 Vic. cap. 125, entitled "An Act for the further Amendment of the Process, Practice, and mode of pleading in, and enlarging the Jurisdiction of the Superior Courts of Common Law at *Westminster*, and of the Superior Courts of Common Law of the *Counties Palatine of Lancaster and Durham*," and it is mentioned in the Index of the Statutes printed by the *Queen's Printer* as extending only to England, being marked with the letter E. This Act effects many important changes in the law of evidence, the jurisdiction of the judges, the conduct of causes, and the practice of the courts, and is of considerable length, containing 107 Clauses.

In this Act is contained an interpretation clause, (section 99,) that most perplexing and inartificial mode of legislation. This clause immediately follows the main provisions of the Act, and declares that in the construction thereof the word "court" shall be understood to mean any one of the superior courts of common law at *Westminster*; and the word "judge" shall be understood to mean a judge or baron of any of the said courts; and the word "action" shall be understood to mean any personal action in any of the said courts. Now, surely, in an Act of such length, and by its title, its interpre-

tation clause, and the first 102 sections of its enactments adapted and apparently confined to the courts specified in the title, it is a monstrous thing (without any recital or reason assigned) to introduce a clause, (section 103,) to this effect, viz.: the enactments contained in sections 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of this Act shall affect and extend to every court of civil judicature in *England and Ireland*. But the 19th section, which is the first section of which the enactments are extended to every court of civil judicature in *England and Ireland*, is to this effect, viz.: "It shall be lawful for the court or judge at the trial of any cause where they or he may deem it right for the purposes of justice, to order an adjournment for such time and subject to such terms and conditions as to costs or otherwise as they or he may think fit." Now, here evidently there is a distinction taken between the court and the judge; the one apparently meaning the court in its collective capacity, and the other the judge presiding at *Nisi Prius*; and in the latter case it is, at least, doubtful whether a judge sitting at *Nisi Prius* in *Ireland* or any place out of *Westminster*, would have authority to postpone a trial, for although the words of sec. 103, extending the enactments in clause No. 19 and the following clauses to every court of civil judicature, so far enlarges the restrictive meaning of the word "court" in the interpretation clause, yet it does not allude to or extend the meaning of the word "judge," which by the interpretation clause is restricted to a judge or baron of the superior courts of common law at *Westminster*. And we imagine that it would not be convenient for a judge of the Court of Common Pleas at *Westminster* to make an order in a cause at trial in the County of *Donegal* or *Kerry*, before a judge or baron of the superior courts in *Ireland*.

We do not offer any opinion as to the construction which the courts may put on these contradictory enactments; but we feel persuaded that it is a specimen of legislation which is unworthy of our enlightened Legislature. G.

Court Papers.

Chancery.

Nov. 9.—The following gentlemen were this day admitted to the degree of Barrister:—

Thomas Kane, Esq., A.B., T.C.D., second son of Daniel Ryan Kane, of Upper Fitzwilliam-street, Esq., Q.C.

Henry Colclough Burroughs, Esq., A.B., T.C.D., second son of the Rev. Arthur Thomas Burroughs, late Rector of St. Luke's Parish, in the City of Dublin, deceased.

George Whitty Abraham, Esq., A.B., T.C.D., only son of John Abraham, late of Riversdale, in the County of Wicklow, Esq., deceased.

Oliver Joseph Burke, Esq., A.B., T.C.D., second son of Joseph Burke, of Ower, in the County of Galway, Esq.

Christopher Cheevers, Esq., A.B., T.C.D., second son of John Cheevers, of Killyon, in the Co. Galway, Esq.

Walter Sweetman, Esq., London University, fourth son of Michael Sweetman, late of Longtown House, in the County of Kildare, Esq., deceased.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 299, vol. 6.)

CAP. LXXXIX.

An Act to amend the Laws for the better Prevention of the Sale of Spirits by unlicensed Persons, and for the Suppression of illicit Distillation, in Ireland. [10th August, 1854.]

"Whereas an Act was passed in the session holden in the second and third years of her Majesty, intitled *An Act for the better Prevention of the Sale of Spirits by unlicensed Persons in Ireland*, and certain of the provisions therein were temporary, and have been continued to the twenty-fourth day of August, one thousand eight hundred and fifty-four: and whereas it is expedient to make further provision for the better prevention of the sale of spirits by unlicensed persons in Ireland: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. This Act shall commence from the twenty-fourth day of August, one thousand eight hundred and fifty-four: and from that day so much of the said Act of the second and third years of her Majesty as shall not have expired shall be repealed.

II. It shall and may be lawful for any one or more justice or justices of the peace, whether in or out of petty sessions, upon being satisfied by the personal examination on oath of a credible witness that there is reasonable ground for suspecting that spirits are sold, kept for sale, or exposed for sale in any house or place within the county, not licensed for the sale thereof, or by some persons not having a licence to sell spirits in or at such house or place, or that illicit spirits are kept for sale in or at any house or place, to grant a warrant under his or their hand or hands, authorizing within the police district of Dublin metropolis any superintendent or inspector of police, or in any other part of Ireland any sub-inspector, head or other constable of constabulary, with his assistants respectively, to enter such house or place at all times, to search for spirits, and if any spirits shall be found in such house

or place exceeding one gallon, without a permit or other legal authority justifying the keeping thereof, or any spirits in any quantity whatsoever, the full duties whereon shall not have been duly paid, shall be found in such house or place, to seize such spirits together with the vessel in which the same are contained; and such warrant shall continue in force for one month from the date thereof, and shall be a sufficient authority to the superintendent, inspector, sub-inspector, head or other constable therein named, and his assistants respectively, such assistants being members of the constabulary force, in his presence to enter into such house or place, and seize all such spirits as aforesaid and the vessel containing the same, and to carry away and deliver the same to some revenue officer; and the person on whose premises such spirits shall be found as aforesaid shall on conviction be liable—

For the first offence, to a fine not exceeding five pounds nor less than two pounds, or to be imprisoned with or without hard labour, for any term not exceeding three months nor less than one month:

And for the second and every subsequent offence, to a fine not exceeding ten pounds nor less than five pounds, or to be imprisoned, with or without hard labour, for any term not exceeding six months nor less than three months:

And all such spirits and the vessels containing the same so seized as aforesaid shall be forfeited.

III. Every person, not being duly licensed to sell wine, spirits, beer, ale, cider, or perry, who shall sell, or keep for sale, or expose for sale, any wine, spirits, beer, ale, cider, or perry, shall for every such offence be liable—

For the first offence, to a fine not exceeding two pounds nor less than five shillings, or to be imprisoned, with or without hard labour, for any term not exceeding one month nor less than one week:

And for the second and every subsequent offence, to a fine not exceeding five pounds nor less than twenty shillings, or to be imprisoned, with or without hard labour, for any term not exceeding three months, nor less than one month:

And for the purpose of any such conviction it shall be sufficient to prove that wine, spirits, beer, ale, cider, or perry, was kept for sale or exposed for sale by such person or on his premises, or had been illegally consumed on such premises, at any time within two months preceding such alleged offence; and if any person be found drunk in such house, or having the appearance of having been recently drinking, it shall be deemed evidence of his having been drinking in such house, and of the unlawful consumption of wine, spirits, beer, ale, cider, or perry, unless the contrary be proved.

IV. If any superintendent, inspector, or serjeant of the Dublin metropolitan police, or any sub-inspector, head or other constable of constabulary, or other credible witness, shall make oath in writing before a justice of the peace that the said superintendent, inspector, serjeant, sub-inspector, head or other constable, or credible witness, has good reason to believe that wine, spirits, beer, ale, cider, or

perry, are retailed or sold without a licence, or kept for sale without licence, in any room, house, or other place, it shall be lawful for such justice to grant a warrant authorizing, within the police district of *Dublin* metropolis, any superintendent, inspector, or serjeant of police, and in any other part of *Ireland* any sub-inspector, head or other constable of constabulary, with his assistants respectively, to enter into any such room, house, or other place as aforesaid at all times, and such warrant shall continue in force for one month from the date thereof; and if any person shall be found to be drinking or tipping, or having the appearance of having been recently drinking or tipping, on such unlicensed premises, such person may be summoned before the justices of the peace in petty sessions, or divisional justices of the metropolitan police district of *Dublin*, as the case may be, or may be lawfully apprehended and brought, so soon as conveniently may be, before a justice of the peace, to be dealt with according to law, and upon conviction of his having been so drinking or tipping on such unlicensed premises shall be liable—

For the first offence, to a fine not exceeding five shillings, nor less than two shillings and six-

pence, or to be imprisoned, with or without hard labour, for any time not exceeding twenty-four hours nor less than twelve hours from the time of his conviction:

And for the second and every subsequent offence, to a fine not exceeding ten shillings, nor less than five shillings, or to be imprisoned as aforesaid for any time not exceeding one week, nor less than three days:

And in all cases where such person shall be found drinking or tipping, or having the appearance of having been recently drinking or tipping, on such unlicensed premises, it shall be lawful for any such superintendent, inspector, sergeant, sub-inspector, head or other constable, and his assistants respectively, to seize any quantity of wine, spirits, beer, ale, cider, or perry found on such premises, together with the vessel containing the same, and all vessels, jugs, or glasses used in the sale or consumption thereof, and on conviction of any such person so found as aforesaid such spirits, wine, beer, ale, cider, or perry, vessels, jugs, and glasses so seized, shall be forfeited, and shall be delivered to some revenue officer.

(To be continued.)

Incumbered Estates Court.

CONDITIONAL AND ABSOLUTE ORDERS, ENDING 26TH OCTOBER.

Owner.	Conditional Orders.	Absolute Orders.	Posting for Sales.	Solicitor.
Barlow, John,	Nov. 16,	John Smith.
Baile, Rev. John,	...	Oct. 23,	.....	H. Joyce.
Clarke, Denis,	Dec. 1,	W. Lambe.
Cooke, R. & J.—F. Rolleston, Trustee,	...	„ 18,	.....	E. Lewis.
Constable, Robert,	Jan. 23, 1855,	John Hunt.
Donnellan, H. Stafford,	...	„ 19,	.....	John Ganssen.
Fetherstonhaugh, Outhbert,	...	„ 18,	.....	.....
Garvey, William and another,	Feb. 13, 1855,	J. Henderson.
Harington, Euphenia G., widow,	...	„ 20,	.....	J. Collum.
Jones, John,	Nov. 30,	John Bagenal.
Kearney, Flan,	Feb. 6, 1855,	M. Cullinan.
Lysaght, George,	Nov. 24, 1854,	W. Cullen.
M'Donnell, C. P.	Feb. 13, 1855,	H. A. Dillon.
Mornington, Earl of,	Nov. 31, 1854,	Garde and Atkinson.
O'Connell, Richard,	„ 23,	James Tyrrell.
O'Kearney, Patrick J. O.	„ 24,	V. B. Delandra.
Power, Eyre, Trustee of,	„ 23,	H. O'Shea.
Roberts, Charles T. C.,	Dec. 1,	Garde and Atkinson.
Ryall, G. Assignee of,	Nov. 30,	G. Bolton.
Skene, Grace,	„ 23,	Garde and Atkinson.
Stewart, Sir H.	Jan. 18, 1855,	S. F. Adair.
Thornton, P. M.,	Nov. 23, 1854,	W. Leech.
Tottenham, A. H.,	...	„ 20,	.....	John Collum.
Tuphill, John and another,	„ 23,	H. F. Burroughs.
Vesey, G. W.,	Feb. 6, 1855,	Seymour and Webb.
White, Henry C. and others,	Nov. 30, 1854,

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THE

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DUBLIN, NOVEMBER 18, 1854.

Our learned cotemporary (*The English Jurist*) contains, in its last number of November 11, a well-timed article upon the decay of sound legal learning. The writer complains of the rapid extinction of the class of lawyers who do their business conscientiously, completely and satisfactorily to themselves and to their clients, and of the substitution for them of a race of little better than pretenders. Of course the writer speaks from personal experience, and it is very possible that his observations may be painfully true of the Bar, of which he is a member, but we are willing to hope that he has somewhat overcoloured the gloomy picture. We trust, at all events, that the Bar of Ireland has not yet arrived at this melancholy pass. But the causes which have produced this deterioration, and which we fully admit are calculated to corrode the system, are at work here as well as there. These causes are twofold, in his opinion, namely, crude legislation and re-legislation, and the

multiplication of reports. The Editor of *The Jurist* gives it as his opinion that it has become, at the present day, quite impossible to regard the law as a science, so liable is it to continual and capricious fluctuation. He refers to his own experience in this respect and tells us that he had, till recently, by dint of a system of accurate noting up of fresh cases and statutes, managed to keep up an acquaintance with the current state of the law, but that his efforts were at last completely baffled. Now, we quite agree with our learned friend that the law as now administered has ceased to be a science, and that it is morally impossible for any man of mere ordinary intellect to aspire to a thorough abiding knowledge of it, such a grasp for example of his profession as Lords Coke and Hale possessed of the legal lore of their times. We think, however, that he is mistaken in supposing that from the time when his career opened, there has been such a sensible degeneracy in the law as he assumes. It is true that the work of law-making, both by legislators and judges, has been going on briskly since then; but, on the other hand, it must be borne in mind

that many legal shoals and quicksands, which were wont to embarrass the practitioner, have since that time ceased to exist, and the great landmarks of the law have not materially been shaken.

Making allowance for this laudation of a by-gone period, we do not underrate the perils with which we are now encompassed. We ourselves have, ere this, commented on the crudities of legislation, by which we have been harrassed of late years, and earnestly do we hope that a remedy will, ere long, be provided. That we consider to be by far the greatest difficulty with which we have to cope. We live in too practical and utilitarian an age for the law to submit to be cramped into a science; and the mental stock in trade with which a student must now be satisfied to commence practice should be mostly a thorough knowledge of fundamental principles, leaving the rest to be learned *pro re nata*: but, unless there be some guarantee for well matured legislation, these landmarks will be in continual jeopardy.

With respect to the multiplication of reports, this is also a serious inconvenience. It is discouraging to the student not only in point of expense, but from the hopelessness of ever mastering such a conflict of authorities; and it introduces another element of uncertainty into the administration of the law, inasmuch as it places it within the power of the able and unscrupulous advocate, by dint of sophistry, to carry his point, through the improvidence of the court, and thus to add another authority in support of a fallacy.

The suggestion of our contemporary for the remedy of this evil has much to recommend it, namely, the appointment of a commission somewhat resembling that which sat in the reign of the Emperor Justinian, to make a Digest of such reported cases as are to be regarded as authorities, and to consign the rest to oblivion; and, with regard to future decisions, that the *Court* should appoint reporters, whose labours should be under their special controul. There are, however, a class of reports, relative to questions of practice, which will always be found of value to the Profession, dealing, as they do, with questions resolved, not for permanence, but to suit the exigency of the time, and begin rather in the light of memoranda to refresh the memories of the judges than authorities to coerce them, and such might be safely left to private enterprise.

We hope that both the sources of difficulty, to which we have referred, will be carefully considered and apt remedies devised.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 4.)

V. If any person occupying any house or place, or any person aiding or assisting such occupier, on demand made of entrance by any justice of the peace, or superintendent, inspector, or sergeant of police, sub-inspector, head or other constable respectively, and on his stating that he seeks to enter by virtue of his office as a justice of the peace, or by the authority of a warrant from a justice of the peace (which warrant he shall produce when required so to do), shall delay or refuse to admit such justice, superintendent, inspector, sergeant, sub-inspector, head or other constable, or his assistants respectively, into such house or place for the purpose of executing such warrant as aforesaid, such person shall forfeit and pay a sum not exceeding the sum of two pounds, nor less than ten shillings, or be imprisoned for any term not exceeding one fortnight, nor less than one week, unless proof shall be made to the satisfaction of the justice or justices who may hear the complaint that there was reasonable cause for giving such delay or refusal: provided always, that for the purpose of such conviction as last aforesaid, proof to the satisfaction of the justice who may hear the complaint that spirits were sold or kept or exposed for sale in such room, house, or place where such person was so found therein shall be sufficient evidence that no licence then existed for selling spirits, unless the contrary be proved.

VI. As to spirits *in transitu* or process of removal from one place to another, it shall and may be lawful for any county inspector, sub-inspector, head or other constable of constabulary, to demand from any person having in his custody or possession any spirits in any quantity whatsoever exceeding one gallon a proper permit or certificate authorizing the removal of such spirits, and on the production of any such permit or certificate to endorse the same with his own name, together with the place, date, and time of such endorsement; and in case no permit or certificate shall be produced, or any permit the limitation of which shall have expired, it shall be lawful for such county inspector, sub-inspector, head or other constable, to seize such spirits, together with the vessel containing the same, and the horse or other cattle, and cart or other carriage, used in the removal thereof, and to arrest the person in whose possession or custody the same shall have been found, and to convey him, as soon as conveniently may be, before a justice of the peace, to be dealt with as herein directed; and the person in whose possession or custody such spirits shall have been found without such permit or certificate, or with any permit the limitation of which shall have expired, shall be liable—

For the first offence, to a penalty not exceeding five pounds, nor less than twenty shillings, or to be imprisoned, with or without hard labour, for a term not exceeding three months nor less than one month:

And for the second and every subsequent offence, to a penalty not exceeding ten pounds, nor less

than forty shillings, or be imprisoned as aforesaid for a term not exceeding six months, nor less than two months.

VII. Nothing herein contained shall extend to prohibit any person or persons duly licensed under any Act or Acts relating to the excise laws in *Ireland* to carry on his trade or business, for which he shall be so licensed as aforesaid, in booths, tents, or other places, at the time and place, and within the limits, of holding any lawful and accustomed fair, or at any public races, or shall authorize the seizure of wine, spirits, beer, ale, cider, or perry in any such booth, tent, or other place, within the limits aforesaid, in which such person so licensed shall so carry on his trade, or the taking or apprehending of any person therein at any time or hour during which the sale of spirits is not prohibited by law.

VIII. All proceedings under this Act shall be conducted, and all penalties imposed, and costs awarded under this Act shall be sued for, levied, and recovered, and any conviction under this Act shall be appealed from, as by the "Petty Sessions (*Ireland*) Act, 1851," is directed, provided, and enacted, except where otherwise specially exempted or provided for in the said Act and this Act, anything in any former Act or Acts to the contrary notwithstanding.

IX. From and after the commencement of this Act, every person who shall apply for a certificate to obtain an excise licence, under or by the authority of any Act or Acts for the sale of wine, spirits, beer, ale, cider, or perry by retail in *Ireland*, to be drank or consumed on the premises or elsewhere, shall, twenty-one days at least before the quarter sessions at which such application is intended to be made, give notice in writing to the sub-inspector of the district in which he resides, or in his absence to the head constable, or if in the metropolitan *Dublin* police district, to the superintendent of police of the division in which such person resides, stating the intention of such person to make such application, and setting forth his place of residence, the situation and place of the house where such wines, spirits, beer, ale, cider, or perry are to be sold, and the names and places of abode of the persons whom such person requiring such certificate proposes as sureties.

X. The sub-inspector of the district, or in his absence the head-constable, or if in the metropolitan *Dublin* police district, the superintendent of police of the division, shall be and is hereby authorized to object to such certificate before the justices at the quarter sessions or recorder, as the case may be, and the justices or recorder shall proceed to consider, examine on oath into, and adjudicate upon the truth, sufficiency, and validity of such objection; and it shall be lawful to require the applicant to answer whether he belongs to any unlawful society or not, but any admission by such applicant is not to be used in evidence in any prosecution against the party making it; and if such justices or recorder shall be satisfied of the truth and sufficiency of such objection, they may prohibit such certificate to be issued, in like manner as they are authorized to do according to law.

XI. From and after the commencement of this Act, it shall not be lawful for any officer of excise in *Ireland* to grant a renewal of any such licence as aforesaid to any person applying for such renewal at and for the same house as shall have been licensed in the year immediately preceding, and whose licence shall not have been withdrawn or annulled, without such person producing a certificate, signed by two or more justices of the peace presiding at the petty sessions of the district in which such person resides, or if in the *Dublin* metropolitan police district by a divisional justice of the district in which such person resides, to the good character of such person, and to the peaceable and orderly manner in which such house had been conducted in the past year.

XII. "And whereas by the Act of the session holden in the eighth and ninth years of her Majesty, chapter sixty-four, intituled *An Act to amend certain regulations respecting the retail of spirits in Ireland*, power is given to any justice of the peace, or any chief or other constable or overseer, within the limits of his jurisdiction, to enter into any house or place kept open for the sale of spirits to be consumed elsewhere than in such house or place: and whereas doubts have arisen as to whether the right of entry extends to every part of such house or place, or only to the particular part entered as licensed for such sale of spirits in the books of the inland revenue department:"

From and after the commencement of this Act, the words "chief or other constable" shall be construed to mean and include any county inspector, sub-inspector, head or other constable of constabulary, or any superintendent, inspector, or constable of the *Dublin* metropolitan police; and the words "house or place" in this and the aforesaid Act, or any other Act or Acts relating to the sale of spirits, wine, beer, ale, cider, or perry in *Ireland*, shall be construed to mean and to extend to every room, closet, cellar, yard, stable, outhouse, shed, or any other place whatsoever of, belonging, or in any manner appertaining to such house or place; and whatever particular part of such house or place shall be entered in the said books of the said inland revenue department as licensed under the said Act of the eighth and ninth years of her Majesty, or any other Acts relating to the sale of spirits, wine, beer, ale, cider, or perry, as aforesaid, it shall be lawful for any such justice of the peace, chief or other constable, or overseer, or any officer of excise, with their assistants respectively, to enter every room, closet, cellar, yard, stable, outhouse, shed, or any other place whatsoever belonging to such house or place.

XIII. And for the better prevention and suppression of offences against the laws relating to illicit distillation in *Ireland*, from and after the passing of this Act, whenever and from time to time as often as the Lord Lieutenant or other chief governor or governors in *Ireland* shall see fit so to order and direct, it shall and may be lawful for the county inspector, sub-inspector, head or other constable within any county, county of a city, or county of a town, or in any one or more barony or baronies or half barony or half baronies in such county at large, or any part or parts or district or districts of any

such county or county of a city or county of a town named in any order issued in that behalf, to exercise all the powers and authorities and to have and possess all the privileges granted to officers of excise by an Act passed in the first and second years of the reign of his late Majesty King *William* the Fourth, intituled *An Act to consolidate and amend the Laws for suppressing the illicit making of Malt and Distillation of Spirits in Ireland*, in searching for private stills, wort, wash, potale, low wines or singlings, or spirits, and corn and grain making into malt, and in arresting and detecting persons discovered in the place where the private making of wort, wash, or potale, or distillation of spirits or making of malt, is carrying on, as fully and effectually as if the clauses in the said Act had been repeated and re-enacted in the body of this Act, and made to apply to such county inspector, sub-inspector, head or other constable as aforesaid.

XIV. Provided always, that no such order as aforesaid shall be issued after the expiration of three years from the passing of this Act, nor shall any such order continue in force after the expiration of the said term of three years; and it shall be lawful for the Lord Lieutenant or other chief governor or governors of *Ireland*, at any time within the said term of three years, to revoke any such order as aforesaid for the time being in force; and from and after such revocation such county inspector, sub-inspector, head or other constable as aforesaid, shall cease to exercise and possess such powers, authorities and privileges as aforesaid.

XV. And it shall and may be lawful for the inspector-general of the constabulary force in *Ireland*,

with the approbation of the Lord Lieutenant or other chief governor or governors of *Ireland*, from time to time to frame rules and regulations for the guidance of the said constabulary force in the prevention or suppression of illicit distillation in such districts as aforesaid, and for the making of returns to the Lord Lieutenant or other governors of *Ireland* of all seizures whatsoever made, and of the apprehension of offenders by any county inspector, sub-inspector, head or other constable of the said constabulary force, and also of all other measures taken for or towards the prevention or suppression of illicit distillation, under the authority of such orders as aforesaid.

XVI. A copy of all rules, regulations, or orders which may be made by the inspector-general of constabulary for the guidance of the said constabulary force to carry into effect the provisions of this Act shall be laid before Parliament within six weeks from the date of the issue thereof, if Parliament be then sitting, or if not then sitting, within six weeks from the day of the next ensuing meeting of Parliament.

XVII. All seizures made under the provisions of this Act by the said inspector or superintendent or serjeant of police, or by any county inspectors, sub-inspectors, head or other constables, shall be, as soon as conveniently may be, delivered over to the officer or supervisor of excise most convenient to the place where such seizure shall have been made, to be dealt with as is directed by the said Act of the first and second years of the reign of his late Majesty King *William* the Fourth for the suppression of illicit distillation in *Ireland*.

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DUBLIN, NOVEMBER 25, 1854.

We have often observed in settlements of large properties in this country the omission of a most important clause—we mean a power enabling tenants for life to grant renewals of leases in which were contained covenants for renewal.

It is clear that the ordinary leasing power given to tenants for life does not extend to the granting of renewals, for that power requires the last rent to be received, forbids the taking any fine, and is usually confined to the grant of a term for 21 or 31 years, whereas the rent to be reserved in the renewal of leases is generally some actual rent, much below the letting value of the land, and only granted on the payment of a fine and generally for the term of three lives; all which are inconsistent with the usual leasing power. Now, in the absence of a special power for this purpose, the tenant for life can only renew for the term of his own life, and at his death the estate of the tenant is gone at law. It is true that the inconvenience of this state of

things is much lessened by the provisions of that valuable Act—the Leasehold Conversion Act, 12 & 13 Vic. cap. 100; but still it is important in the many cases where no conversion has been made under that Act. When we say that we have observed the omission of this provision in settlements generally, we do not mean to say universally; for we have met with some carefully prepared settlements of such property, in which the clause is inserted; and perhaps it was the finding such provision that more particularly drew our attention to the general omission of such a provision in settlements made either on marriage or by will.

In this country there has not been the same subdivision of the Profession which occurs in England—we have here no distinct class of conveyancers; and although the general powers of the Bar in Ireland are considerable, and their exertions in court are brilliant, containing strong reasoning and eloquent appeals, yet the thoughts of our Bar are diverted from, or rather not directed to, the consideration of the more minute circumstances of this particular branch, to which constant habit and re-

flection direct the mind of the conveyancer. In truth, settlements in this country are usually prepared by attorneys, and copied by them from English precedents, and as leases for lives renewable for ever do not exist in England on the estates of private individuals, no provision is made in those precedents for the renewal of them; but as in this country such tenure is of general occurrence, provision should be made for the proper renewal of such leases. The clause to which we allude should follow the ordinary leasing power inserted in settlements, and might be as follows:—"Provided also, that in case the said towns, land and hereditaments hereby granted, assigned or conveyed, or expressed or intended so to be, or any part of the same, shall be held by any tenant under any lease or leases in which there shall be contained any covenant for renewal binding on the inheritance of the said towns, land and hereditaments on the renewal of any such lease or leases; it shall and may be lawful to and for the said (tenant for life) to accept and receive such fine or fines, and thereupon to grant such renewal or renewals of such lease or leases, at such rent or rents, and for such time or times, and subject to such conditions, and generally in such manner as shall or may be required or stipulated by such covenant or covenants respectively."

G.

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To the Editor of the Irish Jurist.

SIR,

The following article, which I observed in the "Sentinel" of October 14, last, appears to me to deserve to be recorded in the columns of "The Irish Jurist," as the branch of law there discussed is not very generally known.

I remain,

Your obedient servant,

PROCURATOR.

PEWS IN PARISH CHURCHES.

"1. Every parishioner has a right to a seat in the parish church without paying for it. *Walter v. Gunner*, (1 Haggard, 317.)

"2. The distribution of seats rests with the churchwardens, as the officers, and subject to the control of the bishop or ordinary. *Fuller v. Lane*, (2 Addams, 425.)

"3. The duty of the churchwardens is to look to the general accommodation of the parish, consulting, as far as may be, that of all the inhabitants, according to their station. *Fuller v. Lane*, and *Blake v. Osborne*, (3 Haggard, 733.)

"4. This power of the churchwardens is subject to the control of the ordinary, who is to see that the churchwardens exercise their authority dis-

creetly for the proper accommodation of the parishioners at large. *Blake v. Osborne*, and *Wyllie v. Mott*, (1 Haggard, 33.)

"5. [*Holding land is not enough.*] There can be no property in pews. The ordinary, or churchwardens, may grant a pew to a particular person while he resides in the parish; but as to absolute personal property in a pew, the law knows no such thing; it can only exist under a special Act of Parliament. *Walter v. Gunner*, (1 Hagg. Consistory, 319); *Hawkins v. Compeigne*, (3 Phillimore, 16.)

"6. When this limited personal title ceases, either by death or removal from the parish, the pew reverts to the parish; and the churchwardens have a right to place in it whomsoever they may think best entitled to it. *Wyllie v. Mott*, (1 Hagg. 33); *Woollcombe and Ouldrige*, (3 Adams, 77.)

"7. The incumbent of a parish has no authority in the seating and arranging the parishioners, beyond that of an individual member of the vestry, and the influence which his station and position in the parish legitimately confer upon him. He may, however, very properly object to a plan which is inconvenient, and affects the accommodation of his parishioners. *Fuller v. Lane*, (2 Addams, 425); *Tattersall v. Knight*, (1 Phillimore, 252.)

"8. A mere possessory right is not good against the churchwardens. They may displace, and make new arrangements; but they ought not, *without good cause*, to displace persons in possession. If they do so, the ordinary should replace them; possession, therefore, should have due weight.—*Pettman v. Bridger*, (1 Phillimore, 324.)

"9. All private rights to pews must be held under a faculty, or by prescription; these constitute the only bar to the absolute control of the bishop and churchwardens over pews.—*Walter v. Gunner*:

"10. [*Thirty years' possession, without any evidence of the beginning of the possession, may now be sufficient.* See *Mannerings v. Hales*, (5 Band. Ald. 361.)] Prescription is a presumption of law that a faculty has, at some distant period, been granted, arising from immemorial possession of a pew, and repairing it, by the possessor.—*Pettman v. Bridger*, (1 Phill. 327.)

"11. A faculty is an instrument appropriating a pew to a man and his family so long as they remain parishioners, or appropriating a pew to a particular house in the parish,—*Tattersall v. Knight*; *Walter v. Gunner*; *Fuller v. Lane*.

"12. If the faculty be to the individuals, it can only be so long as they may continue parishioners; if it be to a house, the right passes, with the house, to its occupiers, and cannot, in any manner, be separated from it.—*Walter v. Gunner*.

"13. In no manner (save by Act of Parliament) can a pew be granted to a man and his heirs or executors, so as to be capable of transfer as property.—*Walter v. Gunner*, and most of the cases before quoted.

"14. [*This conclusion I draw from the general law upon the subject.* See *Tattersall v. Knight*, (1 Phill. 237.)] In analogy to a faculty, churchwardens may, I conceive, annex pews to houses in the parish, but this will be subject to a right of subsequent churchwardens to alter the arrangement,

should circumstances require it—such as if the house becomes dilapidated, be occupied by a different class of tenants, and so forth, or new houses be built, and the inhabitants require pews.

"15. The best mode for churchwardens to allot pews is, 'so long as the allottees continue inhabitants of the parish, or so long as they continue inhabitants and occupiers of a house named.' By this means the disposition of the pews returns, from time to time, to the parish." *Ubi supra*.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 8.)

CAP. XC.

An Act to repeal the Laws relating to Usury and to the Enrolment of Annuities.

[10th August, 1854.]

"WHEREAS it is expedient to repeal the laws at present in force relating to usury:" be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. The several Acts and parts of Acts made in the Parliaments of *England* and *Scotland*, *Great Britain* and *Ireland*, mentioned in the schedule hereto, and all existing laws against usury, shall be repealed.

II. Provided always, that nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any Act done previously to the passing of this Act.

III. Where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where upon any debt or sum of money interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this Act had not been passed.

IV. Provided always, that nothing herein contained shall extend or be construed to extend to repeal or affect any statute relating to pawnbrokers, but that all laws touching and concerning pawnbrokers shall remain in full force and effect, to all intents and purposes whatsoever, as if this Act had not been passed.

SCHEDULE referred to by the foregoing Act.

ACTS and PARTS of ACTS of the Parliaments of England, Great Britain, and the United Kingdom of Great Britain and Ireland.

37 Hen. 8, c. 9.—The whole of an Act passed in the thirty-seventh year of the reign of King Henry the Eighth, intituled "A Bill against Usury."

13 Eliz. c. 8.—The whole of an Act passed in the thirteenth year of the reign of Queen Elizabeth, intituled "An Act against Usury."

21 Jac. 1, c. 17, made perpetual by 3 Car. 1, c. 4, s. 5.—So much of an Act passed in the third year of the reign of King Charles the First

as enacts that an Act passed in the twenty-first year of King James the First, intituled "An Act against Usury," be made perpetual.

12 Car. 2, c. 13.—The whole of an Act passed in the twelfth year of the reign of King Charles the second, intituled, "An Act for restraining the taking of excessive usury."

Confirmed by 13 Car. 2, stat. 1, c. 14.—So much of an Act passed in the thirteenth year of the reign of King Charles the second, intituled "An Act for confirming an Act intituled 'An Act for encouraging and increasing of shipping and navigation,' and several other Acts, both public and private, mentioned therein," as confirms the herein-before mentioned Act of the twelfth year of the same reign.

12 Anne, Stat. 2, c. 16.—The whole of an Act passed in the twelfth year of the reign of Queen Anne, intituled "An Act to reduce the Rate of Interest, without any prejudice to Parliamentary Securities."

53 Geo. 3, c. 141.—The whole of an Act passed in the fifty-third year of the reign of King George the Third intituled "An Act to repeal an Act of the Seventeenth Year of the Reign of his present Majesty, intituled 'An Act for registering the Grants of Life Annuities, and for the better Protection of Infants against such Grants, and to substitute other provisions in lieu thereof,'" except so much thereof as repeals the said Act of the seventeenth year of King George the Third.

3 Geo 4, c. 92.—The whole of an Act passed in the third year of the reign of King George the Fourth, intituled "An Act to explain an Act of the fifty-third year of the reign of his late Majesty, respecting the enrolment of memorials of grants of annuities."

7 Geo. 4, c. 75.—The whole of an Act passed in the seventh year of King George the Fourth, intituled "An Act to explain an Act of the fifty-third year of the reign of his late Majesty, respecting the enrolment of memorials of grants of annuities."

5 & 6 W. 4, c. 41.—So much of an Act passed in the session of Parliament holden in the fifth and sixth years of the reign of King William the Fourth, intituled "An Act to amend the law relating to securities given for considerations arising out of gaming, usurious, and other illegal transactions," as relates to securities given for considerations arising out of usurious transactions.

13 & 14 Vic. c. 56.—The whole of an Act passed in the session of Parliament holden in the thirteenth and fourteenth years of the reign of her present Majesty, intituled "An Act to continue the Act for exempting certain bills of exchange and promissory notes from the operation of the usury laws."

ACTS OF THE PARLIAMENT OF SCOTLAND.

An Act of the eleventh Parliament of King James the Sixth, chap. 52, "It is not leassum to take ane

greater annual rent for the 100 poundes nor ten poundes, or five bolls victual."

An Act of the fourteenth Parliament of King James the Sixth, chap. 222, "For punishment of committers of usury."

An Act of the fifteenth Parliament of King James the Sixth, chap. 251, "It is not leasum to take mair annuall rent or profet nor ten for the hundreth."

An Act of the sixteenth Parliament of King James the Sixth, chap. 7, "Explanation of the Acts of Parliament anent ocker and usury."

An Act of the twenty-third Parliament of King James the Sixth, chap. 28, "Anent taking of annual rent beforehand to be usurie."

ACTS OF THE PARLIAMENT OF IRELAND.

An Act of the tenth year of King Charles the First, session two, chap. twenty-two, intituled "An Act against Usury."

An Act of the second year of Queen Anne, chap. sixteen, intituled "An Act for reducing of interest of money to eight per cent. for the future."

An Act of the eighth year of King George the First, chapter thirteen, intituled "An Act for reducing the interest of money to seven per cent."

An Act of the fifth year of king George the Second, chap. seven, intituled "An Act for reducing the interest of money to six per cent."

CAP. XCII.

An Act to continue an Act of the Eleventh Year of her present Majesty, for the better Prevention of Crime and Outrage in certain Parts of Ireland.
[10th August, 1854.]

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"WHEREAS an Act was passed in the session of Parliament held in the eleventh and twelfth years of the reign of her present Majesty, intituled *An Act for the better Prevention of Crime and Outrage in certain Parts of Ireland until the First Day of December, One thousand eight hundred and forty-nine, and to the End of the then next Session of Parliament*: And whereas by an Act passed in the session of Parliament held in the fifteenth and sixteenth years of the reign of her present Majesty, intituled *An Act to continue an Act of the Eleventh year of her present Majesty, for the better Prevention of Crime and Outrage in certain Parts of Ireland*, the said first-mentioned Act was continued until the thirty-first day of August, one thousand eight hundred and fifty-three: And whereas by an Act passed in the session of Parliament held in the sixteenth and seventeenth years of the reign of her present Majesty, intituled *An Act to continue an Act of the Eleventh Year of Her present Majesty, for the better Prevention of Crime and Outrage in certain Parts of Ireland*, the said first-mentioned Act was further continued until the thirty-first day of August, one thousand eight hundred and fifty-four: And whereas it is expedient that the said first-recited Act should be further continued for a limited period;" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

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DUBLIN, DECEMBER 2, 1854.

In a late Number—307, Nov. 11—we referred to some remarks of our learned contemporary, THE JURIST (English), on the multiplication of law reports, and the (almost) impossibility for any man in moderately good business to read the numerous cases that issue from the press. Our difficulty in this country is still greater; for in England there is a division of labour, so that Equity men need not read the law reports, nor the Common Law men the cases decided in Courts of Equity. There also (as we believe) the habit is to have a consultation in every case of importance, and in these consultations the junior counsel brings to the attention of the reader all the cases bearing on the subject, but here our habits are different. The Bar here (with few exceptions) practise in all the courts, and there is no consultation (we mean as a matter of course.) Now, we are obliged, in addition to all the reports of all the cases in all the English courts, to read all the reports of all our Irish cases. And here we would

observe that some very important cases have been decided in these courts, to which we shall hereafter more particularly refer. The new Act, (17 & 18 Vic. c. 125,) giving considerable Equity jurisdiction to the Common Law Courts at Westminster, will, we presume, cause a considerable revolution in the habits of the practitioners in those courts, and increase their difficulty by extending the study of reports to the Equity and Common Law Reports, in the same manner that barristers in this country are obliged to read both. The most practical (and, perhaps, best) way of mitigating the evil of too numerous reports, as occur to us, would be to have reports of leading cases published more frequently, we mean leading cases on particular points, as distinguished from mere judgments, which should show the reasons on which the cases were decided, and, perhaps, give extracts from any lucid judgment pronounced thereon, and should collate the law on the particular subject up to the date of the going to press. The effect of collecting and comparing cases decided upon the same subject would be to lead the mind of an intelligent editor to perceive and

point out the principle involved in the class of cases on which he comments, and this collection of cases would afford great assistance to the men in practice.

We have already observed that there are in this country many cases of great importance, and these ought to appear in any collection of leading cases. For the present we shall only allude to two, both decided in the Court of Exchequer—the one, *Gorman v. Mahon*, decided in the year 1826, the other, *Assignee of Green v. Earl of Listowell*, decided in the year 1840. The case of *Gorman v. Mahon* was a decision on the law of estoppel, and we believe that there is no other case upon the precise point there ruled. The case, it will be observed, was decided before the recent case had occurred, in which the doctrine has been so fully investigated and discussed. That was an action of covenant brought by James Gorman against Patrick Hanlon, and the declaration stated that one Terence Gorman and James, the plaintiff, by indenture of lease and release, demised to the defendant certain lands, to hold to the defendant for the term of his (the defendant's) life. The defendant did, by the same indenture of release, covenant with the said Terence and plaintiff at a certain yearly rent, to pay them the rent during the term; Terence Gorman died, and after his death the rent became in arrear, and the successor then declared for nine years arrears of rent. To this declaration the defendant pleaded secondly, that before the making of the said indenture, one Robert Duggan was seized in fee of the lands, &c., and that he, by indenture, &c. demised to one Mary Gorman, and her heirs, the said lands, for three lives still subsisting; that Mary Gorman died so seized, leaving the said Terence Gorman, her eldest son and heir-at-law, her surviving, who thereupon became seized, as heir of the said Mary, for the term of lives so granted, but that the said Terence, being so seized, did, by the said indenture in the declaration mentioned, demise unto the said plaintiff and confirmed to the defendant the said lands, to hold, &c. without this, that the said Terence and plaintiff demised to the defendant *modo et forma*.

There was another plea which, after the like inducement, stated that after the demise to the defendant the said Terence Connor released to the defendant all his estate by a certain deed, of which defendant made profert. To these pleas the plaintiff demurred, on the ground that defendant was ESTOPPED from pleading that the plaintiff had nothing in the land, and that the covenant being express must bind the defendant in being a party thereto,

and that the demise was only inducement. On the other side it was argued for the defendant that the plea showed that an interest passed under the deed, and that in such case there was no estoppel; also that the rent was incident to the reversion, and followed the estate, and that the covenant would be construed according to the title of the parties. The court overruled the demurrer, holding that there was no estoppel, and that the covenant was to be contended to secure the rent to the party entitled to it. This case is shortly stated in 2 Huds. & B. 17, n., and referred to by Bushe, C. J., pp. 110, 111, in that book.

The case of *Assignee Green v. Earl of Listowell*, is reported in (2 I. C. L. Rep. 384.) It was an action of covenant for rent, brought against the defendant as assignee of the lessee. The declaration stated that T. F. Greene, by indenture, demised to the Hon. Richard Hare the lands, &c., for 100 years, provided the lessor should so long live; and that the lessee by the said indenture covenanted for himself, his executors, administrators, and assigns, for payment of the rent on the days, &c. It then averred that all the estate of the lessee by assignment came to and vested in the defendant, who thereupon entered and was possessed of the premises for the residue of the said term: and it also averred the life of the lessor. The defendant pleaded, amongst other pleas, that all the estate, &c. of the lessee did not come to and vest in the defendant *modo et forma*. The case was tried at Cork. On the trial letters of administration to the late Hon. Richard Hare, granted to the defendant were produced and proved by the plaintiff in support of the issue that the defendant was the assignee of the Hon. Richard Hare, the lessor. The judge directed the jury to the effect that if the defendant was assignee, otherwise than as administrator, to find for the plaintiff; but, if he were assignee only in the character of administrator, to find for the defendant. Mr. Jonathan Henn for the plaintiff excepted to the latter part of the direction of the judge. The jury, under this direction, found a verdict for the defendant. The bill of exceptions was argued in the Court of Exchequer, when the majority of the court allowed the exceptions, and held that the defendant was liable as assignee, by reason of taking out letters of administration. The court thought that it did not appear on the bill of exceptions that the defendant had entered, and therefore the naked point, that the defendant, by taking out administration, became assignee, was

then decided. The reasoning of that distinguished judge, Baron Pennefather, appears to us to be satisfactory and conclusive on the question.

The same point arose in the case of *Wollaston v. Hakewill*, in the Court of Common Pleas at Westminster, and is reported 3 Man. & Gr. 227. That also was an action of covenant for rent against the assignee of the lessee. The case of *Assignee Green v. Listowell* was not cited in the argument, and there was no express authority on the point. The observations of Chief Justice Tindall during the argument tended to impress our mind with the feeling that his opinion was against the judgment which he afterwards pronounced. It does not appear from the report whether any or what day intervened between the argument of the case and the pronouncing the judgment of the court. It would seem that that eminent judge had in the interim seen the report of our Irish case, but certain it is that in his judgment Chief Justice Tindall adopted the train of reasoning used by Baron Pennefather, and cited our Irish case with approbation, as deciding that an executor or administrator of a lessee is, as such, chargeable as assignee of the lessee, and the case of *Wollaston v. Hakewill* was decided accordingly.

We cite these cases to illustrate the proposition with which we started, as to the need which exists for a more systematic method of publishing legal reports, which would render them valuable legal auxiliaries, instead of being, what is now too frequently the case, ready materials for the construction of traps for the Bench by clever advocates.

G.

Review.

Ireland's Recovery. An Essay, &c., by JOHN LOCKE, A. B., Fellow of the Statistical Society of London, &c. Third Thousand. London: J. W. Parker & Son, 1854, pp. 68.

THIS treatise consists, as its name denotes, of a summary of the various symptoms of improvement which have been exhibited in the condition of Ireland, since the transfer of landed property through the agency of the Incumbered Estates Court; and the general deductions of the author are illustrated and enforced by a copious appendix of statistics. The present pamphlet is a third and enlarged edition brought down to the present year, of a *brochure* which first appeared in 1852, and which re-appeared in the following year. This annual revision, by the

author, of his original essay, is calculated to secure considerable accuracy in the details presented to the public. There can be little doubt that the publication of this treatise has already done good service to the cause of Ireland, in calling the attention of the monied classes in England and Scotland to the vast latent resources which our island contains within herself; and to develop which, time, capital, and enterprise, alone are required. The author deserves vast credit, not only for the industry and intelligence which he has exhibited in the collection of the numerous interesting details with which the work abounds, but also for the praiseworthy lesson he inculcates of seeking to raise our social and material condition by self-reliance and individual exertion, in place of a dependance upon Parliamentary aid. Our author has, perhaps, in some instances, fallen into the error of being over sanguine and of regarding matters occasionally in too favourable a light: as, for example, at page 2 when he speaks of the workhouses having been emptied by emigration, a state of things which we can only say, we wish was as he describes; but these faults are almost inevitable, for when a man writes in a hopeful mood, the objects of which he treats are all in some measure tinged with the complexion of his own feelings. We think it right to present our readers with a few extracts, whereby they can better judge of the scope and character of the work. The author opens with the following remarks:—

“As with nature so with man, whether in his individual or collective aspect, progress is essential to prosperity. Arrest of onward movement implies origination of decay, the very elements of which are eliminated from the richness of those resources that Divine Providence has so amply supplied for the appropriation of our national industries in this highly favoured clime and country.

“But there is now no symptom of decline, nor occasion for despondency. The famine period appears to have filled up the measure of Ireland's misfortunes and punishment together; and the opening year of the half century witnessed, with the extinction of political animosities, the rise of an industrial activity, destined, if pursued with unswerving aim, to lay a firm foundation for future prosperity, and render Irishmen worthy to possess, and able to sustain that rational freedom, which it was as little in the power of civil strife to achieve as of selfish passion to enjoy.”

Speaking of the working of the Incumbered Estates Commission, Mr. Locke writes:—

“In 1849, the landlords of Ireland were generally incapacitated by insolvency and absenteeism, their duties delegated to attorneys, agents, or fac-

tors, and chancery receivers, who had no moral and little material interest in the welfare of estates or their cultivators. There was no middling class to unite proprietor and peasant, no certainty of enjoying the fruits of his toil to encourage the industry of the tenant, insecurity of title depressing the inclination to invest, even in cases where the facility existed for sale of estates in parcels. The inevitable effects of all these—deficiency of skilled labour and industrial education, a certain listlessness of action and infirmity of purpose prevalent amongst all classes of the population; many looking to patronage and petty official appointments for support—many wasting life and time in vain censure of government and laws, instead of aiding themselves, idly expectant of the future, while the fleeting present swept neglected by.

“The Incumbered Estates Commissioners have sold, in five years, nearly two millions acres, or about an eleventh of the land area of the Island, for a total sum of thirteen millions and a half, ten millions and a half of which have been actually distributed; and now this enormous amount, hitherto locked up in barren mortgages and chancery litigation, is quickening through a thousand channels every branch of Irish industry. The unquestionable usefulness and success of this tribunal in Ireland suggests the policy of establishing a similar jurisdiction for sale of land in Great Britain and our colonies, and completing its functions by a simple system of registration of each transfer. At home, this registry would be very materially facilitated by the government survey, which marks, on a scale of six inches to a mile, all boundaries and divisions of land.”

The author makes the following sensible remarks respecting the propriety of following out in England and Scotland, the experiment hitherto so successful in Ireland:—

“In Great Britain titles are every year becoming more complex and involved, by reason of multiplied settlements, limitations, and incumbrances, until their investigation has become so costly, tedious, and uncertain, as often to prevent the sale and transfer of landed property, however hopelessly incumbered, and thus perpetuate an incapacitated ownership to the general detriment of society. Hence the obvious necessity for England, and especially Scotland, of a tribunal for sale and transfer of land, by which estates can be cheaply and speedily brought into the market, in order to clear

off all outstanding charges, and bestow *de novo* an indefeasible title on the whole property, or each lot thereof, by whomsoever purchased.

“Let those who object that such a measure would derange the social balance, by subdividing the possessions of the landed gentry among capitalists, farmers, and traders, recollect, on the other hand, that a safe and just opportunity is thus afforded for that ardent desire to acquire land, which characterizes the manufacturing and trading classes of Great Britain; and, in proportion as their capital and industry are directed to culture of the soil, so will the prosperity and comforts of the population be multiplied; although it may happen, that sundry ancestral estates will be shorn of their territorial dimensions.”

We shall conclude this hurried notice of Mr. Locke's Essay, which we trust will reach many more editions, with the following passage regarding the opportunities which the Irish Land Market offers for investment:—

“The land market of Ireland still offers very favourable opportunities of investment. The advantageous circumstances of cheap labour, freedom from the burthen of certain assessed taxes, and the higher negotiable value given by Parliamentary title, together with a simple mode of transfer, unclogged by the expenses, delays, and uncertainties of disabling laws, must also prove great encouragements. The fertile pastures of Leinster—the high-rented, well farmed, but minutely divided districts of Ulster—the rich arable soils of Munster—these yield ample, and, generally speaking, immediate returns for investment. The extensive wastes of Connaught, where frequently a thin surface of peat covers an intact virgin mould—rivers, lakes, and coasts abounding with fish—water power unappropriated—capacious natural harbours undisturbed by the keel of commerce—to this remoter region has flowed the principal stream of British capital; but here disappointment must ensue to those who are not prepared to invest further outlay, and wait patiently for productive returns. Not only does the soil require drainage and reclamation, but the facilities of a good market will not be experienced until the Western Highlands are opened by railway extension. To facilitate this event, however, the change of proprietorship under the Incumbered Estates Court will be mainly instrumental.”

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THE

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DUBLIN, DECEMBER 9, 1854.

In the English Common Law Procedure Act, 1854, (17 & 18 Vic. c. 125.) there are two sections which are likely to prove peculiarly valuable, and which, it is to be hoped, will form a portion of any similar measure, which may hereafter be brought forward for this country. We allude to sections 34 and 35, which allow appeals from new trial motions. Section 34 enacts that "in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused, or granted and then discharged or made absolute, the party decided against may appeal."

Section 35—"In all cases of motions for a new trial, upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule, being refused, or, when granted, being discharged or made absolute, as the case may be, or,

provided the court in its discretion think fit, that an appeal should be allowed; provided, that when the application for a new trial is upon matter of discretion only, or on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed." These sections are followed by others, providing the mode for carrying into effect this appellate jurisdiction. These appeals may be prosecuted through the Exchequer Chamber into the House of Lords, like other proceedings in error, and are to be made up somewhat in the form of bills of exceptions. We anticipate that this new procedure will operate most beneficially in reducing the expense of litigation. At present, with us, as in England before this Act passed, if the judge at Nisi Prius rule a point against either party, and he move for a new trial, which is granted, the only mode in which his opponent can review the decision of the particular court is by going to a fresh trial, and then excepting to the ruling of the judge, which, as a matter of course, will be in conformity with the judgment already pronounced. Even this inconvenience is of minor importance

when compared with the denial of justice which has often been the fate of a party who has staked his fortunes on a new trial motion, and has been concluded by its adverse result. Many are the accidents which may render such a discussion unsatisfactory. The motion may be suddenly called on, at a time when the parties are little prepared; the documents upon which it is founded may be in a state of confusion, and the facts thus badly presented; last, though not least, some of the members of the court may be absent, whose opinion the party appealing would be desirous of taking. The inconvenience to which we have alluded has often struck the bench, who have not seldom endeavoured to induce the parties, upon the argument of a contested new trial motion, involving questions of importance, to agree to place the facts upon the record in the shape of a bill of exceptions or a special verdict. This power the defeated party will now (in England) enjoy, irrespective of the consent of the other side, under the limitations imposed by the enactments referred to. The special case to be stated on an appeal under section 34 will have the incidents of a special verdict, on account of the previous reservation at the trial; that under section 35 will be more analogous to a bill of exceptions.

It will be observed that section 35 differs materially from 34 in this, that with respect to the appeal under the latter, unless the judgment to be appealed against be not unanimous, its allowance is to be a matter of discretion for the court. One case has already occurred, in which the Court of Queen's Bench in England, acting in the exercise of their discretion, have refused to allow an appeal. In *Gurney v. Womersley*, (24 L. Jour. 98,) a new trial had been applied for, the question being, whether the defendants, who had negotiated, without indorsing, a bill of exchange, which afterwards proved to be fictitious, were liable for the amount. Lord Campbell, C. J., in pronouncing the judgment of the court, refusing to allow an appeal, observed, "If the point were new, and we had no doubt about it ourselves, still we should grant an appeal; but this has been decided again and again by the different courts in Westminster Hall; and, therefore, we should not be exercising our discretion soundly and properly if we granted the appeal. Therefore, no appeal will be allowed."

We apprehend that this case will suggest a sound and intelligible criterion as to the propriety of granting or refusing such an appeal.

STATUTES PASSED IN THE SESSIONS 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 12.)

CAP. XCIX.

An Act to provide for the Establishment of a National Gallery of Paintings, Sculpture, and the Fine Arts, for the Care of a Public Library, and the Erection of a Public Museum in *Dublin*.

[10th August, 1854.]

"WHEREAS it is expedient to establish a national gallery of paintings, sculpture, and the fine arts in *Ireland*: and whereas it is also expedient to render Archbishop *Marsh's* Library more conveniently accessible than it now is to the inhabitants of *Dublin*: and whereas at the close of the Great Industrial Exhibition of 1853 in *Dublin* a subscription was entered into by several individuals, both in *Great Britain* and *Ireland*, for the purpose of commemorating the eminent public services of *William Dargan*, Esquire, in founding and sustaining that Exhibition: and whereas the Royal *Dublin* Society for the promotion of husbandry and other useful arts in *Ireland* is desirous of erecting a public museum for the purposes of that society:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. That *Francis William*, Earl of *Charlemont*, *Richard Griffith*, Esquire, *George Roe*, Esquire, *Thomas Aiskew Larcom*, Esquire, and *Thomas Hutton*, Esquire, together with such person and persons as the Lord Lieutenant by warrant under his hand may from time to time appoint, shall be and they are hereby constituted trustees of the building next hereinafter mentioned; and that it shall be lawful for the said trustees and all other the trustees of the said building for the time being (hereinafter called the Building Trustees) to receive such sums of money as may be subscribed, given, or contributed, or may from any source become available, for the purpose of erecting a suitable building in *Dublin* to be devoted in part to the fit accommodation of a National Gallery of paintings, sculpture, and the fine arts, and the remainder to the reception of a public library.

II. It shall be lawful for the said trustees or other the trustees for the time being of the said building to take and hold, by purchase, lease, or otherwise, ground in *Dublin* proper for the site of the said building, upon such terms as they may deem advisable, and to lay out the monies received by them in the erection of the said building, but with such approbation nevertheless and subject to such agreement as hereinafter mentioned.

III. All and every persons and person seized of or entitled in possession to lands in *Ireland*, or to the receipt of the rents and profits thereof, for an estate of fee-simple or fee-farm, or any other perpetual estate, subject to any mortgage or incumbrance, or for an estate in tail or quasi entail of an estate in inheritance or perpetual interest, or for the term of his, her, or their own life or lives (not be-

ing jointresses or jointress), or for the life or lives of any other person or persons, or for so many years as he, she, or they may live, or for an unexpired term of years, not being less than sixty years in its inception, and whether absolute or determinable on a life created out of an estate of inheritance or perpetual interest by way of settlement, and not in consideration of or subject to any rent reserved thereby, and whether or not such estate or interest shall be subject to any mortgage or other incumbrance (provided the incumbrancer shall not be in possession), shall have power by virtue of this Act to make a lease or leases of all or any part of such lands to the said building trustees and to the said Royal Dublin Society respectively for any term not exceeding nine hundred and ninety-nine years, or in fee-farm for the purposes of the said building and of this Act: provided always, that every such lease made under this Act shall be a lease in possession, and not in reversion or by way of future interest, and that the rent reserved thereby shall be the best improved yearly rent that at the time of making such lease can be obtained or reasonably expected from a solvent tenant, without fine or consideration of any kind: provided always, that all rents reserved and covenants and conditions contained in any lease made under this Act, shall enure to the persons who for the time being would, if such lease had not been made, be entitled to the actual possession of the lands comprised in the said lease, or to the receipt of the rents and profits thereof, according to their estates and interests therein; and that every lease made under this Act, and pursuant to the provisions thereof, shall be valid to bind the lessor or lessors, his, her, or their heirs, executors, administrators, assigns, and successors in estate, and all persons whomsoever deriving under the same title or settlement as that under which the lessor or lessors derives or derive, and notwithstanding any entail, law, or custom to the contrary, and whether there be or be not any leasing power annexed or belonging to the estate of such lessor or lessors, but so as not to prejudice or interfere with any other power of leasing to him, her, or them belonging.

IV. It shall be lawful for the governors and guardians of Archbishop Marsh's Library, (anything in an Act of the Parliament of Ireland, intitled *An Act for settling and preserving a Public Library for ever in the House for that purpose built by his Grace Narcissus now Lord Archbishop of Armagh, on Part of the Ground belonging to the Archbishop of Dublin's Palace near the City of Dublin*, passed in the sixth year of the reign of Queen Anne, or otherwise, to the contrary notwithstanding,) to cause the said library to be removed to the said building so to be erected, as soon as the same shall be completed and in a condition to receive the said library: provided always, that the said governors and guardians shall approve of the plan and arrangements of that portion of the said building to be appropriated to the reception of a public library.

V. It shall be lawful for the governors and guardians of the said library, at any time after the said library shall have been removed to and deposited

within the said building so to be erected as aforesaid, from time to time to alien, sell, and dispose of the several buildings, grounds, gardens, courts, and premises now vested in them by virtue of the said last-mentioned Act of Parliament, or otherwise, or any of them, or any part thereof respectively, anything in the said Act or otherwise to the contrary notwithstanding: provided always, that the proceeds of all and every such alienations, sales, and dispositions, shall be applied by the said governors and guardians to make such compensation as they shall think fit to any officer or officers for any loss which such officer or officers shall have incurred by reason of the removal of the said library as aforesaid, and to the objects of their trust, and not otherwise.

VI. The governors and guardians of Archbishop Marsh's Library shall continue to have the same exclusive control over the said library which they at present possess, and shall have the entire and exclusive possession, occupation, and control, for the purposes of their trust of those portions of the said building so to be erected as herein-before mentioned which shall be upon the completion of the said building set apart by the said building trustees for the accommodation of the said last-mentioned library.

VII. The president and senior vice-president of the Royal Dublin Society for the time being, the president of the Royal Hibernian Academy for the time being, the president of the Royal Irish Academy for the time being, the chairman of the board of public works in Ireland for the time being, George Petrie Esquire, George Francis Mulwany Esquire, William Brabazon Earl of Meath, Thomas Aiskew Larcom Esquire, William Dargan Esquire, Francis William Earl of Charlemont, the Right Honourable Maziere Brady, Lord Chancellor of Ireland, the Lord Talbot de Malahide, Sir George Frederick John Hodson Baronet, Robert Calwell Esquire, John Calvert Stronge Esquire, and John Edward Pigot Esquire, and their successors, appointed as herein-after directed, and subject to the provisions herein-after contained, shall be and they are hereby constituted a body corporate by the name of "The Governors and Guardians of the National Gallery of Ireland," and shall have a common seal, and by the said name shall have perpetual succession, and shall and may take, purchase, and hold lands and real estate and other property in trust for the purposes of a national gallery of paintings, sculpture, and the fine arts, subject to the provisions of this Act; and all the powers of the said corporation may be exercised so long and so often as there shall exist five members thereof.

VIII. It shall be lawful for the said last-mentioned body corporate to receive devises, bequests, donations, and subscriptions (annual or otherwise) of land, buildings, money, and works of art, and to hold the same, and to lay out such sums of money as they shall so receive for the purposes of the National Gallery of Ireland, in the improvement and enlargement of the collection of works of art presented to or purchased for the said gallery, or deposited therein, and the said body corporate shall have the entire and exclusive possession, occupa-

tion, and control, for the purpose of their trusts herein mentioned, of those portions of the said building so to be erected as herein-before mentioned which shall be, upon the completion of the said building, set apart by the said building trustees for the accommodation of the National Gallery of Ireland, and of all such other buildings, enclosures, and appurtenances as shall or may from time to time be required and obtained for the purposes of the said National Gallery, or any part thereof.

IX. The said building so to be erected as aforesaid for the purposes herein-before mentioned shall be constructed according to such plans and specifications as shall have been approved of and agreed upon by and between the said building trustees, the said governors and guardians of the National Gallery of Ireland, and the said governor and guardians of Archbishop Marsh's Library.

X. The persons who for the time being shall compose the said respective bodies corporate, that is to say, the governors and guardians of the National Gallery of Ireland, and the governors and guardians of Archbishop Marsh's Library, shall be one body corporate, under the name of "The Joint Trustees of the National Gallery of Ireland and of

Marsh's Library," and so soon as the said building so to be erected as aforesaid shall have been completed, the said building trustees shall declare it to be so by an instrument under the hands of them or of any three of them, and thereupon the said building, together with the ground whereon the same shall have been erected, shall become and be vested in the said last-mentioned body corporate for ever, subject nevertheless to the exclusive possession, occupation, and control of those portions of the said building respectively to be occupied by the said governors and guardians of the National Gallery of Ireland, and the said governors and guardians of Archbishop Marsh's Library, for the purposes of their respective trusts as aforesaid.

XI. Each of the governors and guardians of the National Gallery of Ireland, save and except only the first three of them herein-before named, shall continue to hold office, subject to the provisions herein contained, for the term of five years at a time, from the time of his becoming such governor and guardian, and not longer, but at the expiration of such five years he shall be eligible to be re-appointed or re-elected as such governor and guardian.

(To be continued.)

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DUBLIN, DECEMBER 16, 1854.

TRIAL by jury is an invaluable institution; it lies at the foundation of our liberties, and may be regarded as the crowning glory of our free constitution. It was aptly said, by a statesman of the last generation, that the ultimate aim of the respective functions of King, Lords, and Commons was, to put twelve honest men into the jury box. But, in proportion as we value this time honoured institution, so ought we to cherish it, and to guard it from all possibility of abuse. There has of late years grown up in the minds of some, an opinion that jury trial in civil cases is unsatisfactory. We do not, in anywise, concur in that sentiment; but we apprehend that the want of confidence in the verdicts of juries in civil cases, has too frequently been well founded. We do not, however, hesitate to avow ourselves staunch advocates of trial by jury in controverted questions of fact; and we think likewise, that, in general, juries may be safely entrusted with the ascertainment of damages. We desire no fundamen-

tal change in the present system, but merely a corrective for what we deem its occasional abuses. It is chiefly with reference to the latter topic, namely, the apportionment of damages, that we desire to speak. We can hardly conceive how a dispassionate spectator can regularly attend a lengthy Nisi Prius sittings in any one of our Law Courts, without being occasionally startled and amazed at the exorbitant verdicts delivered in his presence. The trial which may have just concluded, may possibly be one in which the plaintiff has complained that having been, in custody for debt, and having failed to obey an order of the Insolvent Court to file his schedule he has been in accordance to a usage supposed at the time to be legal, but subsequently ascertained not to have been warranted by law, committed by the above court to a stricter custody than that in which he previously was. The spectator arrives at the conclusion, in his own mind, that the wrong having been involuntary on the defendant's part, and in a degree caused by the act of the plaintiff himself justice would surely be satisfied by nominal damages. The jury, however, take a different view of the case,

and award a *solatium* to the injured party of £200! Again, he hears a complaint preferred by a child against a magistrate for false imprisonment. No doubt the circumstances are somewhat peculiar, and the observer, in common with every body in court, feels that the magistrate has acted upon a mistaken view of law and fact, and has committed an illegality in detaining the plaintiff to secure as he conceives the ends of justice, while, at the same time, he has sought to make the captivity as little irksome as possible. This is a case in which, admittedly, some damages must be given; but the observer is not a little startled at hearing announced a verdict of £500!! That, be it remembered, is by way of compensation, not for the injury done to relatives of the child by the outrage to their feelings; that is quite foreign to the case: but to indemnify the child himself for the suffering he *alone* in his *own* person has endured. Again, he hears another trial in which the governor of a certain prison is sought to be mulcted for an affront given to a prisoner by a sub-official. There the jury visit the offence upon the head of the superior, who appears to have been altogether ignorant of the commission of the grievance, with the moderate fine of £300! which, by the way, was six-fold the amount at which a former jury had assessed the compensation.

These are a few actual instances taken at random from a multitude of cases, in which it is painfully evident that juries, in estimating the amount of damages, have been led by their state of feeling at the time—a state of feeling which a host of artifices have been resorted to for the purpose of raising to an excited standard, thereby unfitting them for the discharge of a judicial duty. It is no dispraise of the individual juror that he has been hurried by the spur of the moment into giving an excessive verdict. A state of facts is laid before him which either excites his sympathies or arouses his indignation. The injured party is permitted, by having the first word, to pre-occupy the mind of the juror by his tale of suffering or of wrong, and by reason of his right of reply he, in great measure, restores the impression, which the defendant's explanation has served partially to obliterate. Eloquence and sarcasm have, in many of these cases, had a very fatal effect in disturbing the equilibrium of the jury box, and all the vigilance of the opposite side, and the rigid impartiality of the judge, will not serve to prevent the introduction of topics of an aggravating character. Many, moreover, are the incidents, trivial in themselves, as casual conversations and remarks, paragraphs of letters, and the like, which the ingenuity of counsel invests with a fatal significance, and presents to the jury as proofs of the heartless conduct of the defendant. We fear that too often the jury think only of the moral lesson which their verdict will carry with it; and, satisfactory as it may feel to them to return from the seclusion of their jury-room into the presence of the breathless auditory and anxious litigants, the harbingers of a rattling verdict, they too seldom reflect that what may be play to them may be death to the defendant.

Now what we propose, in order to remedy this occasional abuse of trial by jury, is to confer upon

our courts of law a controlling power over the verdict. This in fact is not even a new jurisdiction with which we want to invest them, but rather an extension of a power which they have already assumed. We propose that all courts sitting in Banc should be at liberty, upon the motion of the defendant, to review the reasonableness of the amount of the verdict in causes where personal injuries have been complained of, and either to grant a new trial, as at present, or to reduce the damages.

Several advantages would arise from this. In the first place, time would necessarily elapse, during which a calmer temper would have returned; again, a court would be more competent, from habitual practice, to deal with the evidence in a judicial manner than a jury, and their critical retrospect, founded on a long course of experience, would moderate the possible excess of the verdict. Lastly, they would be the best judges of the effect which the introduction of certain exciting topics might have exerted; they would know what allowance, in the nature of discount off the verdict, ought to be made for such, and that would tend, most probably, to curb an injustice now too prevalent. On the other hand, we do not fear that any such powers conceded to the Bench would be abused, considering the well-known independence of that learned body, and their deference to enlightened public opinion.

We should observe that the power of revision which we propose would be quite incomplete without empowering the court to reduce the damages at their discretion. The reference of a cause already tried to another jury might, in many cases, so far from bettering the condition of the defendant, make him the victim of further injustice, as his very non-acquiescence might be tortured into an aggravation of his original misconduct.

STATUTES PASSED IN THE SESSIONS 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 20.)

XII. The president and senior vice-president of the Royal Dublin Society, the president of the Royal Hibernian Academy, the president of the Royal Irish Academy, and the chairman of the Board of Public Works in Ireland, that is to say, the persons for the time being holding those offices respectively, shall be *ex-officio* members of the said body corporate, and governors and guardians of the National Gallery of Ireland, but shall cease to be such governors and guardians respectively upon, ceasing to hold the aforesaid offices respectively: provided always, that whensoever and so often as the said George Petrie Esquire and George Francis Muleany Esquire, or either of them, or their or either of their successors nominated or appointed at next herein-after mentioned, shall cease to be such governor and guardian or governors and guardians as aforesaid, then and in every such case it shall be lawful for the Royal Hibernian Academy to nominate and appoint such artist or artists resident in Ireland as they shall think proper to be a governor and guardian or governors and guardians in the room of the person or persons so ceasing to

be such governor and guardian or governors and guardians as aforesaid, and every such resident artist so nominated or appointed by the Royal *Hibernian Academy* shall thereupon forthwith become and be one of the governors and guardians of the National Gallery of *Ireland* to all intents and purposes as fully as if he had been so named herein in the place of the said *George Petrie Esquire* or *George Francis Mulvaney Esquire*: And be it enacted, that whosoever and so often as the said *William Brabazon Earl of Meath*, *Thomas Aiskew Larcom Esquire*, and *William Dargan Esquire*, or any or either of them, or their or any or either of their successors appointed as next herein-after mentioned, shall cease to be such governor and guardian or governors and guardians as aforesaid, then and in every such case it shall be lawful for the Lord Lieutenant, by warrant under his hand, to appoint a person or persons to fill such vacancy or vacancies, and every such person or persons so appointed to fill such vacancy or vacancies shall thereupon forthwith become and be one of the governors and guardians of the National Gallery of *Ireland*, to all intents and purposes as fully as if he had been so named herein in the place of the said *William Brabazon Earl of Meath*, or *Thomas Aiskew Larcom Esquire*, or *William Dargan Esquire*: provided also, that whosoever and so often as any one or more of the remaining seven governors and guardians herein-before mentioned, or their or any or either of their successors nominated, elected, or appointed as next herein-after mentioned, shall cease to be such governor and guardian or governors and guardians as aforesaid, then and in every such case, so long and so often as there shall be at least one hundred persons, each of whom at the time of the occurrence of such vacancy or vacancies shall have made a donation to the governors and guardians of the National Gallery of *Ireland*, for the purposes of their trust, of not less than two guineas in money, or of a work or works of art to the value in the whole of twenty pounds (such value to be declared by the said governors and guardians by an entry or entries in their books), or shall then be an annual subscriber of one guinea or upwards to the funds of the said last-mentioned body corporate, and shall have paid his current subscription to the said body corporate within twelve calendar months then last past, it shall be lawful for such donors and subscribers to elect and nominate persons or a person to fill such vacancies or vacancy; and when and so often as on the occasion of the happening of such vacancy or vacancies there be less than one hundred such donors and subscribers, then and in every such case it shall be lawful for the Lord Lieutenant by warrant under his hand to appoint a person or persons to fill such vacancy or vacancies, and every such person so nominated, elected, or appointed to fill such vacancy or vacancies shall thereupon forthwith become and be one of the governors and guardians of the National Gallery of *Ireland*, to all intents and purposes as fully as if he had been so named therein in the place of the said *Francis William Earl of Charlemont*, the Right Honourable *Maziere Brady*, Lord Chancellor of *Ireland*, the Lord *Talbot de Malahide*, Sir *George Frederick*

John Hodson Baronet, *Robert Calwell Esquire*, *John Calvert Stronge Esquire*, or *John Edward Pigot Esquire*.

XIII. It shall be lawful for the governors and guardians of the National Gallery of *Ireland*, from time to time, to make, alter, vary, and repeal by-laws for the management of the said gallery, for securing the attendance of members of the body corporate; and for all other purposes necessary for the execution of their trusts; and all officers and servants, salaried or otherwise, employed in the care or management of the trust property, shall be appointed by the said governors and guardians, subject to such regulations and conditions as they shall think proper.

XIV. It shall be lawful for the governors and guardians of Archbishop *Marsh's Library*, to admit into that portion of the building to be erected as aforesaid which shall be appropriated to the reception of a public library any books which any public body or private individual or individuals may desire either to present or give to the said last-mentioned governors and guardians, or may desire to deposit there for the use of the public, upon such terms nevertheless as to the arrangement of such books, the mode of access thereto, the accommodation of readers, and the management and control of said books, as may be agreed upon between the said last-mentioned governors and guardians and such public body or private individual or individuals so giving or depositing such books as aforesaid; and all such books as shall be so given, presented, or deposited shall, until Parliament shall otherwise provide, be and remain under the care management and in the possession of the said last-mentioned governors and guardians and such other person or persons as shall be agreed upon between them and the body or bodies, individual or individuals, giving, presenting or depositing such books, or in such other care, management, and possession as shall be agreed on between the said last-mentioned guardians and such body or bodies, individual or individuals, so giving, presenting, or depositing as aforesaid.

XV. In the construction of this Act the word "lands" shall include messuages, tenements, and hereditaments of every tenure, whether corporeal or incorporeal; the expression "perpetual interest" shall comprehend, in addition to any greater interest, any lease or grant for one or more than one life, with or without a term of years, or for years, whether absolute or determinable on the dropping of one or more than one life, with a covenant or agreement by a party competent thereto, in any of such cases, whether contained in the instrument by which such lease or contract is made, or in any separate instrument, for the perpetual renewal of such lease or grant; the word "entitled" shall mean entitled either legally or equitably; the word "settlement" shall include every assurance or connected set or series of assurances, whether by deed, will, private Act of Parliament, or otherwise, by which lands are or shall be limited in a course of settlement, or agreed so to be; the word "building" shall include the land upon which such building shall be built, together with all enclosures, yards,

curtilages, and appurtenances held therewith or appertaining thereto; the word "Lord Lieutenant" shall be held to mean the Lord Lieutenant of *Ireland* or other chief governor or governors of *Ireland* for the time being.

XVI. "Whereas it may be found expedient that certain part or parts of land and premises now in the possession or occupation of the Royal *Dublin* Society for the promotion of husbandry and other useful arts, in *Ireland*, should be appropriated for a building or buildings for the purposes of a museum, and that other part or parts of the said lands and premises should be appropriated for a building or buildings for the purposes of the said library and National Gallery:" be it enacted, that, upon the surrender by the said society (which surrender the said society is hereby empowered to make) of such estate, right, title, or interest as they may at present have in any such lands or premises, it shall be lawful for all and every persons and person seised of or entitled in possession to the said lands and premises so now in the possession or occupation of the said society as aforesaid, or to the receipt of the rents and profits thereof, for an estate of fee-simple or fee-farm, or any other perpetual estate, subject to any mortgage or incumbrance, or for an estate in tail or *quasi* entail, in an estate of inheritance or perpetual interest, or for the term of his, her, or their own life or lives (not being jointresses or jointress), or for the life or lives of any other person or persons, or for so many years as he, she, or they may live, or for an unexpired term of years, not being less than sixty years in its inception, and whether absolute or determinable on a life created out of an estate of inheritance or perpetual interest by way of settlement and not in consideration of or subject to any rent reserved thereby (and whether or not such estate or interest shall be subject to any mortgage or other incumbrance), by virtue of this Act, to make a lease or leases of all or any part or parts of the same lands and premises to the said society for any term not exceeding nine hundred and ninety-nine years, or in fee-farm at the best improved yearly rent that may reasonably be obtained for the same from a solvent tenant, without any fine or consideration; provided that such rents, and all clauses and conditions to be inserted in such leases, shall secure to the person or persons who for the time being would, if such leases had not been made, be entitled to the actual possession of the lands and premises therein to be comprised, or to the receipt of the rents and profits thereof, according to their respective estates and interests therein, and that such respective leases as last aforesaid shall be valid and effectual to bind the lessor and lessors, his heir, or their heirs, executors, administrators, assigns, and successors in estate, and all persons whomsoever deriving under the same title or settlement as that under which the lessor or lessors derives or derive, and notwithstanding any settlement, Act of Parliament, entail, law, or custom to the contrary, and whether there be or be not any leasing power annexed or belonging to the estate of such lessor or lessors, but so as not to prejudice or interfere with any other power of leasing to him, her, or them belonging.

XVII. When and so soon as the said Royal *Dublin* Society shall have obtained such lease or leases, it shall be lawful for such society to divide the lands and premises which shall be comprised therein in such proportions, and under such conditions and restrictions, as to the Board of Trade and Navigation shall seem meet, between the said building trustees and the said Royal *Dublin* Society, and to apportion the rents to be payable respectively on the said respective divided portions in such manner as may be, in the opinion of such board, conformable to justice, and to make and execute such leases, conveyances, and other assurances for the purposes last aforesaid, as such board shall think fit.

XVIII. This Act shall only extend to *Ireland*.

INCUMBERED ESTATES COMMISSION.

NOTICE TO CLAIMANTS & INCUMBRANCERS.

IN the matter of the Estate of JOHN WHITE, CHARLES ALBERT GREERY, and FREDERICK OGLE, Trustees of the will of HENRY HARDY, Owners; *Es-parte* EDWARD DAWSON A'KINSON, Petitioner.

The Commissioners having ordered a Sale of the Lands of DROMARL otherwise DRUMARL, situate in the Barony of Oneilland Wise, and County of Armagh. All parties objecting to a Sale of the said Lands, or having claims thereon, are hereby required to take Notice of such order, Dated this 14th day of Dec. 1854.

HENRY CAREY, *Secretary*.

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All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

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THE

IRISH JURIST.

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DUBLIN, DECEMBER 23, 1854.

In these times, when men are prone to regard mere arbitrary changes in the law as so many genuine reforms, we feel reluctant to suggest alterations in an existing code, lest, by so doing, we should involuntarily encourage and promote rash innovations. It is, however, impossible to shut our eyes to those defects in the administration of the law which lead to practical hardship and injustice. We at present allude to the criminal law, which, while we candidly admit, in most respects, to work satisfactorily, having, within the last century, undergone a complete transformation for the better, is still susceptible of improvement. An instance very recently occurred at the Commission Court in Dublin in which a verdict was obtained, in a criminal case, which we believe to have been almost universally regarded by professional men as contrary to the weight of evidence. The accusation was one of that character which Lord Hale has characterised as "easy to be made, hard to be proved, but harder to be defended by the party accused," and in which a verdict, however perverse, if suffered to remain on record must *per se* work irreparable mischief to the party impeached. It is not needful for us, on the present occasion, to enter into the evidence which was given at the trial, which will be sufficiently in the recollection of our

readers, or in fact to say more with regard to the particular subject than to intimate that we allude to the well known case of *Reg. v. Jebb*, which was tried only the week before last, and the verdict in which caused general surprise. We refer to this case, as showing that an alteration should be made in the law for the purpose of enabling courts of superior jurisdiction to review such verdicts, on the ground of their incompatibility with the evidence, and, if needful, of referring the cases for further trial. A measure with this object was some time since introduced by Mr. Butt, prompted by the recent case of *R. v. Kirwan*.

With the details of that measure we are not particularly acquainted, nor do we recollect whether it was formally rejected or merely abandoned from press of other business. There is certainly danger in such projects, however consistent they may appear with abstract justice, lest they may practically cripple the administration of justice, and perhaps also tend to relieve the judge who presides at the trial of a share of the responsibility which a sense of his comparative absolute authority in the direction of the particular trial might engender in a just and feeling mind.

However, let us remember that in actions at the civil side of the court, in some of which, perhaps, the very same question may be involved as in a trial on an indictment, the finding of the jury would

be open to review, in case of any glaring inconsistency between the rational drift of the evidence and the conclusion at which they arrive, whilst generally in criminal cases their verdict, except upon technical grounds, must stand in any event. It is impossible that such an incongruity should fail to impress our minds.

There is, however, an exception to the rule in criminal cases, to which we have adverted, which exception makes the defect in question all the more glaring for the want of consistency which it exhibits. Suppose an indictment be removed by *certiorari* into the Queen's Bench, the cause will go down for trial upon a *Nisi Prius* record at the civil side of the court; the verdict will be duly recorded on the *postea*, and the court above, by virtue of their inherent power over their own record may, in *favour of the accused*, grant a new trial as against the Crown. Now, if new trials are injurious in criminal cases, they should not be admitted under the latter state of circumstances any more than in ordinary cases. There is no reason why parties who happen to have been prosecuted originally in the Queen's Bench, or have had their indictments removed thither, should be specially favoured. We say, either abate this privilege, or make it general, and empower the Court of Queen's Bench or any other competent court of criminal appeal, to review the relevancy of the facts adduced in evidence to found the verdict, as the law now admits of an appeal on questions of mere law. If the additional facilities of late years thrown in the way of the latter have been judicious, *a fortiori* should some similar provision be made for the former, where the merits of the case would be the principal element involved, whilst it cannot be denied that in the large majority of cases which now come before the court of criminal appeal, the questions to be decided are wholly irrespective of merits. Another advantage arising from the granting of a power to review the *facts* in criminal cases would be that it would in many cases cease to be necessary to resort to the writ of *certiorari*, for the purpose of indirectly affecting that which direct agency would then accomplish. We hope, therefore to see some such measure of criminal law reform as we have suggested, and as it has, we believe, already formed the subject-matter of a recommendation by the Common Law Commissioners in England, we anticipate within no very distant period a legislative scheme of that nature, common to both kingdoms.

SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

A PAPER ON PARTNERSHIPS UPON THE PRINCIPLE OF LIMITED LIABILITY.

Read at a General Meeting of the Society, Nov. 6, 1854, by ANDREW EDGAR, Esq., Barrister-at-Law, and referred to the Committee on Commercial Laws, with a request to take the subject into immediate consideration.

THE recent resolution of the House of Commons on the subject of partnership with limited liability, and the prevailing opinion of the public on the question, render it certain that considerable changes will shortly be introduced into the existing law. It is not to be denied, however, that amongst the mercantile community there exists a formidable, though by no means general, opposition to any extensive change in the present law; while amongst those persons who are favourable to the principle of limited liability, there is some difference of opinion, both as to the extent to which it should be admitted, and as to the best mode of carrying it out and insuring it against abuse.

Although this society, therefore, has already inquired into the question, it seems wise and expedient to recur to the subject at the present time. From the recent establishment of various sectional committees, the opportunity is now afforded of considering the matter in all its different bearings and ramifications, and of thus arriving at results, which may aid materially in the final settlement of the question. The subject may be referred generally to the different committees, each of which will consider that section of the question which comes within its own province, or it may be referred specially to the Committee on Commercial Laws, which will receive assistance from the other committees on the different points which fall under the cognizance of each respectively.

The views of those who are in favour of the introduction of the principle of limited liability into our law, rest on the clear and intelligible proposition, that it is not expedient "to prohibit by law, persons from entering into partnership, and to prohibit them and others from dealing together, on the terms that the liability of one, or more, or all of the partners should be limited."* This proposition, independently of the authority which it derives from the rules of enlightened jurisprudence, is supported by unquestionable evidence of the evils and hardships produced by the present law in this country, and of the advantages flowing from a different system in other countries.

But strong as the case is in favour of a change in the law of partnership, there are various objections still urged against it in certain quarters. Those objections would not, at the present stage of the question, be entitled to much consideration, did they not proceed from men of great mercantile experience, and whose interests may be regarded as involved in the matter. Even admitting that

* See First Report of Commissioners on Mercantile Law. Opinion of Mr. Bramwell, p. 23.

there was some force in the objections referred to, they would only illustrate what Archbishop Whately calls the "*Fallacy of objections*, i. e. showing that there *are* objections against some plan, theory, or system, and thence inferring that it should be rejected; when that which ought to have been proved is, that there are *more or stronger* objections against the receiving than the rejecting of it."

It is necessary, however, in such a question as the present, for the reason already stated, that the objections to which I have alluded should be carefully examined; and for this purpose I am anxious, on the present occasion, to call attention to the report of a committee of this society in 1849, to whom it had been referred to consider the law of partnership with reference to the liability of partners. The opinion of a majority of that committee was in favour of allowing the formation of partnerships in which the responsibility of certain of the partners should be limited to the amount of capital advanced by them, under proper restrictions for the prevention of fraud. The minority came to an opposite conclusion, and stated, in a separate paper, their reasons against the recommendation contained in the report of the committee. As I fully concur in the resolutions of the committee as far as they go, and as the paper of the minority appears to me to embody the leading objections which can be urged against the system of limited liability, and are substantially the same as those brought forward by the majority of the mercantile law commissioners in their first report, I do not think I can better re-introduce the subject to the consideration of the society than by examining some of the principal points of objection in the paper to which I have referred. These, I may observe, are entirely directed against the principle recommended in the report; and are chiefly founded on prudential and economical grounds. There is one objection, however, of a legal nature which calls for observation. The second reason stated is, "Because it is as inconsistent with the principle of English law as with justice that the risks and losses incidental to commercial speculation should not be borne by those who originate them, and who alone are to receive the profits if any arise." Now, although, according to modern decisions, the law makes no distinction between active and dormant partners as long as the latter remain in the firm, I am at a loss to understand how there is any thing opposed to the original principles of our jurisprudence in limiting the liability of the latter under certain circumstances. I do not allude to joint stock companies incorporated by Act of Parliament or by royal charter, which partake rather of the nature of *privilegia* in the Roman law; although, if the doctrine contended for be right, and its violation be as inconsistent with the principle of English law as of justice, to allow the board of trade to grant charters authorising limited liability must be as impolitic and unjust as, in the language of Mr. Lowe, to allow "the secretary of the treasury to grant dispensations for smuggling, or the attorney-general licences to commit murder." But the general principle of our law is that notice, or express stipulation, will limit the liability of partners as well as of other contracting parties. In some

cases, where the business of a partnership is conducted by means of written documents, this is possible, and is commonly done in the case of life, fire, and marine insurance. This method, however, is of extremely limited application; and in the ordinary departments of trade, it is practically impossible to adopt such a course. But if the names of all the dormant members of a partnership whose liability was limited, and the amount of capital agreed to be advanced by such limited partners, were registered and duly published, and the style of the firm should indicate its character, so as to make notice a reasonable presumption, and at all events throw the duty of inquiring on the party contracting with the partnership, I can scarcely think that this would be inconsistent with the real principles of English law, far less with any principle of justice of which I am aware. The same observation would apply to associations and companies where the liability of every member was limited; and in this case, indeed, it would only be allowing parties to do for themselves what the Crown or the Legislature can now do for them.

With regard to reckless and fraudulent trading, which it is objected would result from partnership with limited liability, I cannot think that *that* which now exists is likely to be very much increased by the proposed change. Of course it would be necessary that the most stringent provisions should be adopted against fraud. One thing is clear that the present state of the law has a tendency to prevent honourable and intelligent persons from having anything to do with joint stock companies, and to leave their formation to the more speculative part of the community. Nor does it seem at all doubtful that there would be less room, under a system of limited liability, for the indolence, the carelessness, the positive dishonesty with which parties are too apt to enter into contracts with companies when they know that every individual member is liable to his uttermost farthing. Mere bubble schemes, however high and respectable the names which they might put forth, would have small chance of success, when the furthest extent of their resources could be easily known, and when the indefinite liability, which now gives such schemes all their factitious credit and importance, was withdrawn. Independently of this, with regard to such periods of excitement and panic as those of 1824-5, 1836, 1841, 1845, 1846, and 1847, I believe that the present law of partnership had no inconsiderable effect in giving rise to the perturbations which then took place. Unless there had been an immense amount of capital in the country which was not profitably employed, the opportunity would not have been afforded for the schemes which caused the panic and excitement in those periods; and the best preventive of their recurrence seems to be to afford convenient means for the profitable investment of capital by a system of limited liability, which by equalising the pressure will render it wholesome and beneficial.

But the great objection stated by the minority of the committee, and which still forms the leading ground of opposition against limited liability, is, that although such a system may suit a country where capital is scarce, it is inapplicable to, and

would be dangerous in, this country, where there is no want of capital to carry out any enterprise the prospects of which are capable of reasonable demonstration. Now this objection, I venture to think, is altogether fallacious. There is a large class of the community active and enterprising, but with whom capital is scarce, on whom the system would operate as beneficially as it does on those countries generally which are limited in point of capital; and it is impossible to overlook the case of such, notwithstanding the general wealth of this country, and the abundance of resources that may be at hand for carrying out every reasonable enterprise. But with regard to capital never being wanting to carry out any reasonable enterprise, this is a view from which I beg totally to dissent. If we confine our attention to trade and manufacture as carried on in the great commercial districts of the country, there may be some appearance of truth in the proposition. But the moment we extend our view over the whole country, and take into account the agricultural, as well as the trading and manufacturing interests, we shall find that there is a great want of capital, and that this want operates in the most unfavourable manner. Not only are there many small towns advantageously situated for manufactures and trade which *vegetate* from generation to generation,—not only are many works of public utility, and which might be ultimately profitable to their promoters, left unattempted throughout the country; but a large proportion of land capable of being profitably cultivated remains unimproved, while a very considerable proportion of that which is under cultivation yields only half returns, in consequence of the want of capital on the part of landholders and farmers. And the evil is daily becoming more felt in this latter case since the present state of agricultural science has suggested many improvements which it requires considerable capital advantageously to introduce. If any one is of opinion that the resources of this country have been fully developed, or that the capital we possess is sufficient, under the present law of partnership, to carry them to their utmost limits, he will of course reject my argument; but believing as I do, that much remains to be accomplished both in trade and agriculture, and that whatever capital is in existence should be made available for this purpose to its fullest extent, I can admit of no distinction between this and poorer countries; and when I see that this country is capable of being rendered so much richer than it is, I must demur to any objection to a change of the law which proceeds upon the idea that we already have enough of capital for all beneficial purposes. For in truth the whole of this objection seems to involve the notion, unsound in every economical view, that a country can have too much capital, or that all its capital should not be made available to the highest degree. Else why if the system of limited liability is advantageous in giving full effect to the capital of a poor country, are we to be deprived of the benefit? This is the strict logical result of such an objection, and it amounts therefore to a most obvious *reductio ad absurdum*.

If it be true that there is some fear on the part

of capitalists of the rivalry of societies and partnerships under the principle of limited liability, I venture to think that such fear is unwarranted by the sound principles of economical science. The general increase of the capital of the country, or the rendering more available what exists, must operate favourably on every branch of trade. New enterprises undertaken, new fields of industry cultivated, and new markets opened up do not necessarily interfere with the old ones. And if the present law *does* give to those possessed of large capitals a monopoly in certain departments of trade and manufactures, I have yet to learn that such a state of things tends to the public advantage, or that those who benefit by it would not benefit still more under a system of unlimited competition and the full development of all our resources.

There is one aspect of the question which I am anxious to bring before the notice of the Society, both because I think it has not occupied a sufficiently prominent place in most of the discussions on this subject, and also because, although it really forms the most important element in the whole question, it does not strictly fall within the cognizance of any of our committees. I allude to the social bearings of the question,—its relations to the present state and prospective condition of the working classes. The great inequality of property in this country is no doubt productive of many social evils; and all laws whose tendency it is artificially to maintain this inequality, must be regarded as impolitic and unwise. Such are the law of primogeniture and the law of unlimited liability in partnership. The latter of these is no doubt productive of the greater evils. "What the working classes feel," says Mr. J. S. Mill, "is not so much the inequality of property, considered in itself, as the inequality consequent upon it, which unhappily exists now, namely, that those who already have property have so much greater facilities for getting more, than those who have it not, have for acquiring it." That the present law of partnership throws impediments in the way of working men acquiring property, is a matter of which there can be no question. The expense and difficulty of obtaining an Act or a charter renders it impossible for them to undertake schemes on the principle of limited liability, and, with regard to ordinary partnerships, the formidable responsibility which may be incurred prevents persons possessed of capital from assisting working men in undertakings which they might often be qualified to carry on effectively. And what renders the evil more serious is, that at the present day trade and manufactures can in general only be carried on successfully by means of large capitals; so that the difficulty of a working man in bettering his condition is now greater than ever, and those who have saved a little money have no means of investing it at a profit at all proportionate to that which their employers enjoy. Of course all this tends to prevent the formation of habits of frugality and saving among the working classes, and to foster a general spirit of discontent with their condition, which leads them often to regard unfavourably the legitimate profits of capital. The consequence of which is, that a hostile spirit

subsists to a very great degree in the manufacturing districts between employers and employed, and which occasionally breaks forth in the "strikes" and "lock-outs," from which the general interest of the country suffers, and which threaten our whole social system.

I cannot but think that if a system of partnership with limited liability were introduced, which should allow the working classes to unite together in carrying on the business with which they were acquainted, and which should afford greater facilities for intelligent and industrious artisans being taken into partnership by their employers, or receiving assistance from persons possessed of capital, it would tend both to the prosperity of the country, and to the peace and happiness of a large portion of the community. Considering the discontent and the socialist tendencies which undoubtedly exist in the manufacturing districts, I see no remedy for the present evils so direct and efficacious as a change in the law, which should afford to the working classes the opportunity of becoming capitalists themselves, and participating, according to their industry and frugality, in the profits of capital. And with the views which I entertain, I do not rest the matter solely on the grounds of policy and expediency; but regard the change with reference to the working classes, as well as to the rest of the community, as a measure of substantial justice.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 24.)

CAP. CII.

An Act to consolidate and amend the laws relating to Bribery, Treating, and undue Influence at Elections of Members of Parliament.

[10th August, 1854.]

"Whereas the laws now in force for preventing corrupt practices in the election of members to serve in Parliament have been found insufficient: and whereas it is expedient to consolidate and amend such laws, and to make further provision for securing the freedom of such elections:" be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. The several Acts of Parliament mentioned in the Schedule A. hereto annexed, shall be repealed to the extent specified concerning the same Acts respectively in the third column of the said schedule.

II. The following persons shall be deemed guilty of bribery, and shall be punishable accordingly:

1. Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any

voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election:

2. Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election:
3. Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in Parliament, or the vote of any voter at any election:
4. Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavour to procure the return of any person to serve in Parliament, or the vote of any voter at any election:
5. Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person with the intent that such money, or any part thereof, shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery, at any election:

And any person so offending shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of one hundred pounds to any person who shall sue for the same, together with full costs of suit: provided always, that the aforesaid enactment shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses *bona fide* incurred at or concerning any election.

III. The following persons shall also be deemed guilty of bribery, and shall be punishable accordingly:

1. Every voter who shall, before or during any election, directly or indirectly, by himself, or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment, for himself, or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting, at any election.
2. Every person who shall, after any election, directly or indirectly, by himself, or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting,

or having induced any other person to vote or refrain from voting, at any election :

And any person so offending shall be guilty of a misdemeanor, and in *Scotland* of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of ten pounds to any person who shall sue for the same, together with full costs of suit.

IV. Every candidate at an election, who shall corruptly by himself, or by or with any person, or by any other ways or means on his behalf, at any time, either before, during, or after any election, directly or indirectly give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay, wholly or in part, any expenses incurred for any meat, drink, entertainment, or provision to or for any person, in order to be elected, or for being elected, or for the purpose of corruptly influencing such person or any other person to give or refrain from giving his vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting, at such election, shall be deemed guilty of the offence of treating, and shall forfeit the sum of fifty pounds to any person who shall sue for the same, with full costs of suit ; and every voter who shall corruptly accept or take any such meat, drink, entertainment, or provision, shall be incapable of voting at such election, and his vote, if given, shall be utterly void and of none effect.

V. Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, make use of, or threaten to make use of, any force, violence, or restraint, or inflict or threaten the infliction, by himself or by or through any other person, of any injury, damage, harm, or loss, or in any other manner practise intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting, at any election, or who shall, by abduction, duress, or any fraudulent device or contrivance, impede, prevent, or otherwise interfere with the free exercise of the franchise of any voter, or shall thereby compel, induce, or prevail upon any voter, either to give or refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence, and shall be guilty of a misdemeanor, and in *Scotland* of an offence punishable by fine or imprisonment, and shall also be liable to forfeit the sum of fifty pounds to any person who shall sue for the same, together with full costs of suit.

VI. Whenever it shall be proved before the revising barrister that any person who is or claims to be placed on the list or register of voters for any county, city, or borough has been convicted of bribery or undue influence at any election; or that judgment has been obtained against any such person for any penal sum hereby made recoverable in respect of the offences of bribery, treating, or undue influence, or either of them, then and in that case such revising barrister shall, in case the name of such person is in the list of voters, expunge the same therefrom, or shall, in case such person is

claiming to have his name inserted therein, disallow such claim ; and the names of all persons whose names shall be so expunged from the list of voters, and whose claims shall be so disallowed, shall be thereupon inserted in a separate list, to be entitled "The list of persons disqualified for bribery treating, or undue influence," which last-mentioned list shall be appended to the list or register of voters, and shall be printed and published therewith, wherever the same shall be or is required to be printed or published.

VII. No candidate before, during, or after any election shall in regard to such election, by himself or agent, directly or indirectly, give or provide to or for any person having a vote at such election, or to or for any inhabitant of the county, city, borough, or place for which such election is had, any cockade, ribbon, or other mark of distinction ; and every person so giving or providing shall for every such offence forfeit the sum of two pounds to such person as shall sue for the same, together with full costs of suit ; and all payments made for or on account of any chairing, or any such cockade, ribbon, or mark of distinction as aforesaid, or of any bands of music, or flags or banners, shall be deemed illegal payments within this Act.

VIII. No person having a right to vote at the election for any county, city, borough, or other place, shall be liable or compelled to serve as a special constable at or during any election for a member or members to serve in Parliament for such county, city, borough, or other place, unless he shall consent so to act ; and he shall not be liable to any fine, penalty, or punishment whatever for refusing so to act, any statute, law, or usage to the contrary notwithstanding.

IX. The pecuniary penalties hereby imposed for the offences of bribery, treating, or undue influence respectively shall be recoverable by action or suit by any person who shall sue for the same in any of her Majesty's Superior Courts at *Westminster*, if the offence be committed in *England* or *Wales*, and in any of her Majesty's Superior Courts in *Dublin*, if the offence be committed in *Ireland*, and in or before the Court of Session, if the offence be committed in *Scotland*, and not otherwise.

X. It shall be lawful for any criminal court, before which any prosecution shall be instituted for any offence against the provisions of this Act, to order payment to the prosecutor of such costs and expenses as to the said court shall appear to have been reasonably incurred in and about the conduct of such prosecution : provided always, that no indictment for bribery or undue influence shall be triable before any court of quarter sessions.

XI. For the more effectual observance of this Act, every returning officer to whom the execution of any writ or precept for electing any member or members to serve in Parliament may appertain or belong shall, in lieu of the proclamation or notice of election heretofore used, publish or cause to be published such proclamation or notice of election as is mentioned in Schedule B to this Act, or to the like effect.

XII. In case of any indictment or information by a private prosecutor for any offence against the pro-

visions of this Act, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, such costs to be taxed by the proper officer of the court in which such judgment shall be given.

XIII. It shall not be lawful for any court to order payment of the costs of a prosecution for any offence against the provisions of this Act, unless the prosecutor shall, before or upon the finding of the indictment or the granting of the information, enter into a recognizance, with two sufficient sureties, in the sum of two hundred pounds, (to be acknowledged in like manner as is now required in cases of writs of certiorari awarded at the instance of a defendant in an indictment), with the conditions following; that is to say, that the prosecutor shall conduct the prosecution with effect, and shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs.

XIV. No person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action, or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against this Act shall be committed, and unless such person shall be summoned or otherwise served with writ of process within the same space of time, so as such summons or service of writ or process shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the court out of which such writ or other process shall have issued; and in case of any such prosecution, suit, or process as aforesaid, the same shall be proceeded with and carried on without any wilful delay.

XV. "Whereas it is expedient to make further provision for preventing the offences of bribery, treating, and undue influence, and also for diminishing the expenses of elections:" be it enacted, that within six days after the passing of this Act the returning officers of the City of *Canterbury*, the boroughs of *Cambridge*, *Kingston-upon-Hull*, *Malton* and *Barnstaple*, and once in every year in the month of *August*, the returning officer of every county, city, and borough shall appoint a fit and proper person to be an election officer, to be called "Election Auditor or Auditor of Election Expenses," to act at any election or elections for and during the year then next ensuing, and until another appointment of election auditor shall be made; and such returning officer shall, in such way as he shall think best, give public notice of such appointment in such county, city, or borough; provided, that any person appointed an election auditor may be re-appointed as often as the returning officer for the time being shall think fit; and that every person who shall be an election auditor on the day appointed for any election shall continue to be the election auditor in respect of such election until the whole business of such election shall be concluded, notwithstanding the subsequent appointment of any other person as election auditor; and every election auditor upon his appointment shall make and sign before the returning officer the following declaration:

"I [A. B.] do solemnly and sincerely promise and declare, that I will well and truly and faithfully, to

the best of my ability in all things, perform my duty as election auditor, according to the provisions of 'The Corrupt Practices Prevention Act, 1854.'" And every election auditor wilfully doing any act whatever contrary to the true intent and meaning of such declaration, shall be deemed guilty of a misdemeanor, and in *Scotland* of an offence punishable with fine and imprisonment.

XVI. All persons, as well agents as others, who shall have any bills, charges, or claims upon any candidate for or in respect of any election, shall send in such bills, charges, or claims, within one month from the day of the declaration of the election of such candidate, or to some authorised agent of such candidate acting on his behalf, otherwise such persons shall be barred of their right to recover such claims, and every or any part thereof: provided always, that in case of the death within the said month of any person claiming the amount of such bill, charge, or claim, the legal representative of such person shall send in such bill, charge, or claim within one month after obtaining probate or letters of administration, or confirmation as executor, as the case may be, or the right to recover such claim shall be barred as aforesaid.

XVII. Every candidate shall, by himself or his agent in that behalf, within three months after the day of the declaration of the election, or within two months after any bill, charge, or claim has been sent in by the legal representative of any deceased creditor, as herein-before provided, send in to the election auditor for payment of all such bills, charges, or claims, (except as herein-after excepted) as have been sent in to such candidate within the one month herein-before specified from the day of the declaration of the election or after the granting of probate or letters of administration, or confirmation as executor, as the case may be: provided always, that the candidate shall, by himself or his agent as aforesaid, at the time of his sending in any such bill, charge or claim, state to the election auditor whether he admits the whole amount of such bill, charge, or claim, or if not the whole then how much thereof, if any, he admits to be correct: provided also, that in case of the wilful default of the candidate, by himself or his agent as aforesaid, in sending in all such bills, charges, or claims, or in making such statement at the time of sending in such bills, charges, or claims, he shall be liable to a penalty of twenty pounds, and to a further penalty of ten pounds for every subsequent week of wilful default or neglect in sending in all such bills, charges, or claims, or in making such statement, to be recovered by any person who will sue for the same, together with full costs of suit: provided always, that in case any such candidate shall be absent from the United Kingdom at the time of such election, he shall send in to the election auditor for payment of any such bills, charges, or claims as aforesaid, within one month after his return to the United Kingdom, which shall be of the same force and effect as if the same had been sent in as herein provided.

XVIII. No payment of any bill, charge, or claim, or of any money whatever, for or in respect of any election, or the expenses thereof, (except as herein excepted,) shall be made by or by the authority of

any candidate, except by or through such election auditor, and any payment made by or by the authority of any candidate otherwise than as herein provided shall be deemed and taken to be an illegal payment, and upon proof thereof such candidate shall forfeit the sum of ten pounds, with double the amount of such illegal payment, and full costs of suit, to any person who will sue for the same: provided always, that it shall be lawful for any candidate, by himself or his agent, to name any banker through whom alone such bills, charges, or claims, or money, as aforesaid, shall be paid by the election auditor, and in that case the election auditor shall pay such bills, charges, and claims, by cheques drawn on such banker, to be countersigned by the candidate, or some person on his behalf specially appointed for that purpose.

XIX. If the election auditor, by the authority of any candidate, tenders or offers to pay any sum in respect of any bill, charge, or claim sent in as hereinbefore provided, such tender shall be taken for all purposes to be the tender of such candidate, and may, in any action or other proceeding brought against such candidate to recover the amount of such bill, charge, or claim, be pleaded as such, or otherwise be made available according to the proceedings of the court in which such action or other proceeding is brought or carried on; and if such plea is pleaded, or if it shall be deemed advisable for any other reason to pay money into court in any action or other proceeding brought against a candidate in respect of any liability alleged to have been incurred by him at such election, the election auditor may, at the request of the candidate, and by leave of any one of the judges of the superior courts of common law at *Westminster*, or of any one of the judges of her Majesty's superior courts at *Dublin*, or of any one of the judges of the court of session in *Scotland*, as the case may be, pay into court the sum required; and such payment into court by the election auditor shall, for the purposes of such action, be deemed and taken to be and may be pleaded as payment into court by the candidate himself: provided always, that on any issue or hearing in reference to any such tender or payment of money into court, it shall not be necessary to prove the appointment of the election auditor.

XX. Nothing in this Act contained (except as herein specially provided) shall be taken to limit the right of any creditor to bring any action, or otherwise to proceed against a candidate for or in respect of any expenses connected with the election; and if in any such action or proceeding final judgment be obtained against the candidate, such candidate shall forthwith send to the election auditor a copy or certificate of such judgment; and when and as the monies recovered by the said judgments, or any part thereof, shall be paid or satisfied by such candidate, or shall be obtained under or by virtue of any execution, the said candidate shall thereupon forward to the election auditor a statement of the monies so paid or obtained in respect of such judgment.

(To be continued.)

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DUBLIN, DECEMBER 30, 1854.

Review.

Shall we transfer our Lands by Register? A Letter to the Lord Chancellor on the Contemplated Transfer of Land by Register. By JOSEPH GOODEVE, Esq., of Lincoln's Inn, Barrister-at-Law. London: Benning and Co.

REGISTRATION of assurances connected with land in England having been limited to two counties—Middlesex and York, it has long been a question of debate whether a system of registry should not be extended to the entire land of England, as has been the case in this country and in Scotland.

As the march of law reform has advanced, it has been proposed not merely to register, but so to register, as that land may be rendered as easy of transfer as Government stock.

The exact mode of accomplishing this gigantic enterprise with security to existing interests and sufficient simplicity to be adapted to universal application, has not been developed with distinctness. It has been shadowed out as feasible by the aid of the applanance maps and ciphers, but no daring law reformer has introduced a bill into Parliament, the proportions of which can be seen, and either moulded into shape or rejected as unfit for use.

So long as Ireland was a fit subject for experi-

ment, Sir John Romilly was bold enough to make the attempt, and succeeded, contrary to our most earnest remonstrance, in placing upon the statute book the Act of the 13th and 14th Vic. c. 72, which has ever since, and we firmly believe will for ever, (save as to some general sections, which can be dovetailed with usefulness into an improved Registration Act,) remain a dead letter.

It gives approximately an idea of a general mode of registration for England, and, singularly enough has never been alluded to by Mr. Goodeve in the very able pamphlet we purpose to notice. The writer combats with much ability the popular idea of the feasibility of making land as convertible as stock, and has arrayed a vast number of good solid facts to show that the landed interest would gain little, if anything, in point of cost by a general land register, constructed with a view to facilitate sales, whilst they would lose in point of security.

The difficulty which we feel, and which, no doubt, our author felt, is to arrive at a precise plan with which to deal; we have risen from a careful perusal of the pamphlet with an increased idea of the stupendous difficulties of creating a land register, by which land can be conveyed by public registration, giving the purchaser a Parliamentary title, and securing the due application of the purchase-money, but we have not discovered more than the vague outline of a plan for such a purpose. We have men

of buckram, not real warriors, to contend with. We hear it stated, "The thing can be done and easily," but how do the advocates of the proposed undefined system escape from the dilemma thus put?

If, as Mr. Goodeve justly observes, beneficial interests, as distinguished from representative interests, are put upon the registry, transfers cannot be effected without having the beneficiaries represented, and if representative interests are alone put upon the registry you cannot secure the beneficiaries. In the one case immediate and simple convertibility cannot be obtained, nor in the other absence from fraud.

And again, if the land of the kingdom is to be transferred like stock in the books of the Bank of England, it must have, like its subject of comparison, a beginning, by inscription in books, with incidents of transfer analogous to those of stock, and, therefore, the whole land of the kingdom must be inscribed with its title and its ownership, a monster "Domesday Boke" of the 19th century.

One can understand three hundred millions of consols created to-day with peculiar properties, and rendered transferable to-morrow; but we cannot at all comprehend the whole land tenure in England being put upon a register, and reduced, with all its pre-existing and infinitely complicated relations, into a commodity as saleable as stock. The retrospective view is one of the most difficult conceivable. On this point we avail ourselves of the descriptive pen of the writer.

"Any scheme of registration therefore, if it be national, would seem to involve as its preliminary, the labour of getting, in some shape or other, on to the registry, a representation of the whole area of the kingdom, in subdivisions as minute as that of its ownership, and in a form capable of assigning each subdivision to its appropriate title. This too, it will be observed, would be required in reference as much to that one of the plans, pointed out above, which proposes to admit to registration with the infirmities of the antecedent title, as the one which constitutes registration a warranty from the first, inasmuch as a primary transfer under the former must connect itself with the registered parcels, just as much as any succeeding transfer.

"How many sectional subdivisions would be requisite to represent the ownership of the county of Middlesex alone, how many of the city of London, it is presumed, has been calculated by those who promote the scheme; and it must be remembered that every town in the kingdom has its multiplication of ownership, not only in its streets, but in its very alleys.

"Measured by acreage, the whole soil of the country has been computed at thirty-seven millions and a fraction of acres. If in this larger proportion of instances not only one but a plurality of acres is

to be assigned to any single ownership, it is, nevertheless, perfectly true, that cases exist to some amount in which the proprietorship of single acres is distributed among a plurality of owners, indeed almost down to the point in which—

'Every rood of ground maintain'd its man.'

"If this representation of the soil is to be attempted by means of maps, permit me to call your Lordship's consideration both to the labour and the cost involved in the construction of such maps as would at all approach to the requisite detail and the necessary accuracy.

"Try the same thing by descriptive schedule. Into how many miles of parchment would such a 'hide of land' extend itself!

"Infinitesimal as would be the required subdivision of the soil in the case of maps at all events, and to some extent in that of schedules also, even that subdivision would be of the surface only, and would be far from accurately representing the whole ownership.

"Easements form no inconsiderable branch of, or restriction upon general ownership. And these easements as well public as private, and of these, if some exist over the surface, others are underneath it.

"One has a right of way over the soil of the land of another; a second, a right of watercourse through it; a third, a right of mining under it; or there may be rights of common, and so forth, and either in favour of a whole district, or a given locality of some portion of it. There may be rivers with rights of fishing down to some given points of the stream or of the margin, or rights of ferry across, or tolls upon bridges over them.

"Obligations may exist restricting the mode of user, as in the instance of conditions against building otherwise than within some prescribed limit or in some particular form.

"The very boundary or termination of a passage or right of way, the limit of a party wall, the right of user of a passage or a wall, may be a matter of substantial importance to the parties interested.

"All these and every other conceivable ramification of ownership must be defined, or the registry would appear to fail at its very threshold."

Assume even the land and the existing right of proprietorship—though as to the latter the difficulty of determining such right is attended with the gravest difficulties—to have been placed on the register, the practical question arises, with what object? That generally stated is for the purpose of facility of transfer with a title assured to the purchaser.

Is this unattended with objection?

Let us take the illustrations of Mr. Goodeve.

"For example, then, A dies, the registered owner, and let us try the result in reference to either of the two alternative suppositions, that of his registration being beneficial, or its being fiduciary.

"And, first, as to the former. Now, he dies either testate or intestate. Upon the principle of the register being made a warranty of title, the right of succession in his representatives must be

established, before the title founded upon it can with any propriety be placed upon the register as substitutionary for the former title, whether by the immediate admission there of the new beneficiaries, or, in the case of settlement, the registration of trustees to represent them.

"In the case either of testacy or intestacy there is of course required the preliminary proof of death.

"Upon the supposition of testacy the sufficiency of the will as a testamentary instrument, and the construction and validity of the gift under which the title is claimed, with the fact of the testator's death, must be ascertained before the title founded on it can with any propriety be placed upon the register.

"In the case of intestacy, the fact must be established, and with it the representation of the heir, and the title may possibly be founded on some remote descent, and consequently some complicated and difficult pedigree.

"Supposing A's interest, however, to be fiduciary only, the validity of the appointment of the new trustee, who is to be the successor to the deceased, must be established before the right to registration founded on it could be recognized, and for this some process or other would seem to be needed.

"It is hardly necessary to point out that this operation becomes necessary on every occasion of death of the registered owner.

"Whether, and to what extent, the constituting an executor or administrator a *real representative*, (in the way adverted to above, under the observations upon settlement,) would meet the exigency of the cases here suggested, it will be sufficient to discuss when, if ever, such a change shall have taken place in our law.

"But death is not the only casualty which would give occasion for the appointment of a new trustee, and consequently for a new registration.

"Mental incompetency would differ little as a cause of embarrassment from death itself, and the cases of absence beyond seas, bankruptcy, or insolvency, are but a stage removed from either.

"The case of mental incompetency could only, it would appear, be dealt with under the direction of the Court of Chancery.

"The necessity of the new Tribunal suggested above has, indeed, been to some extent anticipated by the authors of the registration scheme; and it is proposed to appoint a staff of officers in the shape of Registrars, with a Registrar General at their head, to whom, among them, it seems, are to be confided powers partly *ministerial* and partly *judicial* for the ascertainment of the title, and generally of the right to registration.

"Now, so far as it may be proposed to confide to such officers as these questions of a *judicial* character, it strikes one as somewhat anomalous that rights and questions of property which we have hitherto been accustomed to consider calling for the adjudication of the higher Courts of Law, acting in the presence of a well-skilled Bar, and under the protection of appellate control, and that through a succession of Courts and up to the highest in the land, should be trusted to a tribunal as-

surely, and from the very nature of the case, a' together of an inferior grade. Still more strange does it appear when we reflect that the tribunal in question, though invested *pro hac vice* with judicial functions, in the main would seem to partake of a *ministerial* only, rather than a *judicial* character.

That no system capable of universal application has been propounded we need not multiply the proofs that turn up *passim* through the pages of this carefully prepared publication, though we cannot forbear quoting the following remark.

"A system of caveats, however, is proposed as a security against malversation by trustees. How far that system is based upon security, which requires the restraint of a caveat against its *natural* action, I leave others to judge. The notion certainly falls somewhat strangely upon the ear. But caveats may miscarry, just as the safety valve of a boiler may get out of order, and the boiler burst; and I cannot but suspect that a perfect caveat would be a much more difficult piece of mechanism to devise than a perfect valve."

"Let it first then be seen what would be the extent of a caveat and the course of dealing under it (to borrow an expression from passing events) necessary 'to establish a blockade?' Why nothing short of a line of caveat against the whole coast of the enemy. Be the interests requiring protection ever so numerous, each separate interest must be guarded by the caveat, or that interest is left unprotected."

There is a *sub modo* use in registration which we have not space here to discuss, but which is appreciated in this country, and even more in Scotland, where we think the system is freer from blemishes. Registration has its advantages, though it will not serve to pass Parliamentary titles or dispense with judicial sales for that object.

Mr. Goodeve's pamphlet is well-written, abounds in practical well-put illustrations, the result of a large experience and an accurate intellect, and is well calculated to upset crude theories and clumsy legislation on one of the vastest of subjects. We recommend cordially its perusal.

REPORT OF THE COUNCIL OF THE INCORPORATED SOCIETY OF THE ATTORNEYS AND SOLICITORS OF IRELAND,

For the Year Ending 1st December, 1851.

The Council, in submitting to the Annual General Meeting of the Society, their usual statement of the various matters which have occupied their attention during their year of office, need scarcely remind their brethren of the numerous and important changes which continue to be made in the practice of the

Courts of Law and Equity, and in the administration of justice in general, by legislative enactments, and which have, in fact, almost entirely remodeled the system of proceedings in our tribunals. These measures, and the extensive changes attendant upon them, have consequently required from the council more constant vigilance, and a greater degree of labour in dealing with the important subjects continually brought before them, than have ever been required at any former period since the Society was founded; and they trust, that the society will find that the best exertions of the council have not been wanting, although they may not have been attended in every case with the desired results.

Your Council, in conformity with the recommendation contained in the last Report of your Society, in reference to the recent Common Law Procedure Act, prepared a schedule of fees, which they submitted to the Clerks of the Rules, with whom, under the sanction of the Judges, they had several meetings and communications, and devoted much time and attention to the consideration of so important a matter, and feeling that a schedule could not all at once be fully and satisfactorily settled, they, therefore, when laying same before the judges, took occasion respectfully to submit, that inasmuch as many of the duties for which fees were heretofore given, would, by the Common Law Procedure Act, be at an end; and as the tendency of that Act was to reduce all matters of controversy to as narrow a compass as possible by means of admissions, the fees upon proceedings to be taken under it would, consequently, be in many cases totally inadequate, if such of them as were applicable to the proposed new practice, should remain without revision. Your Council, therefore, respectfully called the attention of their Lordships to the great changes which would be effected, and submitted, that when the Act should have been for some time in force, and its practical working understood, considerable alteration would be found necessary in the schedule of fees.

By the 99th General Order of the Judges of the 11th January, 1854, in pursuance of the Common Law Procedure Act, the Law Taxing Masters were empowered to arrange printed forms or schedules to be used in certain matters relating to the taxation of costs in their offices. Your Council, after several communications being had on the subject, prepared and submitted suggestions and observations to these officers, who received them in the most satisfactory manner, and with the greatest courtesy and attention.

But your Council regret that they were not able to have introduced into such schedule, charges or fees to attorneys, for attending to take instructions, and writing letter to a debtor, previous to the institution of proceedings against him, in the event of his coming in to settle the debt *before action commenced*.

The rules with respect to ejectment services and affidavits, under said recent Common Law Procedure Act, being found too stringent, and it appearing to your Council, that they required to be modified, in order to their beneficial working, a memorial was presented to the Judges on the subject, and their Lordships have had it under their consideration,

with a view to remedy the difficulty and inconvenience complained of, and your Council trust that the result of their application will be satisfactory to the Profession, as amended rules are about to be finally settled by their Lordships.

A petition was presented by your Council, to the Lord Chancellor, with respect to the fee of 6s. 2d., made payable to the Registrars of the Court of Chancery, upon the countersigning of each draft for the payment of cash, or the transfer of stock, drawn by the Accountant-General, the payment of which operates severely when the sum to be paid or transferred is very small in amount (as it has, in some few cases, occurred that the sum to be received has been actually less than the fee to be paid for the draft), and his Lordship, through his Secretary, was pleased to intimate to the Society, that he was very sensible of the necessity of an alteration in the fees payable on drafts, as stated in the memorial referred to, and would most gladly make such changes in that fee, and in some other fees, payable by the suitors, as his Lordship thought called for reduction, but, in the existing state of the Chancery Fee Funds, he felt very great difficulty in so doing, having regard to the provisions of the several statutes on the subject; that his Lordship, however, had made a communication to the Lords of the Treasury, for the purpose of obtaining the immediate relief of those funds, from the larger portion of the charges now fixed upon them, and should that be accomplished, his Lordship hoped to be able to make a general revision of the fees of the several offices, for the benefit of the suitors.

A memorial was also presented to the Lord Chancellor, on the subject of a regulation in the appearance and writ office of the Court of Chancery, which required that a motion docket or fee should be paid by each party taking out a copy of the order, or appearing by a Solicitor on a motion, and your Council received a communication from his Lordship, that, for the future, the Clerk of Appearances and Writs was only to charge one fee of 3s. on each motion docket, and not, as lately claimed, a fee of 3s. on each copy of it.

Your Council feel regret at being obliged again to state, that numerous complaints continue to be made to this Society of the delays which occur in the Taxation of Chancery Costs, and for which your Council had hoped some remedy would have been found during the past year, as the injury to Suitors and to the Profession, resulting from so serious an evil, calls loudly for some change calculated to expedite the business of that important department.

The attention of your Council having been called to the necessity which existed for having proper indexes kept of the several Deeds enrolled in the Rolls Office of the Court of Chancery, in order to facilitate the making of searches, a memorial was presented, on the subject, to his honor the Master of the Rolls, who was pleased to acknowledge the receipt of it, and to intimate that he would have inquiries made, and again communicate with your Council on the subject.

A Bill having been introduced during the last Session of Parliament, to enable a party to issue execution in any part of the United Kingdom, under

a judgment obtained in any court in England, Scotland, or Ireland, your Council prepared a petition to Parliament against some of its clauses, which were found to be highly objectionable, and with respect to which they had a correspondence with several Law and Mercantile Societies, both in England and Scotland, and likewise a communication with the Chamber of Commerce, in Dublin, the result of which tended to corroborate the views entertained by your Council, as to the very prejudicial tendency of the 7th, 8th, and 9th, sections of such bill, and with respect to which, they also addressed letters to all the Irish Members of Parliament, soliciting them to support the prayer of that petition, and took such other steps, in furtherance of the rejection of said clauses, as ultimately led to their being expunged, when the Bill was being considered by a select Committee of the House of Commons.

Notwithstanding the exertions made by the Commissioners of the Incumbered Estates Court, and their very efficient staff of Officers, to expedite public business, yet much inconvenience has been experienced, from the great length of time which generally elapses, after sales, and before final schedules can be settled; and frequent representations having been made, as to the losses which have fallen on suitors and creditors; in consequence of this delay, your Council felt that this was a subject they were bound to notice, and bring under the attention of the Commissioners, although they believed that the Commissioners were most anxious, as far as in their power, to give every proper facility to the distribution of the funds in the different matters. Your Council, therefore, presented a petition from this Society to the Commissioners on the subject, and took occasion, respectfully, to suggest that further assistance was required, in order to insure dispatch, at that very important stage of their proceedings; and also presented a petition to Parliament in the month of February last, setting forth the great inconvenience and expense which have been occasioned to the public, and to the members of both branches of the Legal Profession, who practice in the Incumbered Estates Court, in consequence of the Court being at such a distance from the place where the Law and Equity business of the country is transacted, and where the Bar and Solicitors are of necessity obliged to be in constant attendance, and praying that the Court and Offices might be removed to the immediate neighbourhood of the Four Courts.

Your Council have not, as yet, been made aware that any step has been taken to accomplish so desirable a measure, but they received an intimation in the month of July last, that it was in contemplation to make arrangements for the sittings of the Court to be held at or in the neighbourhood of the Four Courts, though it was not intended to make any change in the site of the offices, and that consequently while the Commissioners were to transact the judicial business of the Court at the Inn's Quay, the various officers were to carry on their portion of the public business in Henrietta-street. Your Council were and are of opinion that any such arrangement would tend to increase, instead of diminish the inconvenience now felt by the public and the

Legal Profession, and they were resolved on protesting against the impolicy of any such partial change, if the intention of effecting such had been officially announced. Your Council take this opportunity of urging on the Attorneys and Solicitors of Ireland, the propriety of bringing this matter (each in his own county or borough) under the consideration of the Members of Parliament for Ireland, with a view of having the subject pressed on the attention of the Government during the next Session of Parliament.

In Michaelmas Term, 1853, a Barrister, under peculiar circumstances, made an application to the Court of Exchequer to be admitted an attorney, without having served an apprenticeship. This gentleman was the brother of an Attorney, whose death was caused by a railway accident. The Council felt it their duty to oppose the application, but it was granted by the Court, with apparent reluctance, and under a certain supposed state of facts, which was afterwards ascertained to be unfounded. The Council, on behalf of this Society, therefore felt themselves bound to bring the true state of facts before the Court, and to apply to have the name of the gentleman alluded to struck off the Roll of Attorneys, in which they were successful, a result which your Council trust will be attended with beneficial effects, and which, it is hoped, will induce the Courts of Law to be less disposed to entertain favorably, and to scrutinize more closely, applications of such a nature.

A resolution having been passed at a general meeting of this Society, referring it to your Council to consider the prevailing practice of Country Attorneys employing, as town agents, unprofessional persons. Your Council, when the new rules, under the Common Law Procedure Act, were in preparation, took advantage of the opportunity to present a special memorial to the Judges on the subject, setting forth several recent instances of the evil consequences arising from the practice, referring to the course of business in England, and praying that a rule might be made, requiring that all Attorneys resident in the country, should register the name of a Dublin Agent, being an Attorney, resident and practising in Dublin, to transact their Dublin business, and that the name of such Dublin Agent should be signed as agent, to all writs, orders, or other documents requiring the signature of an Attorney.

The same matter was brought under the consideration of the Judges, by a former Council of this Society, on the occasion of the preparation of General Rules, under the Process and Practice Act, and an objection was then raised by the Judges that they had no power, under the provisions of that Act, to make such a rule, but, in reply to the memorial above referred to, your Council were favored with a communication from the Lord Chief Justice, that his Lordship had received the memorial of the Society, which he would bring under the notice of the Judges, as a matter deserving their most serious consideration; and your Council have reason to know, that the framing of such a rule as that sought for was mooted amongst the Judges, but the final consideration of it was postponed, and it, at present, remains an undecided question.

The attention of your Council having been called to the case of *Wisdom v. Kelly*, referred to in the last-mentioned memorial (in which case, persons acting as town agents had been guilty of the grossest malpractices), your Council conceived it to be their duty to appear on a pending motion, for an attachment against a certain individual, and point out to the Court the mischievous effects produced by the practice they had publicly and formally complained of; and upon the discussion of the motion, the Court were of opinion, that a Member of the Profession, and a clerk who acted as town agent, were equally guilty with the individual referred to, and that proceedings should be instituted against them; and, accordingly, the Court granted a conditional order for an attachment against them, and committed to your Society the carriage of the proceedings, the result of which was, that the order for an attachment was made absolute, but directed not to issue until further order.

Your Council regret to state, that although successful in punishing the offenders in this particular case, yet the Court, in pronouncing judgment, did not hold out any hope that a general order would be framed to meet the evil; although one of their Lordships, in observing upon this case of *Wisdom v. Kelly*, and the mischievous effects of the practice complained of, stated: "That what struck him as most objectionable was, that it was alleged that the Country Attorney employed a person, not a professional man, to do business in his name, and that this person, without any authority from him, had undertaken to act for him, and the result was, that three actions were instituted, in a very oppressive manner, upon one Bill of Exchange, and he thought that the practice of an Attorney employing a non-professional man to institute proceedings in his name, without previous communication with him, was one which could not be tolerated by the Court."

Your Council are aware that cases where clerks act, without the authority of an Attorney, are of constant occurrence, but in consequence of the dexterous manner in which such cases are managed, an opportunity of bringing them before the public seldom occurs; and as they conceive the practice to be most mischievous, both to the public at large, and to the character and welfare of their own profession, they beg to impress on the Society the propriety and importance of not relaxing their endeavours, until some general rule shall have been made, calculated to remedy so gross an abuse.

The public and the profession are aware that great inconvenience has been felt in consequence of the difficulty experienced in getting leading counsel to attend at the trials of cases in which they hold briefs; much of this inconvenience arises, no doubt, from the circumstance, that after Term the three Superior Courts of Law commence their *Nisi Prius* sittings simultaneously, and from the natural desire which each suitor has to procure the services of the most eminent men of the day. Your Council, however, were of opinion that some arrangements might be made by the Members of the Bar, as a body, to remedy so serious an evil, and they hoped it could have been done in some way by which the interests of the public and of the bar would be

equally consulted; with this view your Council addressed a letter to Sir Thomas Staples, Baronet, as the Father of the Bar, on the subject. This communication was brought before the bar at a special meeting, and the Council received a letter in reply from Sir Thomas Staples, stating, that the bar, as a body, declined to entertain the subject. Your Council still hope that the Bar of Ireland will see the propriety of framing such regulations as will enable the Sutors and Attorneys, when they retain Counsel and send them briefs, to count on the attendance of at least one leading Counsel through the entire progress of a case, and to have the advantage which such an attendance alone can give, and which the Clients and Attorneys are reasonably entitled to expect.

With respect to the Annual Certificate Tax, your Council, previous to the last Session of Parliament, had a communication with our brethren in England, through the medium of the Incorporated Law Society, Chancery-lane, London, and after full consideration of the whole subject, and although they would have been willing to renew the application for its abolition in that Session if there was any hope of success, yet from the ~~then state of Public affairs, and the uncertainty of a continuance of~~ peace, it was deemed more expedient to abstain from then bringing the subject forward. The Society, therefore, did not present any petition on the subject, and Lord Robert Grosvenor, who, through his strong sense of justice, has constantly supported the claims of the profession, announced in his place in Parliament, that his clients did not admit that the relief afforded to them was satisfactory, but that, on the eve of a war, they felt constrained to defer their claim till the state of public affairs should permit it to be again brought forward; and, from the manner in which this intimation was received, it was evident the prudent course had been adopted. In closing their exertions with respect to this matter for the present, the Council may, however, observe, that after a contest continued during four Sessions of Parliament, the profession has been relieved of part of the Tax, and an opening has been made to press, at a more favourable opportunity, the right of the profession to its total repeal.

Your Council, before concluding their Report, cannot avoid observing that applications have in frequent instances been made to them, to investigate cases of alleged misconduct, and to adjust differences arising out of questions of practice by professional gentlemen, who have never joined the Society, and although difficult, if not impossible, for your Council to refuse to interfere on that ground, yet it is a subject of regret, that while so many members of the profession are still to be found, who, in availing themselves of its assistance to redress wrongs, admit its utility and the benefits to be derived from it, at the same time, by declining or neglecting to subscribe to its funds, withhold from the Society that pecuniary support and aid, without which its efforts to benefit the profession must necessarily be greatly limited and impeded.

Your Council recommend to their brethren of the profession, the conveniences and other advan-

tages derived from being members of this Society, and making their appointments to meet and transact business at the Solicitors' Room, in preference to the Hall of the Four Courts, where they cannot have the requisite accommodation, and exposed to constant interruption; and they would beg leave to direct the attention of members of the Society to the rules established for its management and government, and recommend a strict observance of them, as in several instances complaints have been made of gentlemen frequenting the Solicitor's Room whose subscriptions are in arrear.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 32.)

XXI. No candidate shall be allowed to compound or settle any action or other proceeding brought against him in respect of any expenses alleged to have been incurred by him in or about the election, or to confess judgment in such action or proceeding, without the consent of the election auditor.

XXII. The personal expenses of any candidate, and the expenses of advertising in newspapers with reference to any election, shall be defrayed by the candidate himself, or by his authority, but a full and true account of the sums so paid in respect of the said advertisements shall, as soon as conveniently may be, be made out to the best of his ability, and rendered to such election auditor by such candidate, and the amount of such account shall be included in the general account of the expenses incurred at any election to be made out and kept by such election auditor as herein-after provided.

XXIII. "And whereas doubts have also arisen as to whether the giving of refreshment to voters on the day of nomination or day of polling be or be not according to law, and it is expedient that such doubts should be removed;" be it declared and enacted, that the giving or causing to be given to any voter on the day of nomination or day of polling, on account of such voter having polled or being about to poll, any meat, drink, or entertainment by way of refreshment, or any money or ticket to enable such voter to obtain refreshment, shall be deemed an illegal act, and the person so offending shall forfeit the sum of forty shillings for each offence, to any person who shall sue for the same, together with full costs of suit.

XXIV. No person shall pay or agree to pay any expenses of any election, or any sum of money whatever, in order or with a view to procure or promote the election of any person to serve in Parliament, save to the candidate at such election, or to or under the authority of the election auditor, other than as excepted and allowed by this Act, and every person who shall pay or agree to pay any such expenses or money as aforesaid, save as aforesaid shall become liable to a penalty of fifty pounds, and of double the money so paid or agreed to be paid, to be recovered in an action of debt by any one who shall sue for the same: provided, that if upon the trial of any action to recover any such penalty or penalties it shall appear to the judge

who shall try the same that any such payment shall have been made or agreed to be made without any corrupt or improper intention, such judge may, if he shall think fit, reduce such penalty or penalties to any sum not less than forty shillings, and may also, if he shall think fit, direct that the plaintiff shall not be entitled to costs of such action: provided also, that no expenses of or relating to the registration of electors, and no subscriptions or contributions *bona fide* made to or for any public or charitable purpose, shall be deemed election expenses within the meaning of this Act: provided also, that in any action to recover any penalty under this Act it shall be lawful to the court in which such action shall be brought, or any judge thereof, if they or he shall think fit, to order that the plaintiff in such action shall give security for costs, or that all proceedings therein shall be stayed.

XXV. Any candidate, and his agents by him appointed in writing according to the provisions of this Act, may, at any time before the day of nomination, pay any lawful and reasonable expenses in respect of the election which he or they shall *bona fide* believe fit and proper to be paid in ready money, and the payment of which cannot conveniently be postponed: provided, that the candidate and his agents shall, upon or before the day of nomination, make out to the best of his ability, and deliver to the election auditor, a full, true, and particular account of all such payments, with the names of the persons to whom they have been made, signed by such candidate or his agents respectively, and no payment so made shall be a legal payment within this Act unless such account thereof shall be duly rendered to the election auditor.

XXVI. The election auditor shall, as soon as he conveniently can, make out a full and true account of all the expenses incurred at the election, specifying therein every sum of money paid to him or paid by him or by his authority, on behalf of each candidate, and of all sums claimed, although the same shall not have been allowed or paid, and every sum which has been paid into court as aforesaid or recovered by judgment against such candidate, and to whom, by name, such payment was made, and for what particular debt or liability; and the election auditor shall include in such general account the amount of the sums paid by each candidate for advertisements, and he shall specify therein the total amount of expenses incurred by each candidate; and the account, when so made out, shall be duly signed by him: provided always, that, if it shall be found necessary, the election auditor may from time to time make out a supplementary account or accounts, which shall be made and abstracted in the manner herein provided with reference to the first general account.

XXVII. The election auditor shall keep all accounts which shall come to his hands in some fit and convenient place, and shall, at all reasonable and convenient times, submit the same to the inspection of the candidates or their agents, and permit them to take copies of the same, or any part thereof, upon request, and when such general account as aforesaid shall be so made out and signed by him, he shall keep the same in some fit and con-

venient place; and such general accounts shall be open to the inspection of any person, and copies thereof or of any part thereof shall be furnished to any person at all reasonable and convenient times, upon request, such person paying a fee, at the rate of one shilling for every two hundred words, to a copying clerk, for the same; and when the election auditor shall have concluded the business of any election he shall deliver over all accounts in his hands to the clerk of the peace in counties, and to the town clerk or other officer performing any of the duties of town clerk in cities and boroughs, and to the sheriff clerk in counties in *Scotland*, who shall allow them to be inspected by any person, on the payment of one shilling, and shall furnish copies of the same or of any part thereof on the payment of a fee, at the rate of one shilling for every two hundred words, to the copying clerk, provided always, that for any copy so furnished the fee shall in no instance be less than one shilling, and shall deliver over to the candidates respectively the balance of all monies, if any, and all vouchers in his hands, except any vouchers appertaining personally to himself.

XXVIII. The election auditor shall also, as soon as he conveniently can, insert or cause to be inserted an abstract of such account, signed by him, in some newspaper published or circulating in the county or place where such election is held; and such abstract of account shall specify the amount of each of such bills, charges, or claims admitted to be correct, or claimed and objected to, and the names of the parties to whom the same shall have been paid or are due, or by whom the same have been claimed respectively.

XXIX. In case the person appointed to act as election auditor should, before his duties herein mentioned are completed, die, resign, or become incapable of acting as such election auditor, it shall be lawful for the returning officer for the time being to appoint some fit and proper person to act as such election auditor in the room of the person originally appointed as aforesaid for the remainder of the then current year of such appointment; and the returning officer shall give public notice of such appointment in the county, city, or borough.

XXX. All monies, bills, papers, and documents of and relating to the election which were in the hands or under the control of the election auditor going out of office, dying, resigning, or becoming incapable of acting as aforesaid, except receipts or vouchers for payments actually made by such election auditor, shall be handed over and transferred to the new election auditor appointed as herein before mentioned; and such new election auditor shall in all respects, or as near thereto as may be, have the same powers and act in the same way as if he had been originally appointed previous to the election: provided always, that it shall be lawful for such new election auditor, at all reasonable times, to have access to and take copies of or extracts from the receipts or vouchers above excepted.

XXXI. Every candidate shall, before or at the nomination, or as soon after as conveniently may be, declare to the election auditor in writing the

name or names of his agent or agents for election expenses, who shall be appointed in writing, and that he has not appointed and will not appoint any other agent without in like manner declaring the same to the election auditor, and no other than such agents shall have authority to expend any money or incur any expenses of or relating to the election in the name or on the behalf of the candidate; and such agents may pay any of the current expenses of the election necessary to be paid in ready money, provided that such agents shall make out, to the best of their ability, and render, from time to time, true and particular accounts to the election auditor of all such payments; and every such agent shall, as soon as conveniently may be after his appointment as aforesaid, make and sign the following declaration:

"I [A. B.], being appointed an agent for election expenses by [X. Y.], a candidate at this election, do hereby solemnly and sincerely declare, That I have not knowingly made, authorized, or sanctioned, and that I will not knowingly make, authorize, or sanction, any payment on account of this election, otherwise than through the election auditor, save as excepted and allowed by 'The Corrupt Practices Prevention Act, 1854.'"

(To be continued.)

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DUBLIN, JANUARY 6, 1855.

WE observe that Mr. Isaac Butt has, with his usual assiduity, given notice of his intention, after the Christmas recess, to introduce a bill for the purpose of extending to Ireland the enactment contained in the 18th section of the late English Common Law Procedure Act. It will be recollected that several sections of this Act, which related to the general course of procedure at Nisi Prius and the production of evidence were, during the progress of the measure, at the instance, we believe, of Mr. Butt, applied to Ireland; but, by an oversight, the 18th section, which was quite as appropriate to such an extension as any of the others, and which, if likely to be useful in England, was equally so as regarded Ireland, had been left out of the extending clause. The 18th section is the one which provides that at Nisi Prius, when the defendant calls witnesses, his counsel shall, at the close of the evidence, be permitted to *sum up* that evidence to the jury, before the plaintiff's counsel proceeds to reply generally, and that last-mentioned right, which is now enjoyed by the plaintiff, only when his adversary produces evidence, is now conceded in every case, whether the defendant calls witnesses or not. We entirely approve of the extension to Ireland of this alteration in the law. It is, we will admit, one which *a priori* would not have occurred to us to make; but, as it

has been adopted upon the recommendation of the Common Law Commissioners, we feel assured that it is one of no frivolous character; and, having been adopted in England, there is no reason why the practice in Ireland should be different. We see many reasons why such a change would be beneficial. The second speech of counsel for the defendant seems to be but a measure of justice to that party to secure him against the risk of having the effect of his evidence upon the jury entirely dissipated by a brilliant and damaging reply on behalf of the plaintiff. It may be apprehended that such a privilege would lead to waste of time; but, inasmuch as the speech is to be a mere summing up, and no more, it would be the duty of the judge to check the introduction of irrelevant topics. Such an address ought not, in general, to occupy more time than a rebutting speech does at present, and it ought to save the judge the necessity of a very minute charge. Again, the granting to the plaintiff's counsel leave to reply, when no evidence is called by the defendant, appears to be equally fair. It will protect the plaintiff from the injury to his cause which has at times resulted from an artful, insinuating speech on the part of the defendant, replete with sophistry and bold assertion, and only unanswerable because the mouth of the plaintiff is shut by a rule of practice; and, on the other hand, seeing that the absence of a reply was, under the former system, rather the exception than the rule at

Nisi Prius, and was not, therefore, to be reckoned on in estimating the probable duration of a trial, this change will not in general tend to the consumption of the public time.

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To the Editor of the Irish Jurist.

SIR,

The very forcible strictures which I read with great pleasure in a recent number of your able and valuable journal, touching the crude and slovenly manner in which the legislation of these countries, and perhaps more especially of Ireland, is conducted, have induced me to offer a few observations to the better judgment of my professional brethren in particular, and through them to the public generally. It appears to me that while a spirit remorselessly iconoclastic has gone abroad amongst us, destroying much which our fathers deemed most venerable and sacred, there is yet a total want of any re-organizing or constructive power to build again the structure which has been defaced; and, if we persist in the present work of our hands, nothing will shortly remain of our once boasted system of jurisprudence but a confused and heterogeneous mass of ruins, rubbish, and disjointed material. I do not mean that the work of law reform should be checked amongst us, or even that we have accomplished a tithe of what we ought in that direction; I do not say that there are not in our body politic many deeply-seated and dangerous sores; all I protest against is that unskilful and mangling butchery should first be permitted to aggravate the disease, and then lauded as a scientific cure. The evils arising from the immense mass of undigested reports which now daily teem upon us from the press, have been fully and clearly exposed in your journal, and the proper remedy, I think, pointed out by your suggestion, that there should be certain reporters, appointed by the court and under their especial control, whose business should be to publish the cases in the shape of specific decisions upon the questions really *at issue and decided*, without any *queries or sembles*, or any of those *dicta* which are the pitfalls of legal learning, and that such should alone be considered as reports; and that those cases which do not really illustrate some truth or principle of law, should never be permitted to swell up a volume in the way of book making. These reports should be digested (with the authority of the court) under the respective heads of law which they elucidate; and thus the profession would be enabled to discover (with comparatively little trouble, and, what is much more important, with clearness) the state of the law with respect to any particular point, and, where it is unsettled, the questions which still remain for judicial determination. A digest of the past cases of *real decisions* should also be prepared out of the ponderous tomes which burthen our shelves and confound our judgments, and the residue consigned to the moles and bats; and even although to sweep out these stables is a work which Hercules himself would fail in perfectly accomplishing, and the most skilled reporters (even

with the aid of the judges, who should be required to aid in this undertaking) would be obliged in any such digest to leave questions still undecided which ought long ago to have been settled, and points, which long were settled, but are now left undefined, the landmarks having been swept away by *dicta*, and doubts, and negligence; yet nevertheless the certainty and brevity which such a system would introduce, would more than counterbalance whatever amount of the *wisdom of our ancestors* may be unwittingly consigned to forgetfulness, in tedious and half-forgotten judgments which are now seldom referred to, except, as you well observe, by the unscrupulous advocate to snatch, through the improvidence of the court, a temporary triumph for the fallacy which he supports. There is much more with which I may hereafter trouble you on this subject, but at present I have trespassed so largely upon your space, that I must at once address myself to the point which is prominent in my mind; and I shall therefore say nothing here of a digest of our statutes (which I am happy to find is seriously occupying the attention of some of our eminent jurists.) I deprecate then most solemnly, upon behalf of the body to which I have the honor to belong, (and on behalf of the public whose interests are identical) against the manner in which the enactment of statutes to bind this realm (the most responsible duty which can devolve upon a citizen, clothed with the character of a trustee, for his fellow-countrymen) is at present conducted by our Legislature. Need I refer to the Act of last session, which had so nearly rendered our high judicial functionaries, the Masters of the Court of Chancery, mere annual pensioners upon the bounty of the Crown; or to the Act which, in defiance of all constitutional principle, of common justice, of common sense, and of express judicial reprobation, (here let me, for fear of being considered guilty of contempt, express my deep veneration for the wisdom, the foresight, and the industry of that august body by which our laws are enacted) placed the Commissioners of Public Works in the position of autocrats, absolute over the rights of the subject, and independent of the control of the tribunals of the country. The remedy for all this is very simple; it is to have competent barristers appointed; by whom is not now the question, (for I am not presuming to legislate) neither is it a question for present consideration whether they should be *ex officio* members of the Legislature or not, but their duty should be to examine and *report* on every bill submitted to Parliament, their report in each case operating, of course, only *quantum valeat*, to inform the House of the tendency and nature of each particular proposed change in the law, and to suggest such improvements as to their legal judgments the exigencies of that portion of the community to which the proposed change has reference may require. There should, of course, be such officials appointed for Ireland as well as England; and thus would be prevented that patchwork style of legislation which arises from the lawgiver not being a perfect master of his subject, and not caring to intermeddle with what he does not altogether understand. It would also, I trust, prevent the

experimental system of which Ireland has been too often the victim; much in the way that surgeons were wont formerly to carry out their theories and investigations upon the body of the unhappy criminal. It would certainly tend to make legislation upon any particular subject, when once undertaken, *complete*; for men responsible for enlightened progress in legislation, and for the effect of each particular enactment upon the pre-existing laws, would never permit such crudities to pass through their hands as are now annually thrust upon us, and sometimes even praised as perfect models of legislation, skill, and industry. Let me take an example which lies before me (for I shall pass over the law of judgments, that inextricable labyrinth of confusion worse confounded). In May, 1850, an Act was passed altering, in almost every respect, the practice and proceeding of the Superior Courts of Common Law, and empowering the judges to make new rules in accordance with its provisions. The ink was scarcely dry when it became necessary to amend that Act, which was done by an Act of June, 1850. The judges promulgated their rules accordingly on the 23rd December, 1850, amounting to no less than 284, and further orders were published by them, dated the 15th January, 1851. Practice does not spring up in a day. It would have taken years to settle and harmonize the questions which must inevitably have arisen out of that Act and the accompanying rules; but in August, 1853, another Act was passed creating a second revolution in the practice of the courts, (just as the practitioner was beginning to work more safely and easily under the former,) and rendering a new set of General Orders, amounting to 201, a matter of necessity. I am far from condemning the last mentioned Act; indeed, Sir, I regret to find that in this respect I appear to differ from the opinions expressed in some of the late numbers of your able periodical. I consider the Common Law Procedure Act a wise and comprehensive measure, not indeed without its faults, but on the whole a bold and decisive advance in the direction of reform. At all events this dilemma presents itself. If it be, as I think it, then the former Act must necessarily have been a hasty, an inadequate, and an absurd piece of legislation; if the last Act be not what it ought to be, or something in the right direction, then our present position is the more to be deplored, attempting, as we are at this moment, to reduce it into a well defined and permanent system of practice, understood by the Profession, and certain for the suitor, who too often ascribes the miscarriage of his just claims, arising from the fluctuation of enactments, to what he is pleased to consider the crotchets of the court, or the incompetency of the advocate. Be that as it may, it became evident immediately after the passing of the Act that matters could not rest permanently even upon their then basis; and I believe a much wider and fuller measure was in the contemplation of the learned framer of the late Act, which would probably now be the law, if the public attention had not been distracted and engrossed by the all absorbing topic of the war. As it is, the subject of juries, which the late Act partially embraced, is at

present under the consideration of the House of Commons; and another piece of mutilated Mosaic work has been bestowed upon us by the extension, in the eleventh hour, of certain provisions of the English Common Law Procedure Act to this country. The learned member who procured that extension is undoubtedly entitled to the public thanks; but he would have made himself still better entitled thereto had he more carefully perused the Act, and claimed participation for the Irish public in the many other most valuable provisions which it contains applicable to this country, but which are now the exclusive property of the English people. I do not mean in the least to detract from the great merits and eminent services of the learned gentleman alluded to; all I wish to say is, that as parliament is at present constituted, there is not time for any man, amid the jostlings of party and political strife, to master the entire bearings of any difficult legal subject presented to his consideration; and the result of all this is perplexing and disastrous in the extreme.

The last suggestion with which I shall at present trouble you is this, that until such time as the changes above proposed shall be effected, it becomes the bounden duty of the Bar of Ireland to scrutinize the alterations from time to time proposed in the law, and to endeavour to render them as far as possible accurate, complete, and effective. This, Sir, you yourself have not failed to do as far as lay in your power; but I submit that the most certain means of accomplishing that object will be by the formation of a Law Reform Society for this country, such as has long existed in England. I attribute solely to the existence of that body the fact which is undeniable, that the laws enacted for England are certainly not as variable or unstable as our own; and I doubt not that they would consider it an indelible disgrace to them to have permitted without remonstrance an enactment such as the 13 and 14 Vict., c. 72, purposing to provide for the complete registration of Deeds in Ireland, to become law, if incapable of being carried into effect; or if, on the other hand, its provisions can be carried out, to remain to this hour a dead letter upon the statute book.

There are serious difficulties, no doubt, to be encountered in the formation of such a body, arising principally from the want of professional union and *esprit de corps* amongst the members of the Irish Bar, in other respects as high-minded and learned a body as any in the universe. The truth, however, although an unwelcome one, is palpable that, while the English barrister regards his profession as a science, and enters upon its study with reverence and enthusiasm, the Irishman too often considers it as the mere stepping-stone to preferment, or, at least, seldom looks at it in any other light than as the means of an honourable subsistence. I must not pursue this theme further. I am slow to believe that there are wanting men who, at your call, (for I put it to you to exert your influence in the establishment of such a society,) will devote themselves voluntarily, and without pecuniary remuneration, to the amelioration of our existing laws, by watching the changes proposed in Parliament, and by

suggesting such well-matured alterations in our Institutions as the progress of an enlightened age and the requirements of advancing civilization may from time to time demand. Sure I am that unless some such step be taken, and that speedily, the confidence of the public in the law and its administrators, already shaken, will become rapidly and irretrievably undermined—a conjunction most fatal to the well-being of society at large, and to be dreaded and deplored by every man who values the liberties and the institutions of his country.

I am, Sir,

Your very obedient servant,
A JUNIOR.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 40.)

XXXII. In case any person shall be proposed and seconded at any election in his absence, and without his previous authority, it shall be lawful to the persons proposing and seconding such person to pay and agree to pay the lawful expenses of the election of such person; and such proposer and seconder having agreed to pay such lawful expenses shall become liable to pay the fees hereby made payable to the election auditor, and pay any of the lawful expenses of such election, in like manner and upon the same terms and conditions as herein provided concerning agents for election expenses appointed in writing by the candidates.

XXXIII. If any candidate at any election, or any member hereafter returned to serve in Parliament, shall before the passing of this Act have paid any money for or in respect of any election hereafter to be held, or any expenses thereof, such person shall, to the best of his ability, deliver a full, true, and particular account of such payment or payments to the election auditor.

XXXIV. Every such election auditor shall be paid and be payable to receive, by way of remuneration to him for his services in and about the election, the sum of ten pounds from each candidate at the election, as and by way of first fee; and a further commission, at the rate of two pounds *per centum*, from each candidate upon every payment made by him for or in respect of any bill, charge, or claim sent in to such election auditor as herein-before provided; and the reasonable expenses incurred by the election auditor in the business of the election and the performance of his duties pursuant to this Act shall form part of the election expenses, and shall be paid rateably and proportionably by the candidates respectively.

XXXV. On the trial of any action for recovery of any pecuniary penalty under this Act, the parties to such action, and the husbands and wives to such parties respectively, shall be competent and compellable to give evidence in the same manner as parties, and their husbands and wives, are competent and compellable to give evidence in actions and suits under the Act of the fourteenth and fifteenth *Victoria*, chapter ninety-nine, and "The Evidence Amendment Act, 1853," but subject to and with the exceptions contained in such several Acts:

provided always, that any such evidence shall not thereafter be used in any indictment or criminal proceeding under this Act against the party giving it.

XXXVI. If any candidate at an election for any county, city, or borough, shall be declared by any election committee guilty, by himself or his agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable of being elected or sitting in Parliament for such county, city, or borough, during the Parliament then in existence.

XXXVII. In citing this Act in any instrument, document, or proceeding, or for any purpose whatsoever, it shall be sufficient to use the expression "The Corrupt Practices Prevention Act, 1854."

XXXVIII. Throughout this Act, in the construction thereof, except there be something in the subject or context repugnant to such construction, the word "county" shall extend to and mean any county, riding, parts, or division of a county, stewartry, or combined counties respectively, returning a member or members to serve in Parliament; and the words "city or borough" shall mean any university, city, borough, town corporate, county of a city, county of a town, cinque port, district of burghs, or other place or combination of places, (not being a county as herein-before defined) returning a member or members to serve in Parliament; and the word "election" shall mean the election of any member or members to serve in Parliament; and the words "returning officer" shall apply to any person or persons to whom, by virtue of his or their office, under any law, custom, or statute, the execution of any writ or precept doth or shall belong for the election of a member or members to serve in Parliament, by whatever name or title such person or persons may be called; and the words "revising barrister" shall extend to and include an assistant barrister and chairman presiding in any court held for the revision of the list of voters, or his deputy in *Ireland*, and a sheriff or sheriff's court of appeal in *Scotland*, and every other person whose duty it may be to hold a court for the revision and correction of the lists or registers of voters in any part of the United Kingdom; and the word "voter" shall mean any person who has or claims to have a right to vote in the election of a member or members to serve in Parliament; and the words "candidate at an election" shall include all persons elected as members to serve in Parliament at such election, and all persons nominated as candidates, or who shall have declared themselves candidates at or before such election; and the words "personal expenses," as used herein with respect to the expenditure of any candidate in relation to any election, shall include the reasonable travelling expenses of such candidate, and the reasonable expenses of his living at hotels or elsewhere for the purposes of and in relation to such election.

XXXIX. This Act shall continue in force for one year next after the passing thereof, and thenceforth to the end of the then next session of Parliament.

The SCHEDULE A. above referred to.

[The words printed in *Italics* show the extent of repeal.]

7 W. 3, c. 4, A. D. 1695, An Act for preventing

Charge and Expense in Elections of Members to serve in Parliament.—*The whole Act.*

2 G. 2, c. 24, A. D. 1729, An Act for the more effectual preventing Bribery and Corruption in the Election of Members to serve in Parliament.—*All the Act, except the 3rd section, prescribing the oath to be taken by Returning Officers, and except so far as the Penalties and Provisions of the said Act are applicable to the false taking of such oath, and the Neglect to take the same.*

16 Geo. 2, c. 11, An Act to explain and amend the Laws touching the Elections of Members to serve for the Commons in Parliament for that part of Great Britain called Scotland, and to restrain the Partiality and regulate the Conduct of Returning Officers at such Elections.—*So much of the Act as is contained in the 33rd section.*

43 Geo. 3, c. 74, A. D. 1803, An Act for further regulating the Administration of the Oath or Affirmation required to be taken by Electors of Members to serve in Parliament by an Act passed in the Second Year of King George the Second, intituled "An Act for the more effectual Preventing Bribery and Corruption in the Election of Members to serve in Parliament."—*The whole Act.*

49 Geo. 3, c. 118, A. D. 1809, An Act for better securing the Independence and Purity of Parliament by preventing the procuring or obtaining of Seats in Parliament by corrupt practices.—*The whole Act.*

4 Geo. 4, c. 55, A. D. 1823, An Act to consolidate and amend the several Acts now in force, so far as the same relate to the Election and Return of Members to serve in Parliament for Counties of Cities and Counties of Towns in Ireland.—*So much of the Act as is contained in the 48th, 79th and 81st sections.*

7 & 8 Geo. 4, c. 37, A. D. 1827, An Act to make further Regulations for preventing Corrupt Practices at Elections of Members to serve in Parliament, and for diminishing the Expense of such Elections.—*The whole Act.*

2 & 3 W. 4, c. 65, A. D. 1832, An Act to amend the Representation of the people of Scotland.—*So much of the 26th section of the Act and the Schedule (K) thereto annexed as relates to the oath or affirmation against bribery to be put to any registered voter at any poll or election.*

2 & 3 W. 4, c. 88, A. D. 1832, An Act to amend the representation of the people of Ireland.—*So much of the 54th section of the Act as relates to administering the oath or affirmation against bribery.*

5 & 6 Vic. c. 102, An Act for the better discovery and Prevention of Bribery and Treating at the Election of Members of Parliament.—*So much of the Act as is contained in the 20th and 22nd sections.*

SCHEDULE B.

No. 1.—*Proclamation to be used in counties.*
Election of knight, &c.

THE sheriff of the county of _____ will, at the _____ day of _____ now next ensuing, proceed to the election of a knight or knights, member or members [*as the case may be*] for the county or division of a county [*as the case may be*], at which time and place all persons entitled to vote at the said election are requested to give their attendance.

And take notice, that all persons who are guilty of bribery at the said election will, on conviction of such offence, be liable to the penalties mentioned in that behalf in "The Corrupt Practices Act, 1854."

And take notice, that all persons who are guilty of treating or undue influence at the said election will, on conviction of such offence, be liable to the penalties mentioned in that behalf in "The Corrupt Practices Prevention Act, 1854."

Signature of the proper officer.

No. 2.—*Notice of election in boroughs.*

City or borough of _____ day of _____

In pursuance of a writ received by me for electing a Burgess or burgesses [*as the case may be*] to serve in Parliament for the city or borough [*as the case may be*], I do hereby give notice, that I will proceed to election accordingly on the _____ day of _____ at _____ o'clock in _____, when and where all persons concerned are to give their attendance.

And take notice, that all persons who are guilty of bribery at the said election will, on conviction of such offence, be liable to the penalties mentioned in that behalf in "The Corrupt Practices Prevention Act, 1854."

And take notice, that all persons who are guilty of treating or undue influence at the said election will, on conviction of such offence, be liable to the penalties mentioned in that behalf in "The Corrupt Practices Prevention Act."

Signature of the proper officer.

CAP. CIII.

An Act to make better provision for the paving, lighting, draining, cleansing, and supplying with water, and Regulation of Towns in Ireland.

[10th August, 1854.]

"WHEREAS it is expedient to make better provision for the paving, lighting, draining, cleansing, supplying with water, and regulation of towns in Ireland, and to extend to such towns certain provisions of "The Commissioners Clauses Act, 1847," and of "The Towns Improvements Clauses Act, 1847," and of certain other Acts herein-after mentioned:" be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say,) the word "town" shall mean and include a city, town corporate, borough, market town, or other town in Ireland, containing a population of one thousand five hundred inhabitants or upwards, as ascertained by their last population returns made pursuant to Act of Parliament; the expression "the Lord Lieutenant" or "Lord Lieutenant of Ireland" shall include any other Chief Governor or Governors of Ireland; the word "justices," as far as it relates to any town situate in the Dublin

Metropolitan Police District, shall be construed to mean the divisional magistrates of the said police district; the word "person," and words applying to any person or individual, shall apply to and include corporations; the word "householder" shall mean a male occupier of a dwelling-house, or of any lands, tenements, or hereditaments within the prescribed boundaries of the town rated to the relief of the poor in respect thereof; the word "occupier" shall extend to and include an immediate lessor made liable under this Act to assessments in cases of premises of such small annual value as herein-after mentioned respectively in that behalf, and such word "occupier" shall not include a lodger or a party in the occupation as tenant of a furnished house let for a less period than one year, but shall include the party by whom such furnished house is so let; the expression "lodging house" shall mean a house in which lodgers are housed for a less period than one week at a time, at an amount not exceeding fourpence *per head per night*; the word "county" shall include a county of a city or county of a town; the expression "the Commissioners" shall mean a majority of the Commissioners for the purposes of this Act acting in and for a town by which this Act has been in whole or in part adopted; the word "treasurer" shall mean any bank or banking company appointed by the Commissioners to act as their treasurer; the word "lands" and the word "premises" shall include all lands, springs, dwelling-houses, shops, warehouses, vaults, cellars, stables, breweries, manufactories, mills, and other houses and buildings, and yards and places; the word "street" shall extend to and include any road, bridge, lane, square, court, alley, and thoroughfare or public passage; the word "oath" shall include affirmation in the case of Quakers, and declaration in the case of persons allowed by law to make a declaration in lieu of an oath; the word "owner," used with reference to any lands or premises in respect of which any work is required to be done, or any assessment paid under this Act, shall mean the person for the time entitled to receive, or who, if such lands or premises were let to a tenant at a rackrent, would be entitled to receive the rackrent from the occupier thereof; the expression "Assistant Barrister" shall mean the Assistant Barrister for the county or place in which the lands or premises in question are situate, and shall also include the chairman of the sessions of the peace of the county of *Dublin*; the expression "rackrent" shall mean rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises, and the full net annual value shall (save as regards any valuation for poor rates or valuation for assessments under this Act) be taken to be the rent at which the property ought reasonably to be expected to let from year to year, free from all quit rent, head rent, ground rent, and usual tenants rates and taxes, and deducting therefrom the probable annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain the same in a state to command such rent; the expression "private assessment" shall mean any assessment or charge on in-

dividuals for private improvement expenses, or for house drainage, or otherwise under this Act; the expression "district assessment" shall mean any assessment other than a "private assessment" which is confined only to a portion or district of any town; the word "cattle" shall include any horse, mare, gelding, foal, colt, filly, bull, cow, heifer, ox, calf, ass, mule, ram, ewe, wether, lamb, goat, kid, or swine; the expression "lawful day" shall mean a day not being *Sunday, Christmas Day, or Good Friday*, and when any number of days is appointed by this Act, the same shall be construed to mean such lawful days, and be computed inclusive of the first and exclusive of the last of such days; words importing the singular number shall include the plural number; and words importing the plural number shall include the singular number; and words importing the masculine gender (except only the word "male") shall include females.

II. In citing this Act in other Acts of Parliament, and in legal instruments, and in pleading, it shall be enough to use the expression "The Towns Improvement (*Ireland*) Act, 1854."

III. For the purpose of incorporating part only of this Act with any Act hereafter to be passed, it shall be enough to describe the clauses of this Act with respect to any matter in the words introductory to the enactment with respect to such matter, and to enact that the clauses so described, or that this Act, with the exception of the clauses so described, shall be incorporated with such Act, and thereupon all the clauses of this Act so incorporated shall, save so far as they are expressly varied or excepted by such Act, form part of such Act; and such reference to said introductory words shall also be a sufficient incorporation thereof in any notice, application, or other proceeding under this Act.

IV. Upon the application of twenty-one or more householders of any city or town in *Ireland*, each of such householders occupying a dwelling house or other lands, tenements, or hereditaments within such city or town, and rated in respect thereof to the relief of the poor at a net annual value of eight pounds or upwards, applying that this Act or that specific portion thereof (described as ~~herein~~ before provided) may be carried into execution in such city or town, which application shall specify the boundaries proposed for the purposes of this Act, and a copy of which application shall be inserted in the *Dublin Gazette*, and in one or more newspapers published in such city or town, and if none be therein published, then in one or more newspaper or newspapers published nearest to such city or town, it shall be lawful for the Lord Lieutenant of *Ireland*, one month after receipt of such application, and if he shall approve of such proposed boundaries, to order and direct that the mayor or other chief magistrate of such town (being a corporate town), or the chairman of the municipal commissioners under the Act of the third and fourth years of the reign of her present Majesty, chapter one hundred and eight, wherever the same shall be in force, or any two or more justices of the peace resident within ten miles of such town, shall convene a meeting for the purpose of consi-

dering the carrying of this Act into execution, and one of them shall preside thereat, such orders and directions to be signified by the Chief Secretary of the Lord Lieutenant, or in his absence by the Under Secretary; and a copy of such orders and directions, with the names of the parties signing the application for the same, and the boundaries so approved of shall be inserted, under the direction of such Chief or Under Secretary, in such Gazette and newspaper or newspapers as aforesaid.

V. Any such order and direction as aforesaid shall describe and specify the proposed boundaries, for the purposes of this Act, of such city or town; and the same shall be in like manner published in such gazette and newspaper or newspapers as aforesaid; and if this Act shall be adopted in manner herein mentioned, in whole or in part, such boundaries, so approved of as aforesaid, shall be deemed to be the boundaries of such city or town for the purposes of this Act: provided always, that, in case it shall hereafter appear necessary, it shall be lawful for the commissioners, by and with the consent of the Lord Lieutenant, to alter or extend the boundaries of such city or town; and such altered or extended boundaries shall then be deemed to be the boundaries of such city or town for the purposes of this Act.

VI. Such meeting shall be holden at some convenient place within such city or town, and the said mayor, or other chief magistrate, or justices, as the case may be, shall, within ten days after the receipt of such orders and directions, signified as aforesaid, appoint and notify a place within the town, and a time for holding such meeting, which time shall not be less than ten days, and not more than twenty-one days, from the time of so first notifying the same; and such notification shall be made by affixing notices by handbills ten days before the day of the meeting, in the form in the schedule marked (A) to this Act annexed, on the outside of the principal doors of every parish church and Roman Catholic chapel (if any) situate within such town, and on the principal market house or place where markets are usually holden in the same, and on the door of the sessions house where the general quarter sessions of the peace shall be holden for such city or town, or for the division in which the same shall be situate, and also by causing a notice of like purport to be inserted twice in any newspaper or newspapers published within such city or town, and if none be therein published, then in the newspaper published nearest to such city or town.

VII. At any such meeting convened as aforesaid such persons as next herein-after mentioned shall be admitted and entitled to vote, and no other person whatsoever; that is to say, every person of full age who is the immediate lessor of lands, tenements, and hereditaments within such town, or within such boundaries of the same respectively as aforesaid, of the value of fifty pounds or upwards according to the last poor law valuation, and who shall reside within five miles of the boundary of such town, also every person of full age who shall have occupied as tenant or owner, or who shall have been the immediate lessor (rated for such premises to

the relief of the poor) of any lands, tenements, or hereditaments within such city or town, or within such boundaries of the same respectively as aforesaid, and shall have been rated in respect of such premises for the period of twelve months preceding under the Acts for the relief of the destitute poor in *Ireland*, as occupier of such lands, tenements, or hereditaments, at a net annual value of eight pounds or upwards, such right of voting to be evidenced by the rate book of the union, which the clerk of the union is hereby required to produce at such meeting; and if any controversy shall arise at any such meeting as to the qualification or right of voting of any person claiming to vote, or to be qualified, such controversy shall be determined by the person or persons, as the case may be, presiding at such meeting, by reference to the rate book, which the clerk of the union is hereby required to produce at such meeting.

VIII. Such meeting, after having had this Act laid before them, together with a copy of such application and such order as aforesaid, shall proceed to consider and determine whether this Act shall, in whole or in part, be adopted and carried into execution within such town, or shall appoint a committee of their own number, not exceeding nine, to inquire and report to some future meeting, to be held on such day as shall be appointed by such meeting; and such future meeting shall, upon receiving the report of such committee, proceed in all respects in the manner herein directed for such meeting.

IX. If the provisions of this Act shall be adopted in whole or in part, all the expenses incurred in relation to calling the first meeting, making out returns and lists of qualified occupiers, if such be necessary, and otherwise in relation to carrying this Act into execution, shall be defrayed out of the money assessed and levied under the authority thereof; but in case the provisions of this Act shall not be adopted by such meeting as aforesaid, in whole or in part, then the whole of said expenses shall be borne by the persons signing the application for holding such meeting.

X. The person or persons presiding at such meeting shall ascertain the determination thereof by a show of hands, or in such other manner as shall appear to him or them expedient, and if necessary shall appoint two such ratepayers, qualified as aforesaid, to act as tellers to ascertain and enumerate the votes of qualified persons assenting to or dissenting from the adoption of this Act, in whole or in part, and such tellers shall report the result of their scrutiny to such person or persons presiding at such meeting, who shall declare the same: and in case no poll shall be demanded, as herein-after provided, any resolution to adopt the provisions of this Act, in whole or in part, shall be effectual if carried by a majority of persons qualified and voting as aforesaid: provided always, that if a poll shall be demanded as aforesaid at such meeting in writing, and signed by any ten persons qualified to vote at such meeting, it shall then be lawful for the person or persons presiding at such meeting, and he or they are hereby required, to direct the poll so demanded to be proceeded with at

such polling place or places, and within such period as he or they shall determine, such period not to exceed two clear lawful days from the day of such meeting; and no poll authorized by this Act to be taken shall be kept open for more than one day, and the polling shall commence at the place or places intimated at nine o'clock of the forenoon, and close at four o'clock of the afternoon of the day that shall be named.

XI. Such chief magistrate, mayor, or justices shall direct the necessary number of poll clerks to be appointed, and of poll books to be prepared, in which books shall be inscribed by such clerks the name of the voter and the manner in which he votes.

XII. As soon after the close of the poll as may be the poll clerks shall transmit the state of the respective polls to such chief magistrate, mayor, or justices, who shall sum up the same, and openly declare the result of the total poll at an adjourned meeting to be held on the next lawful day; and any resolution to adopt the provisions of this Act, in whole or in part, shall be effectual if carried by a majority of the persons qualified and voting as aforesaid.

XIII. If such resolution shall be to adopt this Act only in part, the matter or matters with respect to which this Act is so adopted shall be set forth and declared in the minutes of such meeting in the words introductory to the enactment in this Act with respect to such matters, or it shall be set forth and declared in such minutes that this Act, with the exception of the matter or matters so described, is so adopted; and any adoption of this Act, though in part only, shall infer the adoption of the enactments with respect to assessments, and shall also infer the adoption of the enactments with respect to appeal herein-after provided in so far as the enactments relate to the matter or matters adopted, and shall also infer the adoption of every other general enactment or enactments applicable to such matter or matters, though not specially set forth and declared in such minutes to be adopted.

XIV. Where any town shall have resolved not to adopt the provisions of this Act, the householders and occupiers thereof, qualified in each case respectively as aforesaid, may, after the expiration of two years from the date of any preceding meeting, but not sooner, by such and the like proceedings, again take this Act into consideration, and adopt the same in whole or in part, or determine not to adopt the same; and when any town shall have adopted them only in part, the householders and occupiers thereof, qualified in each case respectively as aforesaid, may, after the expiration of two months from the date of any preceding meeting, but not sooner, by such and the like proceedings, again take this Act into consideration, and adopt such part thereof as may not formerly have been adopted, or determine not to adopt the same.

(To be continued.)

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DUBLIN, JANUARY 13, 1855.

In our able and public spirited contemporary *The Irish Quarterly Review*, for last month, there is a most elaborate and spirited article upon a question of a very pressing and, we may add, aggravating character, the removal from England to their native country of the Irish destitute poor. The writer pleads powerfully for the total abolition of pauper removability, in general, but his leading topic is, an exposure of the monstrous injustice which the existing law for the removal of paupers from England and Scotland inflicts upon the struggling poor and the ratepayers of certain districts in this country. The governing statute, relating to removals to this country, appears to be the 8 & 9 Vic. c. 117, by section 2 of which, a person born in Ireland who having gained no settlement in England, (namely, by renting a tenement of a certain value or purchasing an estate,) may become chargeable to any parish in England by the receipt of relief for himself or family, is liable to be removed to Ireland, and section 4 of the same Act directs that such removals shall be made to the ports "which are nearest to the respective places where such persons were born or have resided, unless where any such persons consent to be removed to any other port in Ireland." By the 9 & 10 Vic. c.

66, it was enacted that no warrant should be granted for the removal of any person from any parish in which he shall have resided for five years next before the application for the warrant. This has been held by the Poor Law authorities in England, to apply to the case of natives of Ireland resident in England, but, as was established before the Select Committee of the House of Commons of last session, it has been, in very many instances, scandalously evaded and ignored by the unpaid magistracy of England. For sometime past, a feeling has prevailed, in England, that the laws which authorised the removal of the poor were unjust, and infringed upon the rights of labour, the poor man's capital. Accordingly, upon the 10th February, 1854, Mr. Baines, Q. C., in his capacity of President of the English Poor Law Board, introduced a bill, which had been heralded by a paragraph in the Queen's Speech, at the opening of the session of Parliament, the object of which was, to abolish in *England and Wales* the compulsory removal of the poor on the ground of settlement. From the operation of this measure the case of the Irish poor was about to be wholly excluded. Upon perceiving this strange inconsistency, the Irish Members, most creditably to themselves and advantageously to their country, remonstrated against this meditated injustice, which was well exposed in an able speech by the member for Dungarvan, Mr. Maguire. Not contented with

thus publicly protesting, they met in private consultation, and adopted a memorial bearing the signature of no less than 75 Irish Members. That was dated the 15th of March, and was shortly afterwards presented to Lord Palmerston. The memorial contained among others, this passage, "But we observe that while it is thus proposed to abolish this forcible removal of paupers from one union in England to another, the bill makes no provision to prevent the forcible removal of paupers from unions in England to Ireland. This forcible removal of paupers to Ireland has not only been a matter of great complaint and practical injustice to unions in Ireland, but has entailed, upon the paupers removed, the utmost hardships and sufferings, attended in some cases, with loss of life. This evil, scarcely tolerable while there existed a law of removal and of settlement in England from one parish or union to another, would become intolerable if the law of the two countries should be so nearly assimilated, and the forcible removal of an English pauper from one union to another in England no longer permitted."

Just before the second reading of the bill the following satisfactory reply was received by the memorialists: "The memorial which you sent me was taken into consideration by the *Cabinet* yesterday evening, and they were of opinion that the case set forth is *irresistibly established*, and that *justice requires that the wishes of the Irish members should be complied with*. I will send the papers to Mr. Baines, and he will communicate with you as to the best manner of carrying our common object into effect."

The article then gives a lucid account of the somewhat unlooked-for coldness on the part of ministers, which followed the foregoing frank and candid avowal, and how the Irish members were, in self defence, compelled to vote for the postponement of the debate upon the second reading of the bill, not being satisfied with a vague promise of a further measure to meet the grievance, whereas they insisted that the requisite changes should be incorporated in the bill itself. They clearly saw that herein their only hope lay. The bill was consequently shelved for the session, and a select committee upon Irish and Scotch removals having been shortly afterwards nominated, a mass of evidence was taken before them, which the writer in the *Irish Quarterly* ably dissects and comments upon, and winds up his article with a forcible and spirit-stirring appeal to the justice of the nation against the enormities of the present system.

This is, as we have stated, a subject of the most pressing interest and importance. The law, as it now stands, is intolerable. It is destitute of the least foundation in point of justice. We do not at present moot the general question regarding the policy or propriety of poor-law removals; but we say that at all events, such removals, if at all, should be to the parish of the pauper. But what pretext is there, in point of equity, unless indeed Ireland is to be regarded as a foreign province, and not an integral part of the empire, for their removal, not to the place of birth, but only to the nearest port thereto, or any other port to which they consent? In other words, how can it be reconciled to justice that a man who is a native of Kerry should be carried from his place of residence in England to Cork or the native of Tipperary to Waterford, to become an inevitable burden upon the ratepayers of the unions of the port of debarkation. Surely it cannot be said that these seaports are, in the least degree, responsible for his destitution. There is no greater reason why the Kerry man, who has for a long series of years made England the land of his adoption, and has benefitted her by his industry whilst his strength lasted, should be capriciously thrust out by the parish to which he has become chargeable upon any other district in that country, than that he should be sent back to the nearest port in Ireland, perhaps one hundred miles from the place of his nativity.

But this is not all. The present system is utterly wanting in reciprocity. No corresponding power exists here. An English or Scotch settler becoming destitute must remain a dead weight upon the union within which he may happen to be at the time. Perhaps that is a fortunate circumstance, for it renders the system so odious as to make its permanence impossible. We only hope that the same true-heartedness to the interests of their country—an occurrence unhappily too rare—which animated the Irish members on the late occasion, will abide with them when the subject is resumed, and we shall then rest assured that the grievance will be wholly done away.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 48.)

XV. The person or persons presiding at such meeting shall, within one week, transmit to the Lord Lieutenant of Ireland a copy, certified under his or their hand, of the resolution and determination of such meeting as aforesaid, and within one

month after such resolution or determination shall have been so certified, in case such resolution or determination shall be in favour of adopting the execution of this Act in whole or in part; and in case the Lord Lieutenant shall approve of the same, he shall notify his approbation thereof to the said person or persons, and fix the number of commissioners to be elected for carrying this Act into execution in such town, and cause notice of such approbation to be published in the *Dublin Gazette*; and from and after a day to be named in such notice in that behalf, either the whole of this Act or the portion thereof so adopted and approved shall be applicable to and in force in such town; and the production of a printed copy of such gazette containing such notice shall be deemed and taken to be in all courts and places final and conclusive evidence for all purposes that all the proceedings, acts, matters, and things required by this Act to be had or done for the adoption of this Act in whole or in part were well and sufficiently done, and that the Act is in force in whole or in part, as the case may be, in the town to which such notice relates; and the said notice shall further state the number of commissioners to be elected for carrying this Act into execution in such town, and the number and the boundaries of wards into which such town is to be divided; provided, that in case of any borough or town corporate in *Ireland*, the town council of such borough, or the board of municipal commissioners elected under the provisions of the Act of the third and fourth years of her present Majesty, chapter one hundred and eight, wherever the same shall be in force, shall be the commissioners for carrying this Act into execution therein, where the adoption of this Act, in whole or in part, shall have been determined on and approved in manner aforesaid; and in such case no such statement as last aforesaid of division into wards, or of the number of commissioners to be elected, shall be contained in such notice; and the Lord Lieutenant shall appoint some fit and proper person to divide such town into wards, and to determine and set out the extent, limits, and boundary lines of such wards, and what portions of such borough shall be included therein respectively; and the copy of the particulars of such division, together with the number of commissioners assigned as herein-after mentioned to each ward, shall be forthwith transmitted to the Chief Secretary of the Lord Lieutenant; and if it shall be approved of by the Lord Lieutenant, with the advice of the Privy Council, shall be published in the *Dublin Gazette*; and another copy of such particulars shall be delivered to the town-clerk, or such officer of the town as the Privy Council may direct, to be by him safely kept among the public documents of the town, and such division shall continue and be in force until the same shall be altered by the authority of Parliament; and the person so appointed to divide the town into wards shall also apportion among the several wards of such town the number of commissioners appointed for the town by the Lord Lieutenant; and in assigning the number of commissioners to each ward, such person shall, as far as in his judgment he may deem it practicable, have regard as

well to the number of persons rated to the relief of the poor in each ward, as to the aggregate amount of the sums at which all the said persons shall be so rated, and such apportionment of commissioners shall be subject to the like approval of the Lord Lieutenant and Privy Council: provided, that in case the Lord Lieutenant and Privy Council shall not approve of the said division or apportionment, the Lord Lieutenant shall remit the same either to the person originally appointed, or to some other person, to make a new division and apportionment, subject to the like approval, and so from time to time until such division and apportionment shall be definitively approved of.

XVI. The commissioners for the purpose of executing this Act, to be elected as herein provided, shall be in number not less than nine nor more than twenty-one, as may be determined as aforesaid, such number to be divisible by three; and where the town shall be divided into wards as aforesaid, the number thereof, and the number of commissioners to be elected, shall be so settled and adjusted that there shall be not less than three such commissioners for each such ward.

XVII. In any town where the Act of the ninth year of King *George* the Fourth, chap. eighty-two, shall be in force, and by which town application shall be made and proceedings had in manner aforesaid under this Act, then, from and after the first election of commissioners under this Act for such town, the said Act of the ninth year of King *George* the Fourth shall be no longer in force therein, save and except as to matters or things theretofore done, and as to any debts, demands, rights, liabilities, or engagements theretofore incurred and accrued under the provisions thereof; and all and every the powers, duties, and authorities conferred upon or vested in the said commissioners, whether by statute or otherwise, and all property, (including all property vested in the said commissioners under the provisions of the Act of the third and fourth years of her present Majesty, chapter one hundred and eight,) and all claims, demands, and liabilities or engagements of the commissioners under the said Act of the ninth year of King *George* the Fourth, shall be transferred to and vested in the said commissioners under this Act.

XVIII. Where any local Act in force in any town before the passing of this Act provides for any of the purposes for which provision is hereby made, this Act shall not be adopted or put in force therein in manner herein provided, so far as relates to any of the purposes for which provision is made under such local Act, without the consent in writing of two-thirds of the commissioners or governing body, constituted for the purposes of such local Act, first had and obtained at a special meeting of such commissioners or governing body, called upon ten days previous notice at the least (to be published in the manner and for the time herein-before mentioned), but this Act may without such consent be adopted and put in force for other purposes for which provision is not made under such local Act; but in such case where such consent is hereby required, and has been had, then, from and

after the adoption of this Act in the whole or in part, and the first election of commissioners under this Act for such town, such local Act shall be no longer in force in such town, so far as regards the provisions of such Act which have reference to the purposes for which this Act shall have been so adopted, save and except as to matters and things theretofore done, and as to any debts, demands, rights, or liabilities theretofore incurred or accrued under or in relation to such provisions thereof; and in such case, if under the provisions of such local Act any tolls within such town shall have been payable to and vested in such commissioners or governing body, such tolls, and all rights of receiving and levying the same, and the remedies for the recovery thereof, shall, from and after the first election of commissioners under this Act, be transferred to and stand vested in the commissioners under this Act, subject, nevertheless, to all debts, demands, rights, liabilities, or engagements theretofore affecting such tolls or such commissioners under such local Act in respect thereof; and such tolls shall stand vested in the said commissioners acting under this Act, upon the uses and trusts, and for the purposes, and subject to the same or like regulations as contained and provided in such local Act relating to such tolls, so far as may be consistent with this provision for the transfer of the same as aforesaid; and such commissioners under this Act shall be likewise empowered to raise, levy, and apply, for the purposes of this Act, such rates and assessments, and of such amount and for such purposes, as by this Act is herein-after provided.

XIX. From and after the commencement of this Act it shall not be lawful for the Lord Lieutenant of *Ireland* to order or direct any meeting to be called or convened for the purpose of carrying the said Act of the ninth year of King *George* the Fourth, chapter eighty two, into execution.

XX. In any city or town corporate where any local Act in force provides for purposes for which provision is made under this Act, and where the commissioners constituted under the said local Act decline to consent to the adoption of this Act in the manner herein-before provided, then and in that case this Act may be adopted or put in force in whole or in part in said city or town corporate, by consent obtained in writing under the hands of two thirds of the town council of said city or town corporate; and in case any or all the purposes for which the assessment, or any part thereof, under such local Act is raised and levied are adopted as aforesaid under the provisions of this Act, then the powers of assessment for such purposes under such local Act, and in the manner specified by such local Act, so far as such powers are necessary for carrying out such purposes and no further, shall be transferred to the said commissioners under this Act, in addition to the powers of assessment herein-after provided under this Act: provided always, that in case there exists any debt due of the commissioners of said local Act, borrowed under the provisions thereof, and payable out of the dues and duties leviable under said Act, such debt, with the interest accruing and payable thereon, shall be transferred to the commissioners under this Act,

and be considered as money borrowed by them under the provisions of this Act, and repayable as herein-after provided in respect of all monies to be borrowed by the commissioners appointed under this Act.

And with respect to the election and rotation of commissioners under this Act, except where the town council are the commissioners under this Act, be it enacted as follows:

XXI. As soon as conveniently may be after the receipt of the Lord Lieutenant's approval of the adoption of this Act, in the whole or in part, in and for any town, the chief magistrate, mayor, or justices as aforesaid, shall convene a meeting of the rated occupiers, qualified as next herein-after mentioned, of such city or town, or (if the same shall be divided into wards) of such respective wards, for the first election of commissioners for the purpose of executing this Act, at some convenient place in such city or town, or in their respective wards, as the case may be, to be specified in the notice to be given of such meeting, and in such places as shall be divided into wards as aforesaid, the ward meetings shall, at the said first election of commissioners under this Act, be presided over by a justice of the peace resident within such ward (if any), and in default of such, by one of the highest ratepayers within such ward, to be nominated by the mayor, chief magistrate, chairman of the municipal commissioners, or justices as aforesaid.

(To be continued.)

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DUBLIN, JANUARY 20, 1855.

THE defects in a system of jurisprudence do not, at once, become obvious, but require to be gradually developed by time and experience. Among the vices of our law, which have hitherto escaped the vigilance of the reformer, is the anomaly, whereby all questions of foreign law are submitted, as so many matters of fact, to the decision of the jury. This doctrine appears so to conflict with the spirit of the maxim, *ad questionem juris respondeant judices, sed ad questionem facti respondeant juratores*, that its prevalence is matter of surprise. We conceive that the time has come for making an alteration in the law in this respect, which we consider not only to be unnecessary, but highly inconvenient. There can be no second opinion as to the soundness of the fundamental rule, that in the construction of contracts, the *lex loci contractus* shall govern. That is equally both consonant to natural justice and due to the comity of nations. It follows that the law of

the country must in such cases be ascertained, and inasmuch as those who preside over our legal tribunals are supposed to be skilled in the laws only of their own land, it is necessary to produce the testimony of experts in the law of the state, which is the subject of inquiry, for the purpose of instructing, not the judge, but the jury, in that particular jurisprudence. Were this evidence adduced for the purpose merely of verifying certain approved references, whereby the judge could acquire the desired legal knowledge, this would not appear so very absurd, as he would thus be able to command some reliable sources of information, but it does strike us as opposed to common sense, that instead of the practised mind of the lawyer being selected as the medium for arriving at the result desired, by a process analogous to that by which he forms a conclusion as to the state of the law which he administers, the jurymen, who have had no legal training, should be required to pronounce, upon their oaths, on the evidence taken in open court, an opinion upon an abstract question. Supposing a jury to be gifted with more than or-

dimary intelligence, we can well imagine cases in which their powers of discrimination would be taxed to the utmost, in endeavouring to form a safe conclusion upon the conflicting testimony of learned doctors produced at either side.

Not to allude to a host of cases, in which this inconvenience has unquestionably been felt, we may refer, as an illustration, to a recent celebrated cause, not yet concluded, wherein possibly the turning point of the case may be a question of foreign law, but the solution of which, under our existing procedure, is rendered most difficult, if not impossible.

So far for the inconvenience of this state of the law. Then, as to necessity, we feel satisfied that none exists. Means similar to those whereby lawyers are enabled to study the laws of their own country will enable them to study the laws of foreign states. What lawyer, at least of the present day, is there, who has acquired so thorough an acquaintance with his profession as not continually to acquire fresh legal information, to which he was previously a stranger? It is not so much the thorough command of details that constitutes the profound lawyer, as that well-disciplined habit of mind thoroughly imbued with great principles, which enables its possessor *pro re nata* to master details, and apply them with accuracy to the subject before him. The able lawyer will readily find the comprehension of the state of foreign law bearing upon a given subject, no more difficult in reality than the mastering the provisions of a local statute or the particulars of a local custom, which he had not previously heard of.

Appeals go to the House of Lords from the three parts of the United Kingdom, each of which, we regret to state, has laws entirely peculiar to itself, and those are heard before judges whose early legal education was probably adapted solely for the administration of the laws of England.

Again, the Judicial Committee of the Privy Council in England, many of the members of which are English lawyers, hear appeals from the dependencies of England, from the laws of which a specimen could, perhaps, be selected of nearly every civilized code under the sun. It savours somewhat of the ridiculous, that a judge who has just been sitting at the council board, hearing an appeal involving a question of the law as administered at the Cape of Good Hope, and perfectly understanding its details, should then, at *Nisi Prius*, be compelled to receive the conflicting testimony of experts upon a similar question, and after having

left it to the jury as a question of fact to say which of the opposite doctrines sworn to was the correct one, should be forced to receive a verdict at variance with his own well-considered view upon the point. The remedy for this anomaly is, to our minds, a very simple one. Let our legal functionaries be at liberty to take judicial cognizance of the law of foreign lands, by the same unsworn medium, namely—that of text books, as they do of the law of their own land. In questions of small moment and of no complication, that would probably suffice, and in matters of greater difficulty, let our courts have the power to state cases of facts for the opinion of the foreign tribunals, as to the application of their own laws. When these tribunals thus appealed to exist in the British dominions, it might be made obligatory upon them to entertain these references; and with regard to those which are in the dominions of foreign potentates, such inquiries as to their laws would, we are assured, be courteously responded to.

INCUMBERED ESTATES COURT INQUIRY COMMISSION.

COPY OF COMMISSION.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To our right trusty and well-beloved councillors Maziere Brady, our Chancellor of that part of our said United Kingdom called Ireland, Sir John Romilly, Knight, Master or Keeper of the Rolls in that part of our said United Kingdom called England, James Henry Monahan, Chief Justice of the Court of Common Pleas in that part of our said United Kingdom called Ireland, Francis Blackburne, Abraham Brewster, our Attorney General for that part of our said United Kingdom called Ireland, our trusty and well-beloved Sir Richard Bethell, Knight, our Solicitor General for that part of our said United Kingdom called England, Mountifort Longfield, Doctor of Laws, one of our counsel learned in the law, John David Fitzgerald, Esquire, one other of our counsel learned in the law, and Hugh M'Calmont Cairns, Esquire, Barrister-at-Law, greeting:

Whereas, we have deemed it expedient, for diverse good causes and considerations, that a commission should forthwith issue to inquire into the state of the business of the Court of our Commissioners for the sale of Incumbered Estates in Ireland, and to report whether it would be advisable that the same should be continued with any and what modifications.

Now know ye that we, reposing great trust and confidence in your zeal, discretion, and integrity, have authorised and appointed, and by these presents do authorise and appoint you the said Maziere Brady, Sir John Romilly, James Henry Monahan, Francis Blackburne, Abraham Brewster, Sir Richard Bethell, Mountifort Longfield, John David Fitzgerald,

and Hugh McCalmont Cairns, or any four or more of you to inquire into and report upon the state of the business of the Court of our Commissioners for the sale of Incumbered Estates in Ireland under the Act passed in the session of Parliament held in the eleventh and twelfth years of our reign, chapter 48, and under the Act passed in the session of Parliament held in the twelfth and thirteenth years of our reign, chapter 77, and of an Act passed in the session of Parliament held in the sixteenth and seventeenth years of our reign, chapter 64, and to consider and report whether it would be desirable that the said court should be continued either permanently or for any and for what period, and whether with any and what additions to, or alterations or modifications in its powers, constitution and procedure, or whether the said court should be annexed to, or its powers transferred to our Court of Chancery in Ireland.

And for the better discovery of the truth in the premises, we do by these presents, give and grant to you or any four or more of you, full power and authority to call before you or any four or more of you, such and so many of the Commissioners, officers and clerks of the said court, and all such other persons as you shall judge necessary, by whom you may be informed of the truth in the premises, and to inquire of the premises by all other lawful ways and means whatsoever. And we do hereby give and grant unto you or any four or more of you full power and authority to cause all or any of the officers and clerks of the said court to bring and produce before you or any four or more of you all books, papers, or other writings belonging to the said court, or any of the officers within the same.

And our further will and pleasure is, that you do, within one year after the date of this our commission, or sooner if the same can conveniently be done, (using due diligence,) certify to us in our Court of Chancery, under the hands and seals of you or any four or more of you, what you shall have done in the premises.

And we further will and command, that this our commission shall continue in full force and virtue; and that you our commissioners or any four or more of you shall and may, from time to time, proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment.

And for your assistance in the due execution of this our commission, we have made choice of our trusty and well-beloved James Anthony Lawson, Esquire, Barrister-at-Law, to be secretary to this our commission, and to attend you, whose services and assistance we require you to use from time to time as occasion shall require.

In witness whereof we have caused these our letters to be made patent.

Witness ourself at Westminster, the twenty-third day of November, in the eighteenth year of our reign.

By warrant under the Queen's Sign Manual,

C. ROMILLY.

(seal)

Court Papers.

Chancery.

JAN. 18.—The following gentlemen were called to the Bar at the sitting of the court:—

William Pryce Maunsell, Esq., A. B., T. C. D., second son of Henry Maunsell, Esq., Barrister-at-Law, of the City of Limerick.

John O'Connell O'Leary, Esq., A. B., T. C. D. only son of Joseph O'Leary, late of Lower Gardiner-street, in the City of Dublin, Esq., Barrister-at-Law, and Vice-President of the Queen's College, Galway.

Christopher O'Connell Fitzsimon, Esq., A. B., T. C. D., eldest son of Christopher Fitzsimon, of Glancullen, in the County of Dublin, Esq., Barrister-at-Law, D. L., &c.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 52.)

XXII. At such first and every other meeting for election of commissioners in said town as herein-after prescribed, such persons as next herein-after mentioned shall be admitted and entitled to vote, and no other person whatsoever; that is to say, every person of full age who is the immediate lessor of lands, tenements, and hereditaments within such town, or within such boundaries of the same respectively as aforesaid, of the value of fifty pounds or upwards according to the last poor law valuation, and who shall reside within five miles of the boundary of such town, also every person of full age who shall have occupied as tenant or owner or joint occupier, or shall have been the immediate lessor (rated for such premises to the relief of the poor to the net annual value of four pounds or upwards, and in the case of joint occupiers rated in respect of premises of the net annual value of four pounds or upwards for each of such joint occupiers) of any lands, tenements, or hereditaments within such town, or within such boundaries of the same respectively as aforesaid, and shall have been rated in respect of such premises for the period of twelve months preceding the first day of *January* in the year in which any such election shall be held under the Acts for the relief of the destitute poor in *Ireland*, and shall have paid all such poor rates as aforesaid as shall have become payable by him in respect of such premises and all grand jury rates, and all such rates as shall have become payable by him under any local Act in force in the city or town, or under this Act, except such as shall have become payable within six months next preceding such election; and of the payment or nonpayment of such rate, a receipt, certificate, or certified list, under the hand of the collector of poor rate, the barony collector, and the collector under any local Act in force in the city or town, shall for such purpose be deemed sufficient evidence, and which certificate or certified list such collectors and barony constables are hereby required to furnish to the person or persons presiding at such election; and if any controversy shall arise at such meeting as to the qualification

or right to vote of any person claiming to vote or to be qualified, such controversy shall be determined by the person or persons presiding at such meeting upon reference to the rate book, which the clerk of the union is hereby required to produce at such meeting.

XXIII. The day upon which one third of the commissioners elected under this Act shall annually go out of office, as herein-after provided, shall be the fifteenth day of *October* in each year, or the next lawful day thereto, and on the same day annually the places of commissioners going out of office shall be supplied by an equal number of newly elected commissioners to be chosen from among the householders or occupiers of the town, qualified to be commissioners, as herein-after prescribed; and where the town is divided into wards, the place of each commissioner going out of office shall in all cases under this Act be filled up by the ward which returned him: provided always, that if such first election of commissioners under this Act shall take place before the fifteenth day of *October* in the year of such election, the commissioners then first elected shall all continue in office until the fifteenth day of *October* in the year next ensuing that in which such election shall have been held, or the next lawful day afterwards.

XXIV. Save as herein-before in that behalf provided, so much of "The Commissioners Clauses Act, 1847," as relates to the election and rotation of the commissioners, save so much thereof as relates to the scale of votes of owners and occupiers, shall be incorporated with and read as part of this Act; and that wherever in the portions of said Act, or of "The Towns Improvement Clauses Act, 1847," herein-after incorporated with this Act, the expression "special Act" occurs, same shall be construed, but so far only as relates to towns which shall adopt the provisions of this Act, to mean this Act, and shall be read as if, instead of such expression, there were inserted in such provisions the words "The Towns Improvement (Ireland) Act, 1854," as applied to any particular town adopting the provisions of this Act and of the Acts incorporated herewith.

And with respect to the qualification of commissioners, be it enacted as follows:

XXV. Every person who shall have been for twelve months preceding the first day of *January* in the year in which such election is held the immediate lessor of lands, tenements, and hereditaments within such town, or within such boundaries of the same respectively as aforesaid, of the value of fifty pounds or upwards, according to the last poor law valuation, and who shall reside within five miles of the boundary of such town, and also any householder or occupier of full age rated to the relief of the poor in respect of a dwelling house in the town at the net annual value of twelve pounds or upwards, not being an ecclesiastic of any religious denomination, shall be eligible to be elected a commissioner for the purposes of this Act, and may be proposed at such meeting by any householder or occupier qualified to vote under the provision herein-before contained, and may be seconded by any other householder or occupier qualified to vote as aforesaid.

XXVI. So much of "The Commissioners Clauses Act, 1847," as relates to the qualification of the commissioners, shall be incorporated with and read as part of this Act.

And with respect to the meetings and other proceedings of the commissioners, be it enacted as follows:

XXVII. All the commissioners so returned as aforesaid shall, at twelve of the clock at noon on the first *Monday* after such election, hold their first general meeting in the town hall or other convenient place within such town, with power to adjourn to such other place as they may think fit; and meetings of the commissioners shall be held in such places as they shall appoint within the town upon the first *Monday* of every month in each year, at twelve of the clock at noon.

XXVIII. Save as herein in that behalf provided, so much of "The Commissioners Clauses Act, 1847," as relates to the meetings and other proceedings of the commissioners, and their liabilities, shall be incorporated and read as part of this Act.

(To be continued.)

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DUBLIN, JANUARY 27, 1855.

A talented correspondent, signing himself "Junior," some few weeks since offered a suggestion, through the medium of our columns, relative to the formation of an "Irish Law Amendment Society." We think that his proposition is one which ought not to be lost sight of. In an age like ours, when a mania for making changes in the law is so universal, we regard a Society of this description as a corrective of the mischief which this enthusiasm is calculated to produce. It is better that the crude schemes which frequently see the light for the first time in the House of Commons, should pass through the ordeal of the scrutiny of such a body as we recommend. Many, otherwise crude, observations might thereby acquire a useful and practical form, and the many admitted abuses that still pervade our law and procedure might be brought under discussion, and apt remedies devised. There is one department in which the labour of such a Society would tell with

great effect. We allude to the minor branches of the Law of Procedure, which are by statute placed peculiarly within the power of the judges, who may by general orders direct from time to time the necessary modifications. Suggestions from so enlightened a body as a Law Amendment Society, with respect to the framing of the rules of practice, would, we are convinced, be received by the learned judges with attention and consideration. Indeed, the unsatisfactory and imperfect nature of some of the present rules is, we believe, attributable to the want of competent assistance in their composition. An Irish Law Amendment Society would, of course, maintain a close correspondence with the English body, whose labours have frequently told with effect in Parliament, and this would be a step in advance towards the great work of the consolidation and assimilation of the laws of both countries—"a consummation," we again repeat "devoutly to be wished."

Review.

The Practice of the High Court of Chancery in Summary Petition Matters, with Precedents, by JOHN F. REILLY, Esq., Barrister-at-Law, Secretary to the Right Hon. the Master of the Rolls. Dublin: Hodges and Smith, 1855. pp. 557.

THE legal text books which, in our day, ever and anon issue from the press, continually in the sister country and occasionally in our less favoured land, may be regarded as dividing themselves into two classes: one of these classes consists of the productions of those, perhaps recently inducted into the legal profession, who desire to inaugurate their investiture with the degree of "apprentice of the law" by the publication of an essay on some professional topic, which will display the abilities and acquirements of the writer, and in some degree answer the same purpose which with our less refined transatlantic brethren, is more summarily effected by the issuing of "a card." The other class of legal publications includes books written upon subjects with which the authors are practically conversant, and called into existence for the purpose of illustrating, not the writer's talents, but the nature of the subject with which he deals. Of this latter class we are happy to say that a comparatively large number has recently issued from our press, and to that number the recent treatise of Mr. Reilly, mentioned in the heading of this article, forms a most acceptable and creditable addition. Two things are requisite to render a law book a general favorite; first, that it should be actually wanted; and secondly, that its author should be competent for the task. Both these *desiderata* recommend the present volume. In the first place, we question whether it would have been possible to have selected a subject which demanded a treatise more urgently than did the present one. The host of Acts of Parliament investing the Court of Chancery with powers exercisable upon summary petition, with their multifarious and perplexing provisions, (see Table of Acts, pp. 37—43,) never digested till the present publication, were of themselves calculated to lead the student into a hopeless maze and there leave him to his fate.

Then came a series of decisions, some bearing directly upon these statutes themselves, others upon analogous English Acts, and others, moreover, with regard to the inherent summary jurisdiction of the court to grant relief upon petition without the aid of statute law, which scattered over the pages of a very large library of reports, both English and Irish, were, under ordinary circumstances,

in great measure lost to the practitioner. But then came a third and crowning difficulty. A vast proportion of the learning of this branch of the law was unwritten and to be collected only by oral tradition, always unsatisfactory, or from the responses of the official oracles. Hence delay and uncertainty frequently embarrassed the incipient practitioner in the prosecution of his inquiries, and even the more experienced had not seldom to regret the want of a good manual of practice. Now in proportion to the comprehensive, intricate and novel nature of the subject itself, the number of authorities to be consulted, and the mass of unwritten lore to be reduced to writing, so does the successful achievement of these difficulties redound to the author's credit.

We venture to assert that since the appearance, in 1841, of Mr. Ferguson's able treatise on the practice of the Common Law Courts, no work bids fairer to become a general favourite with the Profession than that now under review. Its form is portable and convenient; its style is clear and easy; its arrangement is simple, perspicuous, and elegant, and its details are full and satisfactory. The body of the work consists of nine chapters, and some of them are again subdivided into appropriate sections. The preliminary chapter treats of summary petitions, in general, and the points of practice common to all such. The author, at the very outset, premises, that "cause petitions, filed under the Chancery Regulation Act, 1850, are in name petitions, but as they are, in their nature, bills, it is not intended to treat of them in the following pages; therefore the observations and the precedents will be entirely confined to petitions presented under the summary jurisdiction of the court, that is, to petitions presented either in a minor's or solicitor's matter, or the like, or in the matter of an Act of Parliament, which gives special jurisdiction to the court," (p. 1). He adds in a note *ib.*:—"Petitions in lunacy and in bankruptcy, not being in Chancery, though heard by the Lord Chancellor, are not referred to in the following pages." Mr. Reilly then discusses *seriatim* the special incidents appertaining to summary petitions in Minor matters, Trustee and Trustee Relief Acts, Acts relating to leases, the jurisdiction of the court over Solicitors, the Lands Clauses Consolidation Acts, the appointment of Receivers on petitions, the Act for enabling Judgment Creditors to charge Stocks, and the Charitable Trusts Act.

With respect to chap VII., wherein the appointment of receivers is treated of, Mr. Reilly, in a note,

explains that, with regard to receivers under the Judgment Acts, "as this subject is considered at large in his book on Judgment Petitions and its Supplement, it is not intended here to give more than *general* directions on the subject, with the addition of cases reported since the publication of the Supplement, and references to the pages of the former book, for the convenience of the practitioner." We must candidly confess that we differ from Mr. Reilly as to the prudence of omitting fully to incorporate that important branch of the subject in his present book, and of thus referring his readers to three treatises in place of one. Without perhaps, it being desirable to reproduce the bulk of the matter of his former work in the present volume, we should have much preferred, had he transferred thither all the *particular* directions relating to that class of summary petitions. Each subject is followed by appropriate, and we doubt not, approved precedents, adapted to the particular case, thus affording to the legal practitioner not only a compass but a chart to steer by. We regard this part of his labours as very useful, stamped as it is, in some degree, with an *imprimatur*. It always strikes us favourably, in connexion with this treatise, that while the results of the authorities bearing upon given questions, are concisely stated, the authorities themselves, as noted at foot of the pages, are numerous. This feature characterizes the present volume. Many topics he disposes of in a few concise paragraphs, with accompanying references, which would have furnished a mere book-maker with as many imposing chapters.

The work is enriched by an Appendix of the several Acts referred to in the text, and by an Index, which we should desire to see a little fuller. Perhaps we might also suggest, that, in the next edition, the heading of each section might appear at the top of the margin of each page. That would give increased facility for reference.

From a work of this character it seems to very little purpose to give copious extracts in a review. We, however, think it right to give a specimen of the author's style and method, which will in degree illustrate that quality of terseness which pervades his book. Speaking of examples of undertakings enforced against solicitors, he thus writes:

"The following are instances of undertakings which the court have compelled attorneys and solicitors to perform: an undertaking to enter an appearance; or to put in a plea of confession; or to obtain an *assent* to arbitration; or to pay the amount of debt

and costs; or the fees of a commission of lunacy; or an undertaking to pay the amount of an award; or for the payment of the amount of rent distrained for and the costs; or a share of the expenses of a commission of bankruptcy; or not to negotiate a promissory note until the expiration of a certain period. The following are instances of undertakings of which the court refused to compel the performance: an undertaking to perform acts for the purpose of clearing the title of lands which had been sold; to give a bail-bond to a sheriff, the contract being void at law; to pay the balance of some purchase-money; to guarantee the amount of a loan; to give an indemnity for being allowed to use a person's name in an ejectment; or to make an arrangement either for the payment of a debt, or to give notice when the debtor is going to leave prison; and an undertaking not made as the solicitor in the cause but merely as a friend, or as party to a suit." —pp. 338, 339.

The scope of the present work, being confined to those summary petitions which are in the nature of independent causes, the class which are merely auxiliaries to plenary suits, as for example, petitions for rehearing, and those to obtain the benefit of pending proceedings, have not been treated of, being more appropriate to a work on general Equity practice. It is not often that a book is presented to the profession under such favourable auspices as the present, recommended as it is by the *prestige* acquired by previous successful labour in the same field, and by the intimate knowledge of his subject which the author enjoys from his official position.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 56.)

And with respect to the chairman of the commissioners, be it enacted as follows:

XXIX. The commissioners elected under this Act shall furnish to the Lord Chancellor of Ireland for the time being a certified return, setting forth the name, age, rating, occupation, or profession of the persons elected to be commissioners, and it shall be lawful for the Lord Chancellor, if he shall think fit, to select from such commissioners a proper and qualified person to act as a justice of the peace for the purposes of this Act within the boundaries of the town, and then in all cases arising under this Act, and cognizable by one or more justices of the peace, the person so selected shall, during his term of office, and during that term so long as the Lord Chancellor shall not disapprove, have the jurisdiction and authority of and be a justice of the peace within the boundaries of the town as specified for the purposes of this Act, and for such purposes only, provided such town be not situate within the Dublin metropolitan police district.

And with respect to the duties of such commissioner so selected as aforesaid, to have the jurisdiction

tion and authority of a justice of the peace, be it enacted as follows:

XXX. It shall be lawful for the said commissioners and they are hereby required to appoint a proper officer to act as clerk, and to provide, if there shall be no public court house within such town, a suitable building to be a public court for the hearing and determining of offences under this Act; and it shall be lawful for the said commissioners or any other justice of the peace of the city or town, or of the county in which such city or town or any part thereof is situate, to sit at and hold such court on every fair and market day of such city or town, and on every other day on which he or they may think fit, for the hearing and determining of offences under this Act; and for the purposes of this Act such commissioner or other justice or justices presiding at such court shall have the same powers as justices presiding at petty sessions.

And with respect to the officers to be appointed by the commissioners, be it enacted as follows:

XXXI. So much of "The Towns Improvement Clauses Act, 1847," as relates to the officers to be appointed by the commissioners, shall be incorporated with and form part of this Act: provided always, that the approval requisite to the appointment of such officers, shall be the approval of the Lord Lieutenant of *Ireland* for the time being.

And with respect to the plans of towns, and of the works to be executed under the powers of this Act, be it enacted as follows:

XXXII. So much of "The Towns Improvement Clauses Act, 1847," as relates to plans of the district, and of the works to be executed under any Act, shall be incorporated with and form part of this Act.

And with respect to making and maintaining the public sewers, be it enacted as follows:

XXXIII. The commissioners may, if they shall think fit, purchase the rights, powers, and authorities vested in any person for making sewers, or contract for the use of, or purchase any sewers within the town, with or without the buildings, works, materials, and things belonging or appertaining thereto; and any person to whom any such sewers belong may sell and dispose of the same to or otherwise contract with the commissioners; and in case of any such sale the purchase money shall be settled and applied to the same uses and trusts to which the property purchased may have been subject at the time of such sale, and the property purchased shall vest in and belong to the commissioners purchasing the same.

XXXIV. So much of "The Towns Improvement Clauses Act, 1847," as relates to the making and maintaining the public sewers, shall be incorporated with and form part of this Act: provided always, that as regards the making, altering, and maintaining sewers and drains, it shall be lawful for any person whose property may be taken or affected, or who shall think himself thereby aggrieved, to appeal thereon to the court of the assistant barrister in manner herein-after mentioned.

And with respect to the drainage of houses, be it enacted as follows:

XXXV. So much of "The Towns Improvement

Clauses Act, 1847," as relates to the drainage of houses shall be incorporated with and form part of this Act: provided, that where the commissioners shall signify their disapproval of the level at which it is proposed to lay the foundations of any new house as provided therein, it shall be lawful for any person who shall think himself aggrieved thereby to appeal therefrom to the court of the assistant barrister in manner hereinafter provided.

And with respect to paving and maintaining the streets, be it enacted as follows:

XXXVI. That clauses fifty-one, fifty-two, and fifty-three of "The Towns Improvement Clauses Act, 1847," shall be incorporated with and form part of this Act; provided, that nothing herein or in the said clauses so incorporated with this Act shall extend or be construed to exonerate any turnpike commissioners or trustees, or any grand jury or other body, or person or persons whatsoever, from his or their duty or obligation to maintain and repair any street or road running through any city, town corporate, borough, or other town adopting the provisions of this Act, unless the commissioners for the execution of this Act shall desire to take upon themselves such duty or obligation; and in such case such commissioners shall become liable in like manner as the party or parties originally liable to such duty or obligation, and shall in like manner answer for and be punishable for any default in the discharge or observance of such duty or obligation.

(To be continued.)

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DUBLIN, FEBRUARY 3, 1855.

Our attention has been recently directed to a singular *casus omissus* in the Common Law Procedure Amendment Act, which, if not speedily supplied, may exert a very injurious effect upon the enforcement of the rights of landlords. We allude to a defect in the new procedure, provided by the Act, in the action of replevin. This will become apparent by briefly referring to the several sections bearing upon the course of this action. It is enacted by section 228, that when a party whose goods shall have been distrained shall dispute the validity of the distress, "such party may commence a personal action for the recovery of the goods or chattels so taken or distrained, by a writ of summons and plaint." This writ contains certain particulars in addition to the ordinary requisites of that writ. By section 229, "where any such personal action shall have been commenced," the plaintiff is next to sue out the writ of replevin, which is, as before, a collateral proceeding, for the

sake of changing the custody of the goods. Lastly, section 230, which is the only remaining clause of the Act, specially adapted to the actions of replevin, provides, that in case the plaintiff shall be non-processed for not filing his summons and plaint, the defendant may file a suggestion, in the nature of a plaint for rent, and thereupon, or in case of a judgment or demurrer for the defendant, a writ of inquiry may be executed; or in case the plaintiff shall be non-suit, or a verdict given against him after issue joined, then the jury shall inquire the amount of rent, and the value of the goods distrained, in order that, in each of the above cases, the defendant may recover a judgment for that amount. With the exception of those sections, there is nothing to distinguish the action of replevin in any of its incidents from an ordinary personal action.

That brings us to the consideration of the class of sections with respect to the settlement of issues for Nisi Prius. The 102nd section casts upon the plaintiff's attorney the duty, after defendant's subsequent pleading filed, and together with notice of

trial, of furnishing to the defendant's attorney a draft of the abstract of the pleadings and of the issues of fact to be tried at *Nisi Prius*, and of taking the subsequent steps for the completing same. The preparation of this abstract is now the only mode of bringing the cause *to issue*. Before the passing of this Act, the defendant brought the cause to issue by filing none but issuable pleas; and in case any of his pleas were such as to require a replication, his course was to rule his adversary to reply. No such power has been conferred by the new Act, and consequently the defendant, after the filing of his defence, is unable to expedite the progress of his suit, until the plaintiff has been manifestly in default for not going to trial. Section 106 provides, that "the plaintiff shall proceed to trial within three Terms from that in which, or the vacation of which, the defence or other subsequent pleading is filed; and in default thereof, the defendant may enter a rule that the plaintiff do proceed to trial at the assizes or sittings next after the expiration of twenty days from the service of such rule, and that in default, the defendant shall be dismissed with the costs of the suit." The non-compliance with this rule is to have a similar effect to that of a judgment as in case of a non-suit.

Section 107 further saves the right of a "defendant to take down a cause for trial, after default by the plaintiff to proceed to trial as aforesaid;" and it declares that "it shall be lawful for the defendant *after such default*, to proceed to have the abstract of the issues settled in the same manner as the plaintiff might have done." Now, the practical effect of these sundry provisions in each case will be, to enable the plaintiff, after he has filed his summons and plaint, to lie dormant for three Terms at least, without being liable to be accelerated by his opponent. Even in common suits, this may, in some cases, operate harshly upon a defendant who has been vexatiously dragged into court; but it is, in the action of replevin, that gross injustice will be the inevitable result. Suppose the landlord to distrain upon his tenant for a year's rent, which is unquestionably due. The tenant, in order to gain time, sues out his replevin and files his summons and plaint, to which the landlord pleads a defence, by way of avowry. What is to prevent the plaintiff from delaying any further proceedings for three Terms, a period which may perhaps extend over the greater part of the year? It is clear that until the plaintiff is *in default*, which is not until the stated period has

expired, the defendant has no right, as the law *now* stands, to change places with the plaintiff and to become an actor in the suit. Formerly it was not so, for first, as we have already seen, the defendant might force the cause to issue, and then by the old Rules, of the Queen's Bench and Common Pleas, now repealed, either party was at liberty, when issue was joined, to take the cause to trial (34th Rule, K. B., 9th Rule, C. P., 1670.) There can be no second opinion as to the necessity of applying a remedy to the mischief which we have thus pointed out, and we think that this can be fully obviated without having recourse to Parliament for an amendment of this branch of procedure. The plenary powers conferred by section 233 upon the Common Law judges to make "general rules and orders for the more effectual execution of this Act, and for establishing a simple code of practice, &c. in the said Courts, and in the Court of Error, in accordance with the intention and object of this Act," are quite sufficient to enable the Bench to promulgate a general rule which would remove the difficulty. Suppose that Rules were made, that within four days after defence in replevin filed, the defendant should be at liberty to rule the plaintiff, to take the needful steps to bring the cause to issue, and to serve notice of trial, upon pain, in case of default, of having the summons and plaint set aside, and the defendant at liberty to non-pros the plaintiff for want of same. Then section 230 would apply, and the defendant would be enabled to take advantage of its provisions. Such a rule as the foregoing would effectually protect a defendant in replevin from a risk to which the present state of the law inevitably exposes him.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 60.)

And with respect to laying out new streets, be it enacted as follows:

XXXVII. So much of "The Towns Improvement Clauses Act, 1847," as relates to laying out new streets be incorporated with and form part of this Act: provided always, that as regards the making and laying out any new streets, and fixing the levels thereof, it shall be lawful for any person whose property may be taken or affected, and who shall think himself thereby aggrieved, to appeal thereon to the assistant barrister in manner herein-after mentioned.

And with respect to naming the streets and numbering the houses, and also with respect to improving the line of the streets and removing obstructions, be it enacted as follows:

XXXVIII. So much of "The Towns Improve-

ment Clauses Act, 1847," as relates to naming the streets and numbering the houses, and also so much thereof as relates to improving the line of the streets and removing obstructions, shall be incorporated with and form part of this Act: provided always, that as regards the improving the line of any street and removing obstructions it shall be lawful for any person whose property may be taken or affected, and who shall think himself thereby aggrieved, to appeal thereon to the assistant barrister in manner herein-after mentioned.

And with respect to ruinous or dangerous buildings, and also with respect to precautions during the construction and repair of the sewers, streets, and houses, be it enacted as follows:

XXXIX. So much of "The Towns Improvement Clauses Act, 1847," as relates to ruinous and dangerous buildings, and also so much thereof as relates to precautions during the construction and repair of the sewers, streets, and houses, shall be incorporated with and form part of this Act.

And with respect to objections to works to be constructed by or subject to the approval of the commissioners, be it enacted as follows:

XL. So much of "The Towns Improvement Clauses Act, 1847," as relates to objections to the works to be constructed by or subject to the approval of the commissioners, except so much thereof as relates to the appeal thereby provided, shall be incorporated with and form part of this Act.

XLI. Any person liable to pay or to contribute towards the expense of any of the works herein-before mentioned, or otherwise aggrieved by any order of the commissioners relating thereto may, at any time within seven days after the making of any such order, give notice in writing to the commissioners that he intends to appeal against such order to the assistant barrister at the next quarter sessions for the division or place, and along with such notice he shall give a statement in writing of the grounds of the appeal; and if within eight days next after giving such notice the party give security by recognizance before a justice of the peace, with two sufficient securities, to the satisfaction of such justice, to abide the order of the assistant barrister, and pay such costs as may be awarded against him thereupon, the work so appealed against shall not be begun until after the judgment of the assistant barrister upon such appeal; and a copy of such notice, and statement of the grounds of such appeal as aforesaid, shall be lodged by the appellant with the clerk of the peace on the day before the commencement of the sessions at which the appeal is to be heard; and the assistant barrister shall hear and determine the matter of the appeal, and shall make such order thereon, either confirming, quashing, or varying such order, proceeding, or matter, and shall award such costs to either of the parties, as the said assistant barrister in his discretion shall think fit; provided, that the appellant shall not be heard in support of such appeal unless such notice and statement have been given and such recognizance entered into as aforesaid, nor on the hearing of such appeal shall he go into evidence of any other grounds of appeal than those set forth in such statement as afore-

said; provided also, that if there be not an interval of fifteen days between the making of such order and the then next sessions, then such appeal may be made and such notice given for the next following sessions for the division or place at which the appeal can be heard.

And with respect to cleansing the streets, and the prevention of nuisances, and the prevention of smoke, be it enacted as follows:

XLII. So much of "The Towns Improvement Clauses Act, 1847," as relates to cleansing the streets, and the prevention of nuisances, and the prevention of smoke, shall be incorporated with and form part of this Act.

And with respect to the construction of houses for prevention of fire be it enacted as follows:

XLIII. The party walls of all buildings erected after the adoption of this Act by any town shall be carried through and above the roof, to form a parapet of not less than twelve inches in height, measured at right angles with the slope of the roof, above the covering of the roof of the highest building to which such party walls belong; and every person who shall erect any building contrary to the provisions herein contained, and who shall not alter the same within one month after notice given to him for that purpose by the commissioners, shall be liable to a penalty not exceeding five shillings for every day that such building shall so continue.

And with respect to supplying buildings with fresh air, be it enacted as follows:

XLIV. So much of "The Towns Improvement Clauses Act, 1847," as relates to supplying buildings with fresh air shall be incorporated with and form part of this Act; provided, that the appeal from the determination of the commissioners in this respect shall be such appeal to the court of the assistant barrister as is herein-before provided.

And with respect to lodging houses, be it enacted as follows:

XLV. It shall not be lawful to keep or use as a lodging house within any town the population of which, as ascertained by the last population returns made pursuant to Act of Parliament, shall be above three thousand inhabitants, any house, not being a licensed victualling house, unless such house shall have been registered as a lodging house in a book to be kept by the commissioners for that purpose.

XLVI. Save as above provided, so much of "The Towns Improvement Act, 1847," as relates to lodging-houses shall be incorporated with and form part of this Act.

And with respect to slaughter-houses, be it enacted as follows:

XLVII. So much of "The Towns Improvement Clauses Act, 1847," as relates to slaughter-houses shall be incorporated with and form part of this Act: provided always, that nothing herein contained shall prejudice or affect the rights, privileges, powers, or authorities of any persons incorporated or authorized by any local Act of Parliament passed before the passing of this Act, for the purpose of making and maintaining slaughter-houses for the accommodation of any city, town, or place.

And with respect to the sale or exposure for sale of unwholesome and adulterated food, be it enacted as follows :

XLVIII. In any shop, building, stall, or place kept or used for the sale of butchers' meat, poultry, or fish, no animal, carcass, meat, poultry, game, flesh, or fish which is unfit for the food of man shall be kept or retained, unless entirely separate and apart from any animal, carcass, meat, poultry, game, flesh, or fish which is intended for such food, nor unless the same be ticketed in large and legible and conspicuous characters as being unfit for such food ; and any person who shall keep in any shop, building, stall, or place occupied or used by him as aforesaid any animal, carcass, meat, poultry, game, flesh, or fish which is unfit for the food of man otherwise than entirely separate and apart, and ticketed as aforesaid, shall be liable to a penalty not exceeding five pounds ; and the inspector of nuisances, officer of health, or any other officer appointed by the commissioners for that purpose, may and he is hereby empowered, at all reasonable times, with or without assistants, to enter into and inspect any shop, building, stall, or place kept or used for the sale of butchers' meat, poultry, or fish, or as a slaughter-house, and to examine any animal, carcass, meat, poultry, game, flesh, or fish which may be therein ; and in case any animal, carcass, meat, poultry, game, flesh, or fish appear to him intended for the food of man, and to be unfit for such food, the same may be seized ; and if it appear to the chairman of the commissioners, upon the evidence of a competent person, that any such animal, carcass, meat, poultry, game, flesh, or fish is unfit for the food of man, he shall order the same to be destroyed, or to be so disposed of as to prevent its being exposed for sale or used for such food ; and the person to whom such animal, carcass, meat, poultry, game, flesh, or fish belongs, or in whose custody the same is found, shall be liable to a penalty not exceeding five pounds for every animal or carcass, fish, or piece of meat, flesh, or fish, or any poultry or game, so found, and as to which such magistrate shall be satisfied that it was intended for the food of man.

XLIX. If any person shall sell or expose for sale any adulterated butter, meal, bread, or other article of food, knowing the same to be adulterated, such person so offending shall, upon conviction before a justice, for every such offence be liable to a penalty not exceeding forty shillings, and such adulterated article shall be forfeited and disposed of as the chairman of the commissioners shall direct ; and it shall be lawful for such chairman on the application of the inspector of nuisances, or other officer acting under this Act, setting forth that he has received information and has just cause to believe that any adulterated article of food is in the possession of any person for the purpose of being disposed of, to grant a warrant to enter upon the premises of such person, and to search for and seize such article of food, and to forfeit and dispose of the same as to him shall seem proper.

L. The business of a blood-boiler, bone-boiler, slaughterer of cattle, horses, or animals of any de-

scription, soap-boiler, tallow-melter, tripe-boiler, or other noxious or offensive business, trade, or manufacture, shall not be newly established in any building or place within the town without the consent of the commissioners ; and whosoever offends against this enactment shall be liable for each offence to a penalty not exceeding twenty pounds, and a further penalty not exceeding forty shillings for each day during which the offence is continued ; and the commissioners may from time to time make such bye-laws with respect to any such business so newly established as they may think necessary and proper, in order to prevent or diminish the noxious or injurious effects thereof.

And with respect to the lighting of towns, be it enacted as follows :

LI. The commissioners may contract for any period not exceeding three years at any one time with the owners of any gasworks, or with any other person, for the supply of such gas or oil, or other means of lighting, and may provide such lamps, lamp posts, and other works as the commissioners think necessary for lighting the streets of the town ; and if the commissioners and the owners of any gasworks authorized by Act of Parliament to supply gas within the town, and with whom the commissioners shall be desirous of contracting, shall not agree as to the price to be paid for such supply, their such price shall be settled by arbitration, and for that purpose the clauses of "The Lands Clauses Consolidation Act, 1845," with respect to the settlement of disputed compensation by arbitration, shall be incorporated with this Act.

(To be continued.)

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DUBLIN, FEBRUARY 10, 1855.

THE near approach of the Circuits reminds us of an inconvenience which has not unfrequently occurred in consequence of the time allotted for each town occasionally falling short of the period which the quantity of business, to be transacted, requires. The result is that some of the civil causes have to be left untied, and are postponed to a future Assizes, unless the parties agree to a reference.

There are two modes by which this great mischief, involving, as it may in some instances, a denial of justice, may be obviated. In the first place, care should be taken to allow ample time for the sittings in each place. It is true that the opposite error to that which we have pointed out may be fallen into; but it is decidedly better to err in the way of allowing superfluous time, than of limiting it too closely.

Travelling, in our days, between the several towns on Circuit and the Metropolis, is comparatively cheap and easy. And again, it must be borne in mind that, since the passing of the Common Law Procedure Act, a novel class of business has arisen, the transaction of which may involve time, and the occurrence of which cannot be anticipated, we refer to the settlement of issues, to be tried on the same day, simple time ought hence to be allowed.

The other expedient which we propose is, that

here, as in England, some of her Majesty's counsel on the Circuit be associated in the Commission of Gaol Delivery, for the purpose of assisting the judges of Assize to try the minor criminal cases, which would, in case a Court of Quarter Sessions had intervened, have been referred to that tribunal. That course is adopted in England with considerable advantage. It is probable that it would not be requisite very frequently to call the services of these learned gentlemen into requisition, but occasions might recur from time to time when such assistance would be very valuable, and tend to the dispatch of business.

Review.

On the Amendment of the Bankrupt Law, Dublin: Hodges and Smith, 1855, pp. 82.

THE design of the present pamphlet is thus described, in the words of its anonymous author.

"The introduction of a bill to amend and consolidate the Law of Bankruptcy in Ireland in the last session of Parliament leads naturally to the consideration of the amendments or alterations required in our bankrupt code.

"That the whole law of debtor and creditor requires revision has been strongly urged by some whose opinion is of great weight. On the other hand, many consider that the best way of proceeding in the reform of the law is by a cautious amend-

ment of the existing code, as developed by experience; and not by a wholesale change, which inevitably results in a heavy tax on the future suitor for compensation to abolished officers; as evidenced in England when the former system of bankruptcy was altered, by which a charge of upwards of £20,000 a year is still, notwithstanding the lapse of time, payable under the head 'compensations.'

"But it is the favorite, and indeed the usual course of amendment 'to assimilate the bankrupt law of Ireland to that of England,' a scheme involving many changes, and requiring serious consideration.

"To have one code of laws for the United Kingdom would be desirable as well for convenience sake, as tending to the perfect incorporation of the three kingdoms; and, according as the best law has been ascertained by practical working in one part of the country, its benefits will, no doubt, be sought after in the others; but, before the present bankrupt law of England is extended to this country, it will be well to consider in what respects it is superior, and in what inferior, to ours. With this view, the appearance of the report of the royal commission appointed to inquire into the 'Bankrupt Law Consolidation Act, 1849,' is the more opportune.

"The present inquiry, then, is not into the principles on which bankruptcy legislation has proceeded, but merely to examine the points of difference between the Irish and English systems, with a view to the adoption of those provisions in the English Consolidation Act which appear to be advantageous, and to guard against those which would subvert such parts of our system as have been found to work well.

"It will be convenient to divide my observations as follows:—

"First, to enumerate shortly the alterations effected by our last Act, thus showing the existing state of the law.

"Secondly, to consider the report of the royal commission, pointing out the differences between the two systems, and their respective advantages and disadvantages.

"Thirdly, to recommend those alterations which would ameliorate our law and the mode of its administration."

After discussing the provisions of the 12 & 13 Vic. c. 107, which extended the operations of the 6 W. 4, c. 14, and came into operation the 1st of November, 1849, the writer gives a brief summary of the Report of "the Royal Commission appointed to inquire into the Fees, Funds, and Establishments of the Court of Bankruptcy in England, and the operation of the Bankrupt Law Consolidation Act, 1849," and in so doing he properly animadverts upon the somewhat partial mode in which this investigation was conducted. He says, "They did not examine a single witness conversant with the operation of the Court of Bankruptcy in Ireland, although they allude to our Act, recommend alterations upon it, and must have known that, in most

respects, the practice in Ireland corresponds to that which prevailed in England prior to the introduction of the Consolidation Act of 1849, the very subject of their inquiry." After reviewing this Report, the author observes:

"The principal value of the report of the bankruptcy commission is, that it demonstrates beyond all question that the cause of the failure of the English Consolidation Act is its extension of the principles of punishment and severity, thereby not only prohibiting debtors from voluntarily seeking its relief, and inducing them to submit to any terms as the alternative of bankruptcy, but deterring even creditors themselves from bringing debtors within its oppressive jurisdiction.

"This is, in fact, the essential difference between the English Consolidation Act of 1849, and the Irish Bankruptcy Act of the same year. The one has, by its severe enactments, lessened general resort to its jurisdiction; while the other, by its system of lesser punishment, and more perfect administration, has increased in usefulness. Estates are now wound up in a much shorter period than formerly; dividends are larger and sooner declared: and confidence is felt both by the bankrupt and the creditors in the court and the official assignees. The promoters of the Irish Bankruptcy Act may therefore very fairly be congratulated on the wisdom with which they selected the beneficial provisions of the Consolidation Act, which they carefully considered in its progress through Parliament.

"While our code is in many respects imperfect, yet on investigation it will be found not only more efficient than the Consolidation Act for effecting the primary objects of the bankrupt law—namely, a rateable distribution of the assets of an insolvent trader amongst his creditors, and the release of such trader from future liability—but also more calculated to protect the public interests and establish credit on a sounder basis.

"It would therefore follow that the mode in which these objects will best be attained, is not by multiplying summary jurisdiction of a penal nature over debtors, but by making the court, as in truth it is and ought to be, an administration court for the distribution of assets, with power, in cases of lesser offences, to suspend the certificate for a limited period; and, in cases of defined offences committed with intent to defeat the objects of the bankrupt law, to hand over the fraudulent trader, for prosecution before the criminal tribunals, rendered substantially effective by a simplification of procedure and every due facility of proof." pp. 42-44.

There is much in the remarks of the writer well worthy of consideration, as to the propriety of entrusting to the criminal tribunals alone the power of punishing mercantile misconduct; but we are inclined to think that, if such a recommendation were carried out, a very considerable protection would be afforded to the dishonest debtor. It certainly cannot be laid to the charge of our courts of criminal judicature that their procedure is compli-

ated, or their rules of evidence defective, and yet it is perfectly clear that in comparatively few cases, which a Bankrupt Court would send for trial, convictions would follow, so jealous are juries of condemning where a doubt may exist in favour of the accused.

We agree with the author, as to the impolicy of the present system, which renders a certificate liable at any subsequent period to be impeached, in case certain acts of misconduct committed prior to the granting of it be established against the bankrupt. We consider that it is but right that the granting of this document should be considered as a *res judicata*, or "Parliamentary title" of indemnity for by-gones; but, at the same time, it would, to our minds, appear to be a most dangerous doctrine to hold that every party subjected to the ordeal of bankruptcy, should have the power ultimately to claim such a certificate as of right, no matter what had been his previous conduct, and that for the latter he was to be answerable only upon indictment.

We may also observe that it does strike us that the good nature of the writer has made him a little too partial to the failings and shortcomings of the bankrupt. It is quite true that the name of bankrupt has no longer that sound of ill omen which it once conveyed. At the same time it is injurious to public morality that a notion should go forth that bankruptcy was an ordinary vicissitude of trade. It should be regarded as the greatest misfortune which can befall a mercantile man; and, while a helping hand should be freely tendered by the law to assist the virtuous bankrupt to regain the position from which he has fallen, it should not be forgotten at the same time that the *bona fide* creditor is no less a fair object of consideration.

The following is the summary of proposed amendments in the law of bankruptcy in Ireland which the author recommends:

- "Consolidation of the law of bankruptcy.
- "The abolishing of commissions of bankrupt; giving primary jurisdiction to the commissioners, and exclusive jurisdiction over all Irish traders.
- "The providing means, in a country bankruptcy, for its local working.
- "The providing means for the reception of proofs of debt by affidavit before the registrars.
- "The facilitating the voluntary and early cession of his assets by the trader-debtor.
- "The amendment of the clauses for arrangements between debtors and creditors under the control of the court.
- "Relaxing the penal provisions.

"Reduction of the fees and substitution of stamps, charging the salaries of the commissioners and the compensations on the consolidated fund, and providing superannuation allowance for the commissioners.

"Regulation of the bankrupt office, and abolition of the clerk of inrolments.

"Besides these amendments, the introduction of the provisions contained in the following sections of the English Consolidation Act would prove useful:—

"Sec. 123. Court may order payment of debts due to the bankrupt's estate, on an admission thereof being signed in the presence of an attorney acting on behalf of the debtor; such order to have the effect of a judgment.

"Sec. 132. Court may, after adjudication, order any banker, attorney, or agent of the bankrupt, to deliver to the official assignee all moneys or securities for money belonging to the bankrupt's estate.

"Sec. 144. Assignee not to take any stock or crop on any lands let to farm, in any other way than the bankrupt would have been entitled to do.

"Sec. 167. If an officer of any friendly society be bankrupt, and have money in his hands belonging to such society, court may order payment thereof before any of his other debts are satisfied.

"Sec. 188. Debts outstanding at the end of two years, which cannot be collected without unreasonable delay, may be sold by the assignee, under the direction of the court.

"Sec. 240. Authorized advertisements in the gazette to be evidence.

"Sec. 244. Affidavits may be sworn in prison before visiting justice or gaoler.

"Sec. 246. Bankrupt and bankrupt's wife to be examined upon declaration, without oath.

"Sec. 267. If debt sworn to by petitioning creditor be not due, or if act of bankruptcy be not proved, and it appear that the petition or adjudication was filed fraudulently or maliciously, court may order satisfaction.

"Sec. 272. Inserting false or unauthorized advertisements a misdemeanor.

"Sec. 273. Forging signature of commissioner or officer, or the seal of the court, a felony.

"Also the following provision from the 15th & 16th Vic., cap. 76, s. 142:—

"Power to assignee to continue actions in which the bankrupt is plaintiff.

"Further, it will be an improvement to provide that one general oath be taken by each messenger, on his appointment to that office, instead of a separate oath on every bankruptcy allotted to him.

"The Bankruptcy Act, 1854, contains the following important provisions, which should be introduced into any amendment of our Bankrupt Law:—

"Sec. 25. Every bankrupt shall be entitled to retain for the use of himself and his family, under the name of excepted articles, such articles of household furniture, and tools, imple-

ments of trade, and other such necessities as he shall specify and select, not exceeding in the whole the value of £20.

"Sec. 26. An inventory and valuation of the remainder of the bankrupt's household furniture, &c., to be made, which shall not be sold without the order of the commissioner.

"Sec. 27. If the bankrupt shall be entitled to any allowance, he shall accept his household furniture, &c., at the valuation so put upon them, in lieu of money.

"There are many other minor amendments, points in themselves apparently of small importance, but, taken with others, tending to render the system more perfect, which can be carried out, on full power being given to make, alter, and vary the General Rules and Orders, as provided by section 15 of 'The Bankruptcy Act, 1854,' a power which would go far to facilitate proceedings, and avoid technicalities." pp. 73-76.

In one recommendation of the author we cordially concur, namely, that our Court of Bankruptcy shall have exclusive jurisdiction over Irish traders.

The suggestion relative to the continuance by the assignee of suits in which the bankrupt is plaintiff, has been already extended to this country by section 102 of the Common Law Procedure Amendment Act.

Want of space will not permit us to enter more into detail upon the matter of this pamphlet, which will repay perusal; and, in conclusion, we may say that we regret that one who has shown so much good sense and knowledge of his subject as the writer should have hesitated to add to his work the further recommendation of his *name*.

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To the Editor of the Irish Jurist.

SIR,

The favourable reception which you have given to the suggestions which I made some short time since respecting the establishment of an "Irish Law Amendment Society," induces me to offer the following *provisional* rules for its establishment.

Of course those rules are only for the purpose of setting the wheels in motion, and without any intention to dictate as to the regulations which may eventually be found expedient for the management of the society.

May I request that you will kindly undertake to receive the names of such gentlemen as shall be willing to co-operate in the formation of the proposed body.

RULES FOR THE REGULATION OF THE "IRISH LAW AMENDMENT SOCIETY:—

First.—That the society shall consist of such gentlemen of the Bar of Ireland as shall enrol themselves members thereof, and pay a subscription of 5s. annually.

Second.—That a committee shall be appointed

of not less than eleven, or more than seventeen, to regulate the times and places for the meeting of the society and the business to be transacted thereat.

Third.—That the special objects of the society shall be—to obtain the earliest information respecting bills introduced or about to be introduced into Parliament, and to endeavour to render such alterations in the law as may be thereby contemplated, beneficial to the community, and consistent with prior existing statutes and decisions; and for that purpose the committee may be at liberty to request such member or members of the society as shall appear to them advisable to state their views, in writing, or report upon such bill or bills to a general meeting of the society.

Fourth.—That it shall be competent for any member of the society, or other person, to suggest to the committee, in writing, or if the committee shall think fit, orally, such improvement in the existing state of the laws or the practice of the professions of barrister and attorney, as shall appear to him advisable, and that the committee shall be at liberty either to request such member to read a paper, embodying his views, at a general meeting of the society, or to refer it to such member or members of the society as shall appear to them expedient, to inquire and report upon such proposed improvements to one of the general meetings of the society.

Fifth.—That at each general meeting, before the regular business of the day be entered upon, the chairman shall inquire whether any members have any proposition to make to the society relative to the matters cognizable by it, and that not more than half an hour be devoted to the consideration of any such subjects as may then be suggested, and that the same may be then ordered, by a vote of the society generally, to be entertained and reported upon to the next general meeting, or otherwise dealt with as shall appear to the society fit, although the same may not have been previously suggested to, or may have been disapproved of by, the committee.

Sixth.—That when any such report or paper shall have been approved of by any general meeting of the society, it shall be the duty of the committee to use their best exertions to carry the suggestions so approved of into effect, and to have such measures taken by the Legislature as shall lead to the adoption of such improvements.

Seventh.—That a treasurer and three honorary secretaries be appointed, to be *ex officio* members of the committee, and that minutes be kept of the proceedings of the committee and the general meetings of the society.

Eighth.—That there shall be an annual election of the committee and officers of the society, and that three members of the committee shall retire at each such election, not to be eligible again during the succeeding year; such three members to be those who shall appear to have been least regular in attendance at the meetings of the committee.

Ninth.—That no such appointment shall be made, or other business transacted, until forty gentlemen have enrolled their names as members

of the society, and that a general meeting be then forthwith called, and the committee and officers for the first year appointed, and the foregoing rules, or such others as may be deemed advisable, finally modified and approved of by the society, with liberty nevertheless for the society at large, from time to time, to amend and vary such rules, upon notice of the proposed amendment being given at the previous general meeting.

I have the honor to be, Sir,

Your obedient servant,

A JUNIOR.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 64.)

And with respect to the supply of water, be it enacted as follows:

LII. The one hundred and twenty-fourth clause of "The Towns Improvement Clauses Act, 1847," shall be incorporated with and form part of this Act, and the commissioners may provide the town from within or without the boundaries of such town with such a supply of water as may be proper and sufficient for the purposes of this Act, and for private use to the extent required by this Act; and for those purposes or any of them the commissioners may from time to time contract with any person whomsoever, or with any company, or purchase, take upon lease, hire, construct, lay down, and maintain such waterworks, and do and execute all such works, matters, and things as shall be necessary and proper, including the opening of roads and streets from time to time, for the purpose of laying down, altering, or repairing water pipes therein; and the commissioners may provide and keep a supply of pure and wholesome water, and may lay on at such pressure as will carry the same to the top story of the highest dwelling house within the town: provided always, that before constructing or laying down any waterworks under the powers of this Act within any limits in respect of which any waterworks company shall have been established, the commissioners shall give notice in writing to every such waterworks company, or private owner or owners of such waterworks, stating the purposes for and the extent to which water is required by the commissioners; and it shall not be lawful for the commissioners to construct or lay down any waterworks within such limits so long as any such company, or owner or owners as aforesaid, shall lay on water proper and sufficient for all reasonable purposes for which it is required by the commissioners; and in case any difference shall arise as to whether the water which any such company, or owner or owners as aforesaid, are willing to supply is proper and sufficient for the purposes for which it is required, or whether the purposes for which it is required are reasonable, the same shall be settled on an appeal in manner aforesaid (but without any recognizance) by either party to the assistant barrister, whose decision shall be final: provided always, that it shall not be lawful for the commissioners to take or use any water, cistern,

pump, well, conduit, or waterwork without having obtained the consent in writing of the owner or owners thereof.

LIII. Where the commissioners are able and willing to supply the houses or tenements within the town with water for domestic and ordinary purposes, the owners of such houses and tenements shall be entitled to obtain such supply by connecting a service pipe with the main pipes to be laid down by the commissioners, the expense of such service pipes and of connecting the same with the main pipes being defrayed by such owners; and where the houses and tenements generally in any street or place within the town shall be supplied with water by means of any such service pipes, it shall be competent to the commissioners to require the owner of any tenement in such street or place not so supplied to take a supply of water by connecting a service pipe with the main pipe as aforesaid; and in the event of refusal or delay on the part of such owner to comply with such requisition, it shall be lawful for the commissioners to enter upon such houses or premises, and proceed to lay down such service pipes themselves, and to recover the expense thereof from such owner in the same manner as damages; and no person in the town shall be entitled, without special agreement with the commissioners, to use the water supplied through the pipes of the commissioners, except for domestic and ordinary purposes; but where there is a supply of water more than is required for such domestic and ordinary purposes within the town, it shall be lawful for the commissioners to contract with any person or persons within the town to supply any public baths and wash-houses, works, manufactories, or other premises within the town with water, at such rate and upon such terms and conditions as may be agreed on or in the event of disagreement, either as to the ability of the commissioners to give the supply, or as to the rate, terms, or conditions on or in respect of which the supply is to be given, the same shall be fixed on an appeal in manner aforesaid (but without any recognizance) by either of the parties to the assistant barrister, whose decision shall be final; and when the main pipes of the commissioners have been laid down in any town or borough, it shall be lawful for the owners of and other persons interested in any house or tenement situate without the limits of such town or borough, at their own expense, to lay down main pipes and service pipes, and to connect the same with the main pipes of the said commissioners, such connexion to be made under the superintendence and to the satisfaction of the engineer for the time being to the said commissioners; and when and so soon as such connexion shall have been made and completed, the said commissioners shall supply such house or tenement with water for domestic purposes at a rate not exceeding that which shall be assessed upon the houses and tenements within any such town or borough; and it shall be lawful for the commissioners to make byelaws regulating all or any matters and things whatsoever connected with the water to be supplied within or without the town through their pipes.

LIV. Whosoever shall wilfully or carelessly break, injure, or open any lock, cock, waste-pipe, or waterworks belonging to or under the management or control of the commissioners, or shall unlawfully divert or take water from any waterworks belonging to or under the control of the commissioners, or from any waters by which such waterworks are supplied, or shall wilfully or negligently waste any water with which he is supplied by the commissioners, shall for every such offence forfeit a sum not exceeding two pounds, and a further penalty not exceeding ten shillings for each day whilst the offence is continued after written notice in that behalf, which penalties shall be paid to the commissioners; and whosoever shall bathe in any stream, reservoir, or other waterworks, belonging to or under the control of the commissioners, or shall wash, throw, or cause to enter therein, any animal, rubbish, or thing of any kind, or shall cause or permit or suffer to run or be brought therein the water of any sink, sewer, drain, engine, or boiler, or other filthy, unwholesome, or improper water, or shall do anything whatsoever whereby any water belonging to the commissioners, or under their management or control, shall be fouled, shall for every such offence forfeit a sum not exceeding twenty shillings for each day whilst the offence is continued, after written notice in that behalf, which penalties shall be paid to the commissioners; and whosoever, being proprietor of any gasworks, or engaged or employed in the manufacture or supply of gas, causes or suffers to be brought or to flow into any stream, reservoir, or waterworks belonging to or under the management or control of the commissioners, or into any drain or pipe communicating therewith, any washing or other substance produced in the manufacture or supply of gas, or shall wilfully do any act connected with the manufacture or supply of gas, whereby the water in any such stream reservoir, or waterworks is fouled, shall forfeit to the commissioners for every such offence a sum not exceeding one hundred pounds, and, after the expiration of twenty four hours notice in writing from them in this behalf, a further sum not exceeding ten pounds for every day during which the offence is continued; and if any water belonging to or under the management or control of the commissioners be fouled in any manner by the gas of any such proprietor or person, he shall forfeit to the commissioners for every such offence a sum not exceeding ten pounds, and a further sum not exceeding five pounds for every day whilst the offence is continued after the expiration of twenty-four hours notice in writing from the commissioners in this behalf; and for the purpose of ascertaining whether such water is fouled by the gas of any such proprietor or person, the commissioners may lay open and examine any pipes, conduits, and works from which the gas is supposed to escape; provided that before beginning so to do twenty-four hours notice in writing be given to the persons to whom such pipes, conduits, or works belong, or under whose management or control they may be, of the time at which the examination is intended to be made; and if upon such examination it appear that the water has been fouled by the gas proceeding from the works examined, the expenses

of the examination shall be paid and borne by the person to whom such works belong, or under whose management or control they may be, and be recoverable from him in the same manner as any debt may be recovered by the law of Ireland; but if it appear that the water has not been so fouled, then such expenses, and all damages occasioned by the examination, shall be paid by the commissioners out of the general assessments levied under this Act, and be recoverable from them upon summary proceeding by civil bill or otherwise, as any debt may be recovered by the law of Ireland.

And with respect to things to be done by the commissioners by special order only, and with respect to clocks, and with respect to entry by the commissioners or their officers in execution of this Act, and with respect to ensuring the execution of the works by this Act required to be done by the owners or occupiers of houses or lands, be it enacted as follows:

LV. So much of "The Towns Improvement Clauses Act, 1847," as relates to things to be done by the commissioners by special order only, and so much thereof as relates to clocks, and so much thereof as relates to entry by the commissioners or their officers in execution of the Act, and so much thereof as relates to ensuring the execution of works required to be done by the owners or occupiers of houses or lands, shall be incorporated with and form part of this Act.

And with respect to the sale of gunpowder, be it enacted as follows:

LVI. No gunpowder shall be sold within the town by candle or other artificial light, under a penalty not exceeding one pound for each offence; and no person shall keep at any time more than ten pounds weight of gunpowder, except by special permission of the commissioners, signed by the chairman and two of the said commissioners, and under such regulations for its safe custody as they may approve and determine, under a penalty for the first offence of any sum not exceeding one pound, for the second offence not exceeding three pounds, and for the third or any subsequent offence not exceeding five pounds, besides forfeiture of all the gunpowder which shall be found exceeding the aforesaid weight; and the aforesaid quantity of gunpowder allowed to be kept as aforesaid shall be deposited in a place separate from all other goods and commodities, and shall be secured by lock and key, under a penalty not exceeding one pound to be paid for each offence by the occupier of the premises in which such quantity not so kept and secured as aforesaid shall be found: provided always, that nothing herein contained shall apply to any quantity of gunpowder provided for military or constabulary purposes.

And with respect to the byelaws to be made by virtue of this Act, be it enacted as follows:

LVII. So much of "The Towns Improvement Clauses Act, 1847," and of "The Commissioners Clauses Act, 1847," as relates to the byelaws to be made by virtue of said Acts, shall, save as next herein provided, be incorporated with and form part of this Act: provided that no byelaw made by the commissioners under the authority of this Act shall come into operation until the same be confirmed by

the Lord Lieutenant, who is hereby empowered to inquire into any byelaws tendered for that purpose, and to allow or disallow of the same as he may think meet; provided also, that no such byelaws be confirmed unless notice of the intention to apply for a confirmation of the same have been given in one or more newspapers circulating within the town (if any,) or otherwise in some newspaper circulating in the county in which the town is situated, one month at least before the making of such application; and any person desiring to object to any such byelaw, on giving to the commissioners notice of the nature of his objection ten days before the making the application for the allowance thereof, may transmit to the Lord Lieutenant a memorial containing the grounds of such objection: and if such byelaws should be thereupon confirmed, in the whole or in part, the order for such confirmation, in the whole or in part, shall be signed under the hand of the chief or under secretary of the Lord Lieutenant, of which order a copy shall be published in one or more such newspapers as aforesaid, and such publication shall be deemed evidence of such byelaws.

And with respect to the contracts to be entered into, and the deeds to be executed by the commissioners, be it enacted as follows:

LVIII. So much of "The Commissioners Clauses Act, 1847," as relates to the contracts to be entered into, and the deeds to be executed by the commissioners, shall be incorporated with and form part of this Act.

And with respect to the appointment and accountability of the officers of the commissioners, other than those herein-before provided for, be it enacted as follows:

LIX. So much of "The Commissioners Clauses Act, 1847," as relates to the appointment and accountability of the officers of the commissioners, save as herein next provided, shall be incorporated with and form part of this Act: provided that the commissioners shall in all cases appoint some bank or banking company to act as their treasurer, and that it shall not be necessary to require from such bank or banking company any security for the due execution of such office as required by said Act; provided also, that the drafts to be drawn on said bank on account of said commissioners shall be drawn at a meeting of the commissioners, and there signed by the chairman of the meeting and by two other commissioners, and no drafts on the said account shall be drawn for any private purpose on any pretence whatever, nor for any other purpose than the payments which shall from time to time be authorized by the commissioners for the purposes of this Act, as the same shall be certified to the said treasurer by the clerk to the commissioners, who shall countersign all such drafts.

And with respect to general assessments under this Act, be it enacted as follows:

LX. Once in each year the commissioners shall assess all occupiers of premises within the town and the boundaries thereof, as before determined on and declared by the Justices, rated in respect of such premises under the Acts for the relief of the destitute poor in the sums necessary to be levied for the pur-

poses of this Act, other than by way of private or district assessments, and shall fix a day, not being less than one month from the date of laying on such assessments, on which the same shall be payable; and the rate of assessment, and day so fixed by the commissioners, shall be published by handbills posted in the town, and by advertisement in any newspaper or newspapers published therein (if any), or otherwise in some newspaper or newspapers published nearest to such city or town: provided that such assessment, other than private and district assessments, shall not in any year exceed the rate of one shilling and sixpence in the pound where the enactments of this Act with respect to water have been adopted, or the rate of one shilling in the pound where such enactments with respect to water have not been adopted; provided, that all unoccupied houses, tenements, or premises, being at the time of such assessment unproductive to the lessors or landlords thereof, shall be exempt from taxation under this Act during the period that such premises are so unoccupied and unproductive, and no longer.

LXI. The clerk of the union shall, on the requisition of the commissioners, produce the rate book of the union, and the said commissioners shall annually cause to be made up a book of assessment, to be signed by the chairman and two others of the commissioners, showing the net annual value of the whole premises in the town under the poor law valuation liable to be assessed under this Act, and according to which the assessments under this Act are intended to be levied; and such book of assessment shall be open to inspection by all ratepayers, in the hands of the clerk; and the commissioners shall have power to rectify any mistake or error, upon the ground of any variance from the last assessment for poor rates, or on the ground of any change of occupation of premises since such last assessment for poor rates, and in each year a copy of the said book of assessment, as finally adjusted by the commissioners, signed by the chairman and two commissioners, and countersigned by the clerk, shall be delivered over to the collector, as the rule for levying and collecting the annual assessment under this Act, and shall be deemed to be evidence of each and every separate assessment for the purposes of this Act.

LXII. For the purposes of any rate to be made or levied under the provisions of this Act or of any Act incorporated herewith, all lands used as arable, meadow, or pasture ground only, or as woodlands, or market gardens, or nursery grounds, and all lands covered with water, and used as a canal, and any towing-path to the same, and all lands used as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed and liable in the proportion of one fourth part only of the nett annual value of such lands respectively.

LXIII. If any person so rated and assessed as aforesaid, shall refuse or neglect to pay the assessment charged upon him for the space of ten days next after the same shall be due and demanded by the collector, it shall be lawful for the collector to levy the same by distress and sale of any goods and chattels of such person which may be found either

on the premises chargeable, or on any premises within the town rented or possessed by the person so assessed, rendering to the owner of such goods and chattels the overplus (if any,) after deducting the expenses of distraining, not exceeding twelve-pence in the pound on the sum for which such distress may have been made; or in case the collector shall not think it expedient to proceed by distress, then it shall be lawful for him to leave at the dwelling house of the party chargeable for or in respect of such premises a notice, bearing date the day and year of serving the same, subscribed with the name and abode of such collector, requiring payment of the sum apportioned within ten days from the date of such notice, and expressing that within ten days the money demanded may be paid to the collector at his house or office; and if such money be not so paid to the collector at his house or office; and if such money be not so paid within such time, then it shall be lawful for such collector to prefer a complaint to any justice of the peace having jurisdiction in such town, and such justice shall summon the party so complained against to appear before him, or any other justice of the peace sitting in petty sessions, and answer the said complaint, and shall, at the time specified in such summons, examine into the matter of such complaint on oath, and shall direct the payment to such collector of such money as he shall find due and payable under such assessment by the party complained against, together with a sum certain for such reasonable costs and charges as to such justice shall seem meet; and in default of the appearance of such party, or upon his or her refusal or neglect forthwith to pay the sum or sums so by such justice directed to be paid, it shall and may be lawful for such justice, or for any justice of the peace having jurisdiction in such town, to issue his warrant authorising and empowering the said collector to levy the money thereby ordered to be paid, by distress and sale of any goods or chattels of the party so complained against, which may be found within the town, rendering the overplus (if any) to him or her, the necessary charges and expenses of distraining being thereout first deducted, as directed by such justice; and the collector shall be bound to preserve the warrants of such seizures or sales, and enter in a book to be kept for that purpose the names of the parties proceeded against, the assessment due, the expense of the proceedings, and the true proceeds of each sale, which book shall be open to the inspection (without any fee) of all parties interested for three months after the date of each sale respectively; and at any time within that period it shall be competent to any party considering himself aggrieved to complain to any such justice of anything done unjustly or oppressively in regard of such seizure or sale, such complaints being made in the form of petitions subscribed by the complainant, and the decision of such justice shall be final; or otherwise the collector shall be and he is hereby authorised and empowered to sue for and recover all or any part of such assessment in arrear by personal action or by suit before the civil bill court of the assistant barrister having jurisdiction in that behalf as to such town, or otherwise according to law; and no misnomer, mistake, or informality

committed in any proceedings for recovery of any assessment under this Act shall prejudice the recovery of such assessment and expenses, nor shall such proceedings abate by the death, resignation, or removal of the collector instituting the same, or by any change in the persons holding office as commissioners, but it shall be lawful for the collector for the time to prosecute and follow forth proceedings commenced and carried on in the name of any previous collector in all respects as if such proceedings had been taken by himself: provided always, that it shall not be competent for any person to sue, nor for any court of law to entertain, any action or proceeding against the commissioners, or the collector or officers or other persons employed in executing any warrant in reference to any assessment under this Act, by reason of any mistake, informality, or misnomer, if the goods or other effects seized or sold under such warrant were *bona fide* the property or in the lawful possession of the person actually liable to payment of such assessment under the provisions of this Act.

(To be continued.)

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DUBLIN, FEBRUARY 17, 1855.

UNTIL the recent alterations in the Law of Civil Procedure here and in the sister country it appears to have been well settled, that in the action of ejectment a previous judgment between the same parties was no estoppel. That principle was recognized in *Doe dem. Strood v. Seaton*, (2 Cr. M. & R. 732,) where Lord Abinger, C. B., is reported to have said, "A judgment in ejectment is not conclusive evidence, because a party may have a title to possession and to grant a lease at one time, and not at another; but it is clearly admissible in evidence. Baron Parke added with reference to the reason of this rule, "A judgment is in no case conclusive, unless pleaded by way of estoppel. It cannot be pleaded in ejectment, because the defendant is bound by the terms of the consent to plead not guilty; but, if the parties are the same, it is evidence to go to the jury. In this case the former judgment shows that the lessor of the plaintiff had no title to demise the premises in question on the particular day of the demise." Such, we presume, would have continued to be the acknowledged state of the law, had not the recent measures intervened. On the other hand, it was equally clear that the rule was different; for an obvious reason, in the case of *action for mesne profits*; there the previous recovery in ejectment which was the ground of the

action might have been replied in estoppel to a plea alleging adverse title in the defendant. *Doe v. Wright*, (10 A. & E. 763.) The first alteration in our practice in ejectment was effected by the 13th Vic. c. 18. That Act, by section 15, provided that the action of ejectment should henceforward be commenced by a writ of summons; and by section 16 required the judges, by general order, "to order and direct what shall be the form and substance of any declaration in ejectment, and to dispense with and discontinue the use of the declaration now used in such actions, and to dispense with and discontinue the use of feigned names and other fictions in the declaration, and to make such other regulations, &c., as to them shall seem meet."

The New Rules of 1850 contain no special provision with regard to what shall henceforward be deemed to be the legal effect of the judgment in ejectment, but the Schedule IV. annexed to those Rules contains forms of declaration and general defences in that action. The former was thenceforward to contain no legal fiction, either in the names of parties or the allegation of a pretended demise and ouster, but, in lieu thereof, it was to allege that upon a certain day, "the plaintiffs, or some or one of them, became, and were, and still are legally entitled to the quiet and peaceable possession of all that and those lands called Blackacre in the County of —, and, being so entitled the said G H wrongfully assumed the possession

thereof, and from thence hitherto withholds and refuses to deliver up such possession to the said plaintiffs." Now, if the question of the *conclusiveness* of a judgment in an action of ejectment thus remodelled had been mooted in a similar suit between the same parties, whilst this Act was in force, it would appear to us to have been a necessary inference from the words of the Act, that no further change was contemplated, save in the *forms* of law, and that the legal effect of the judgment remained unaltered. The mere substitution of real for nominal parties could have worked no essential difference, for such does not appear to have been the ground of the proceedings having previously been inconclusive. However, whatever might have been the construction of this section of the Process and Practice Act, that is now merely a speculative question, as these enactments have been repealed by the Common Law Procedure Act.

The form of summons and plaint in ejectment now in use, pursuant to section 195 of that Act, is very similar in form to that which we have just quoted. The defence to an ejectment on the title has been prescribed by the 198th section, and is simply to allege that the plaintiffs are not entitled to the possession, and that the said possession belongs to the defendant as of right.

The 225th section contains this important provision, that "The effect of a judgment in ejectment under this Act shall be the same as that of a judgment in an action of ejectment heretofore used." These words are precisely the same as those in section 207 of the corresponding English Act. The writ of ejectment which has in England, since the passing of the 15th & 16th Vic. cap. 76, taken the place of the ancient form, is very similar to our summons and plaint in that action. In that country there was no intermediate stage, corresponding to our Process and Practice Act, and the words "heretofore used" can, therefore, in that particular Act, have no other reference than to the ancient practice in ejectment. *A priori*, we should have said, that a similar rule would apply to Ireland. However, the contrary has been decided by the Court of Exchequer in the recent case of *O'Donnell v. Ryan*, (7 Ir. Jur. 127.) The court there held that, inasmuch as the action of ejectment had, by the Procedure Act, been assimilated to other personal actions, a judgment therein was equally conclusive between the parties, to estop them from questioning the propriety thereof in a subsequent ejectment suit, as in any other action. They also held that as only

one form of plea was allowable in actions of ejectment on the title under the Procedure Act, the estoppel might be relied on without being pleaded. We feel very diffident in venturing to call in question the propriety of that decision, but the vast importance of the question, and the certainty that the law must be more thoroughly sifted, induce us to offer a few comments upon the grounds of the judgment in question. An authority was cited in the course of the argument, the effect of which really strikes us as having been greatly overestimated by the learned judges, namely, *Wilkinson v. Kirby*, (2 E. C. L. R. 1395.) It seems to have been taken for granted that that was an authority expressly in point, and that it established the proposition that the character of a judgment in ejectment had, by analogous legislation, been essentially changed. We submit, however, that that case, when carefully examined, proves directly the reverse, although it is true that an extrajudicial observation of one of the judges, (Mr. Justice Crowder) would seem to lead to that inference. What that case decided was this, that in an action of trespass for *mesne* profits, a plea denying the title of the plaintiff might be met by a replication by way of estoppel, relying upon a recovery in ejectment, under the new practice, coupled with an allegation of the entry of the plaintiff under his judgment. The question at issue was not, whether such a replication would previously have been good, for the case of *Doe v. Wright* had established that, but whether the absence of the alleged entry under the fictitious demise could be supplied by an act in *pais*.

Looking at the judgment delivered by the Court of Exchequer, it would really seem as if the learned judges supposed that the decision in the case cited turned upon the substitution of *real* for imaginary parties; and also that the question of the conclusiveness of the judgment had arisen in a second action of *ejectment*—neither of which surmises are at all warranted by the facts of the case. Again, some stress appears to have been laid upon the fact that the code in ejectment established under the Process and Practice Act intervened between the ancient practice and that founded by the recent statute, section 225 of which renders the effect of the judgment in ejectment similar to that "heretofore used." It seems to be inferred that these words in our Act refer to the judgment under the Process and Practice Act; and hence arises the two-fold assumption—first, that the Process and Practice Act did actually alter the nature of this particular

judgment; and, secondly, that the words refer to that modification. With regard to the first of these assumptions, we have endeavoured already to show that that Act does not fairly warrant such a construction; and, secondly, that even if it did, yet as the very same words occur in the English Act, and *there* must necessarily refer to the ancient traditional usage in this action, so entirely the creature of the court, the inference must arise, that the power of the Irish Act, by using the very same words, meant the same thing. It certainly seems to be a narrow construction to refer these words to a code of practice which had been but three years in operation, and which the same Act, expressly repealed. The word "used," moreover seems properly to refer to that which owed its existence to usage.

The second resolution of the Exchequer was this, that contrary to all ancient precedent, the estoppel here could be relied on without being pleaded, because that the statute had forbidden any form of plea but one. Now we submit, on the authority of *Doe v. Seton*, that the very fact of this restriction in point of pleading proves that no such estoppel can exist. It will be found, upon referring to the judgments of both Mr. Baron Pennefather and Mr. Baron Richards, that they agree in ascribing the previous inconclusiveness of the judgment in ejectment to the fact of the parties being nominal, not real; but the ground which was taken by the court in *Doe v. Seton* was, as we have seen, quite different.* There it was held that an estoppel could not be relied on, because it had not been pleaded, and that the parties were restrained from so pleading by the terms of the consent rule. Now that rule being inflexible in its character must be regarded as having been the law of the court, and, therefore, if the existence of that law, which imposed a particular mode of pleading, rendered it impossible for the defendant to rely on an estoppel, it seems to follow, by a parity of reasoning, that where the Legislature has substituted for that conventional plea another form, which would equally purport to oust the possibility of relying upon the estoppel, that ought to be regarded as an indication of its mind upon the subject. We conceive that it is a misapplication of the rule laid down in *Trevivan v. Lawrence*, (2 Sm. L. C. 438), to say that because a general form of plea only is given, the pleader may rely upon an estoppel, because he has no other mode of putting it on record.

On the contrary, the right of setting up an estoppel when a pleading at large, is given only to the party who, by the general pleading of his antagonist, and consequently by no act of his own, is deprived of the opportunity of replying the special matter.† If a party, by force of law, is precluded from pleading an estoppel, we submit that it is tantamount to a legislative declaration against his resorting to an expedient more compendious than equitable.

We may lastly observe, with respect to *O'Donnell v. Ryan*, that the most striking feature in that case was, that a judgment in favour of the defendant was held to be a bar to a second action. Had a recovery for the plaintiff been had in the former suit, there might have been some reason for arguing that the record testified to the title of the former plaintiff, not only upon the day named in the plaint, but from thence to the issuing of the writ; but where the judgment in the prior case was given for the defendant, we are at a loss to know what evidence the record could have afforded that on another day the plaintiff had no title. It is evident from the commentary by Mr. Ferguson upon the 225th section of the Common Law Procedure Act, (p. 247), that the framers of the Act intended to preserve the former system intact in this particular. He says:—

"The judgment will not now be conclusive as to the title more than it was formerly, and the unsuccessful party may bring as many actions as he pleases until stopped by a bill of peace. Lord Mansfield described the effect of a judgment in ejectment in *Taylor v. Horde*, (1 Bur. 11,) as follows: "In truth and substance a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it can only be possessed according to the right *prout lex postulat*. If he has a freehold he is in as a freeholder; if he has a chattel interest he is in as a termor, and, in respect to the freehold, his possession enures according to the right. If he has no title he is in as a trespasser, and, without any re-entry by the true owner, is liable to account for the profits."

Now, it strikes us that this subject would have been divested of much difficulty had the judges, who from time to time have had occasion to discuss the effect of this particular class of judgment, had contented themselves with assigning as the true reason for its possessing this particular attribute, the policy of the judicial authors of this strange combination of legal fictions, who considered that as its object was possessory and not proprietary, it should not conclude, except in actions by way of sequel such as for the mesne profits. Instead of boldly

* See also per Lord Mansfield, C. J. in *Aslin v. Parkin*, (2 Burr. 668.)

† See *Armstrong v. Norton*, (2 Ir. C. L. R. 100.)

advancing this plain proposition, subtle attempts have been made to explain this anomaly, by referring to technicalities, and the result is, that a question has now arisen, whether the fundamental *principle* of this action has not been altered, along with its practice. We venture to suggest that there is no ground either for an alteration of that principle or for surmising that the Legislature meant that it should be affected. Where the subject matter in dispute is so permanent in its nature, and so highly prized as that of land, and where the rules which govern the claims of persons in relation thereto are so complicated, it is very important that the fortune of the claimant should not be risked upon a single chance; and though it is just that, if defeated, the judgment should be cogent evidence against him; still he ought not to be deprived of the power of showing new facts, which may give a new complexion to the case. If *O'Donnell v. Ryan* be law, the judgment in ejectment in Ireland will be similar in effect to that in a class of actions which modern legislation has swept away, and by doing which we presume that the Legislature declared their view as to their impolicy, coupled as this act of abolition was, with a code of limitations for abridging the periods beyond which titles should not be questioned. Is there anything to shew that this view has been changed? We submit that there is nothing in the recent Acts, here or in England, to warrant such a proposition, and that the assumed judicial authority, in England, for that does not exist. We sincerely trust, whatever may be the final conclusion of our tribunals with regard to this interesting question, that it will not be settled without receiving the careful examination which it merits.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 72.)

LXIV. Whenever the nett annual value of the rateable hereditaments in any such town actually occupied by any person or persons shall not exceed four pounds, the assessment under this Act in respect of such property shall be made on the immediate lessor or lessors of such person or persons: and if at the time of making any such assessment the name of the immediate lessor be not accurately known to the persons making the assessment, it shall be sufficient to describe him therein as "the immediate lessor," with or without any name or further addition, and such assessment shall be held to be duly made on him by such description, and shall be recoverable from him accordingly, notwith-

standing any error or defect in his name or description, or the entire omission of his name therein: provided, that wherever any occupier shall claim to be and shall be accordingly rated to the relief of the poor, although the nett annual value of the rateable hereditaments occupied in any town by such person shall not exceed four pounds, the assessment under this Act shall be made upon the person so claiming to be rated to the relief of the poor.

LXV. Any assessment made as aforesaid on any lessor shall be recovered from him by personal action in the name of the clerk of the commissioners, and, by their direction, against such lessor in any of the superior courts of record in *Dublin*, or by civil bill in the court of proper jurisdiction; or, where such lessor resides within such town, the collector may leave at the dwelling-house of such lessor such a notice as hereinbefore provided requiring payment of the assessment within ten days; and if such assessment be not paid within such time, the same may be recovered upon a complaint before a justice, and by distress and sale, under the warrant of a justice, of the goods of such lessor, in manner hereinbefore provided as to assessments; and if a sufficient distress of the goods and chattels of such lessor cannot be found within such town, then on oath thereof made before any justice of the peace of any county in which any of the goods and chattels of such lessor may be found, the goods or chattels of such lessor shall be subject and liable to such distress and sale in such county where the same may be found, and may by virtue of such warrant be distrained and sold in the same manner as if the same had been found within such town; and if such assessment be not paid by such lessor within four months after the making thereof, it shall be lawful for the collector, by direction of the commissioners, to give a notice in writing as aforesaid to the occupier or respective occupiers for the time being of any such property to pay the assessment due in respect of the property in his or their occupation; and after the expiration of one calendar month from the time of giving such notice it shall be lawful to recover such last-mentioned assessment from every such occupier, or, in his default, from any subsequent occupier of the premises; and every such occupier so paying such assessment may deduct from the rent he may be then or next thereafter liable to pay in respect of any such property the whole of any such assessment he may have paid in respect of the same property; and if rent sufficient to cover such assessment be not then or do not thereafter become due from such occupier, he shall be entitled to recover the same from such lessor by civil bill; and so much of "The Towns Improvement Clauses Act, 1847," as relates to the manner of making rates, shall be incorporated with and form part of this Act.

And with respect to private and district assessments for sewers, drains, and private improvements, be it enacted as follows:

LXVI. So much of "The Towns Improvement Clauses Act, 1847," as relates to rates directed to be made for sewers, drains, and private improvements shall be incorporated with and form part of

this Act; and the said commissioners shall cause to be made up a book of assessment applicable thereto, and the same or a copy thereof, signed by the chairman and any two of the commissioners, shall forthwith be delivered over to the collector as the rule for levying and collecting the said assessments; and thereupon the several provisions of this Act in reference to the recovery of any other assessments by this Act authorized shall apply to and be available for the recovery of such private and district assessments.

And with respect to the appeal to be made against any private or district assessment, be it enacted as follows:

LXVII. The commissioners shall appoint a day on which every assessment shall be payable, and another day on which objections by any parties complaining that they have been improperly assessed may be lodged with the clerk, and another day or days, at an interval of one week at the least respectively, on which objections in reference to such assessment shall be heard by the commissioners; and notice to each party intended to be so assessed, stating the particulars of the intended assessment as regards such party, and specifying the several days fixed by the commissioners as aforesaid, shall be sent by the clerk through the post office at least two weeks preceding the day which may be fixed for hearing the objection of parties; and the commissioners may rectify or alter any assessment as regards any person assessed or liable to be assessed therefor, by whom an objection may be taken by letter to the clerk, lodged with him on or before such day for lodging objections as the commissioners shall have fixed as aforesaid: provided, that it shall be lawful for any person considering himself aggrieved by any assessment to appeal from the decision of the commissioners to the assistant barrister at the general or quarter sessions for the division, who shall hear and determine such appeal, and make such order thereupon, and as to the costs thereof, as shall be just, and such determination upon such appeal shall be final.

And with respect to the accounts to be kept by the commissioners, be it enacted as follows:

LXVIII. So much of "The Commissioners Clauses Act, 1847," as relates to the accounts to be kept by the commissioners shall be incorporated with and form part of this Act; provided that the appeal thereby directed shall, in towns adopting the provisions of this Act, be brought before the court of the assistant barrister, who shall hear and determine the same, and make such order in respect thereof, and of the costs thereby incurred, as shall be just, and such determination shall be final.

And with respect to the borrowing of money for the purposes of this Act, be it enacted as follows:

LXIX. It shall be lawful for the commissioners, with the approval of the Lord Lieutenant signified in writing by the chief secretary or under secretary, to borrow, for the purpose of procuring or erecting a slaughter-house, or for erecting lamps, or for constructing common sewers, or for procuring or supplying water or gas, or fire engines, or for any of the purposes authorized by this Act, such sums and

at such times, as the commissioners shall deem necessary for such purposes; provided, that in all cases where it shall be necessary to borrow any sum or sums for the purposes of this Act, it shall be lawful for the commissioners and they are hereby required, at their first annual meeting for assessment after such borrowing, to assess all persons within the town liable in assessment under this Act in such additional assessment as will produce a fund equal to five *per centum per annum* upon the sum or sums so borrowed, and also to the annual interest of such borrowed sum or sums, which sum of five *per centum per annum* the commissioners shall annually appropriate and invest, at the highest rate of interest which can be had for the same, in the public funds, or in the stock of the Governor and Company of the Bank of *England* or *Ireland*, as a sinking fund, applicable and to be applied by the commissioners to the repayment of the money borrowed, until the debt shall be extinguished; provided that such additional assessment shall at no time increase the whole assessment leviable beyond the maximum rate of assessment of one shilling and sixpence in the pound allowed by this Act; and provided also, that no sum of money shall be borrowed until an estimate of the amount required shall have been laid before the commissioners, and until the expiration of six weeks after public notice shall have been given by the commissioners of the amount so proposed to be borrowed, and the purpose to which the same is to be applied, in some newspaper in circulation within such town; and provided also, that the proposal to borrow shall be disposed of at the next meeting of the commissioners six weeks after such public notice, and that the sum borrowed shall not exceed the amount so advertised without a further estimate and notice in manner above provided; and no commissioner or officer acting under them shall be personally liable for the repayment of any money so borrowed, but all such obligations shall be deemed and taken to be granted on the sole security of the rates and assessments authorized to be assessed, and levied as herein-before provided; and, save as above provided, so much of "The Commissioners Clauses Act, 1847," as relates to mortgages to be executed by the commissioners shall be incorporated with and form part of this Act.

And with respect to the regulation of towns, and to obstructions and nuisances in the streets, and to the suppression of vagrants and beggars, be it enacted as follows:

LXX. The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets of the town in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed, and may also give directions to the constables and officers of the constabulary force for keeping order and preventing any obstruction of the streets in the neighbourhood of theatres and other places of public resort; and every wilful breach of any such order shall be deemed an offence against this Act, and every person committing any such offence shall be liable to a penalty not exceeding forty shillings.

LXXI. If any cattle be at any time found at large in any street of the town without any person having the charge thereof, any constable or officer of constabulary, or any person residing within the town, may seize and impound such cattle, and may detain the same until the owner thereof pay to the commissioners a penalty not exceeding twenty shillings besides the reasonable expenses of impounding and keeping such cattle; and if the said penalty and expenses be not paid within three days after such impounding, the person appointed by the commissioners for that purpose may proceed to sell such cattle, or cause the same to be sold; but previous to such sale, then three days' notice of such intended sale shall be given by posting such notice on the constabulary barrack, pound, and other place (if any) which may be appointed by the commissioners for that purpose, and the money arising from such sale, after deducting the said sums, and the expenses aforesaid, and all other expenses attending the impounding, keeping, and sale of any such cattle so impounded, shall be paid to the commissioners, and shall be by them paid, on demand, to the owner of the cattle so sold.

LXXII. Every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences shall be liable to a penalty for each offence as herein-after mentioned; and any constable or other officer appointed by virtue of this Act shall take into custody, without warrant, and forthwith convey before a justice or justices, any person who within his view commits any such offence; (that is to say,)

Every person who exposes for show, hire, or sale (except in a market or market place or fair lawfully appointed for that purpose) any horse or other animal; or exhibits in a caravan or otherwise any show or public entertainment; or shoes, bleeds, or farries any horse or animals (except in cases of accident); or cleans, dresses, trains, or breaks, or turns loose any horse or animal; or makes or repairs any part of any cart or carriage (except in cases of accident, where repair on the spot is necessary), shall be liable to a fine not exceeding ten shillings:

Every person who suffers to be at large any unmuzzled ferocious dog, or sets on or urges any dog or other animal to attack, worry, or put in fear any person or animal, shall be liable to a fine not exceeding ten shillings:

Every owner of any dog who suffers such dog to go at large, knowing, or having reasonable ground for believing, it to be in a rabid state, or to have been bitten by any dog or other animal in a rabid state, shall be liable to a fine not exceeding ten shillings:

Every person who, after public notice given by any justice or justices at petty sessions, chief magistrate, or chairman of commissioners, directing dogs to be confined on account of suspicion of canine madness, suffers any dog to be at large during the time specified in such notice, shall be liable to a fine not exceeding ten shillings:

Every person who slaughters or dresses any cattle, or any part thereof, except in the case of

any cattle over-driven which may have met with any accident, and which, for the public safety or other reasonable cause, ought to be killed on the spot, shall be liable to a fine not exceeding ten shillings:

Every person having the care of any waggon, cart, or carriage, who rides on the shafts thereof; or who, without having reins, and holding the same, rides upon such waggon, cart, or carriage, or any animal drawing the same; or who is at such a distance from such waggon, cart, or carriage, as not to have due control over every animal drawing the same; or who does not, in meeting any other carriage, keep his waggon, cart, or carriage, to the left or near side, or who, in passing any other carriage, does not keep his waggon, cart, or carriage, on the right or off side of the road (except in cases of actual necessity, or some sufficient reason for deviation); or who, by obstructing the street, wilfully prevents any person or carriage from passing him, or any waggon, cart, or carriage under his care, shall be liable to a fine not exceeding ten shillings:

Every person who at one time drives more than two carts or waggons, and every person driving two carts or waggons who has not the halter of the horse in the last cart or waggon securely fastened to the back of the first cart or waggon, or has such halter of a greater length from such fastening to the horse's head than four feet, shall be liable to a fine not exceeding ten shillings:

Every person who rides or drives furiously any horse or carriage, or drives furiously any cattle, shall be liable to a fine not exceeding twenty shillings:

Every person who causes any public carriage, sledge, truck, or barrow, with or without horses, or any beast of burden, to stand longer than is necessary for loading or unloading goods, or for taking up or setting down passengers (except hackney carriages, and horses and other beasts of draught or burden, standing for hire in any place appointed for that purpose by the commissioners or other lawful authority); and every person who, by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath or other public thoroughfare, shall be liable to a fine not exceeding twenty shillings:

Every person who causes any tree or timber, or iron beam, to be drawn in or upon any carriage, without having sufficient means of safely guiding the same, shall be liable to a fine not exceeding twenty shillings:

Every person who leads or rides any horse or other animal, or draws or drives any cart or carriage, sledge, truck, or barrow, upon any footway of any street, or fastens any horse or other animal so that it stands across or upon any footway, shall be liable to a fine not exceeding twenty shillings:

Every person who places or leaves any furniture,

goods, wares, or merchandise, or any cask, tub, basket, pail, or bucket, or places or uses any standing-place, stool, bench, stall, or show-board on any footway, or who places any blind, shade, covering, awning, or other projection over and along any such footway, unless such blind, shade, covering, awning, or other projection is eight feet in height at least in every part thereof from the ground, shall be liable to a fine not exceeding twenty shillings :

Every person who places, hangs up, or otherwise exposes for sale any goods, wares, merchandise, matter, or thing whatsoever, so that the same projects into or over any footway, or beyond the line of any house, shop, or building at which the same are so exposed, so as to obstruct or incommode the passage of any person over or along such footway, shall be liable to a fine not exceeding twenty shillings :

Every person who rolls or carries any cask, tub, hoop, or wheel, or any ladder, plank, pole, timber, or log of wood, upon any footway, except for the purpose of loading or unloading any cart or carriage, or of crossing the footway, shall be liable to a fine not exceeding twenty shillings :

Every person who places any line, cord, or pole across any street, or hangs or places any clothes thereon, shall be liable to a fine not exceeding twenty shillings :

Every common prostitute or nightwalker loitering and importuning passengers for the purpose of prostitution, or being otherwise offensive, shall be liable to a fine not exceeding forty shillings :

Every person who wilfully and indecently exposes his person, or who commits any act contrary to public decency, shall be liable to a fine not exceeding forty shillings :

Every person who publicly offers for sale or distribution, or exhibits to public view, any profane, indecent, or obscene book, paper, print, drawing, painting, or representation, or sings any profane or obscene song or ballad, shall be liable to a fine not exceeding forty shillings :

Every person who wantonly discharges any firearm, or throws or discharges any stone or other missile, or makes any bonfire, or throws or sets fire to any firework, shall be liable to a fine not exceeding ten shillings :

Every person who wilfully and wantonly disturbs any inhabitant, by pulling or ringing any door bell, or knocking at any door, or who wilfully and unlawfully extinguishes the light of any lamp, shall be liable to a fine not exceeding forty shillings :

Every person who flies any kite, or who makes or uses any slide upon ice or snow, shall be liable to a fine not exceeding ten shillings :

Every person who cleanses, hoops, fires, washes, or scalds any cask or tub, or hews, saws, bores, or cuts any timber or stone, or slacks, sifts, or screens any lime, shall be liable to a fine not exceeding ten shillings :

Every person who throws or lays down any stones, coals, slate, shells, lime, bricks, timber, iron, or other materials, (except building materials so enclosed as to prevent mischief to passengers,) shall be liable to a fine not exceeding ten shillings :

Every person who beats or shakes any carpet, rug, or mat (except rugs or mats beaten or shaken before the hour of nine in the morning), shall be liable to a fine not exceeding ten shillings :

Every person who fixes or places any flower pot or box, or other heavy article, in any upper window, without sufficiently guarding the same against being blown down, shall be liable to a fine not exceeding ten shillings :

Every person who throws from the roof or any part of any house or other building any slate, brick, wood, rubbish, or other thing, except snow thrown as not to fall on any passenger shall be liable to a fine not exceeding ten shillings :

Every person who leaves open any vault or cellar, or the entrance from any street to any cellar or room underground, without a sufficient fence or handrail; or leaves defective the door, window, or other covering of any vault, area, or cellar, or who does not sufficiently fence any area, pit, or sewer left open; or who leaves such open area, pit, or sewer without a sufficient light after sunset to warn and prevent persons from falling thereinto, shall be liable to a fine not exceeding ten shillings :

Every person who throws or lays any dirt, dung, litter, or ashes, or nightsoil, or any carrion, fish, offal, or rubbish, on any street, or sea beach, or strand within the boundaries of a town, or cause any offensive matter to run from any manufactory, brewery, slaughterhouse, butcher's shop, or dunghill, into any street: provided always, that it shall not be deemed an offence to lay sand or other materials in any street in time of frost to prevent accidents, or litter or other suitable materials to prevent the freezing of water in pipes, or in case of sickness to prevent noise, if the party laying any such things causes them to be removed as the occasion for them ceases, shall be liable to a fine not exceeding ten shillings :

Every person who keeps any pigstye to the front of any street, not being shut out from such street by a sufficient wall or fence, or who keeps any swine in or near any street, so as to be a common nuisance, shall be liable to a fine not exceeding forty shillings :

Every person drunk in any street, or guilty of any riotous or indecent behaviour in any street, police office, or petty sessions court, or any police station house within the town, shall be liable to a penalty not exceeding forty shillings for every such offence, or, in the discretion of the justice or justices before whom he is convicted, to imprisonment for a period not exceeding seven days.

LXXIII. The commissioners may provide such

engines for extinguishing fire, and such appurtenances for such engines, and such fire escapes and other implements for safety or use, in case of fire, and keep or hire such horses for drawing such engines as they think fit, and employ a proper number of persons to act as firemen, and make such rules for their regulation as they think proper, and give such firemen and other persons such salaries and such rewards for their exertions in cases of fire as they think fit; and the commissioners may send such engines, and the said firemen, beyond the boundaries of the town, for extinguishing fire in the neighbourhood of the town, and the owner of the premises shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the commissioners a reasonable charge for the use of such engines, and for the attendance of such firemen; and the amount of the said expenses and charges, as well as the propriety of sending the said engines and firemen as aforesaid for extinguishing such fire (if the propriety thereof be disputed), shall be determined by the justices at petty sessions, whose decision shall be final; and the amount of the said expenses and charges shall be recovered by the commissioners as damages.

And with respect to places of public resort, be it enacted as follows:

LXXIV. Every victualler, or keeper of any public house, or person licensed to sell fermented or distilled liquors by retail, to be drunk or consumed on the premises, within the town, who harbours or entertains in his public house or place wherein he carries on his business any constable during any part of the time for his being on duty, unless for the purpose of quelling any disturbance or restoring order, shall for every such offence be liable to a penalty not exceeding twenty shillings; and every person keeping any place of public resort within the town for the sale or consumption of refreshments of any kind, who knowingly suffers common prostitutes or reputed thieves to assemble and continue in his premises, shall for every such offence be liable to a penalty not exceeding five pounds.

LXXV. Every person who within the town keeps or acts in the management of any house or place for the purpose of fighting, baiting, or worrying any animals, shall be liable to a penalty of not more than five pounds, or, in the discretion of the magistrate before whom he is convicted, to imprisonment, with or without hard labour, for a time not exceeding one month; and the commissioners may, by order in writing, authorize the officer of police, with such constables as he thinks necessary, to enter any premises kept or used for any of the purposes aforesaid, and take into custody all persons found therein without lawful excuse, and every person so found shall be liable to a penalty not exceeding five shillings; and a conviction of this offence shall not exempt the owner, keeper, or manager of any such house, room, pit, or place from any penal consequence to which he is liable for the nuisance thereby occasioned.

LXXVI. And be it enacted, That all thimblers, loaded dice players, and other swindlers of that or any similar description, who shall be found in possession of implements or articles for practising

games of hazard, or who shall exhibit such implements or articles in order to induce, or who shall induce, any person to play at any game of hazard, or who by any fraudulent art or device shall cozen, cheat, or attempt to cozen or cheat any person, may be convicted before a justice on the testimony of one or more witness or witnesses; and on conviction shall be imprisoned for any term not exceeding thirty days; and shall also at the same time be sentenced to repay any money or restore any property which they may have obtained by means of any such offence, and failing such payment or restoration may under the same procedure be committed to or detained in prison for any further term not exceeding thirty days.

(To be continued.)

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DUBLIN, FEBRUARY 24, 1855.

WHILE reforms in courts of original jurisdiction have been carried out at frequently recurring periods during the last 150 years, comparatively little was done till the present century towards the constitution and regulation of adequate tribunals of appeal.

So far as the Courts of Common Law are concerned, the suitors have, in both countries, the advantage of an intermediate court of appeal, the judgment of which, if tolerably unanimous, ought reasonably to satisfy the vanquished party, and lead him, in general, to acquiesce.

The Equity suitor in England did not, however, till very recently, enjoy this great advantage; and with us, up to the present moment, the party dissatisfied with the decree of the Chancellor, has no resort but the ultimate appeal to the House of Lords.

It is certainly a great anomaly in our legal procedure that whilst, in the Common Law Courts, a judge sitting *solus* will, except in matters of very trivial moment, refuse to adjudicate upon the rights of the parties, and even then subject to an appeal to the full court, the gravest questions of Equity are argued and decided before a single judge. In England it is quite different, for there causes are usually heard before the Master of the Rolls or a

Vice Chancellor in the first instance, and then may be reheard on appeal before the Lord Chancellor and the Lords Justices of appeal.

In the construction of the Incumbered Estates Court the Legislature very wisely provided a local Court of Appeal of a satisfactory nature, the decisions of which, when viewed apart from those legal fictions which attribute a quasi infallibility to the highest tribunal of the realm, are likely to be as sound and just as the fallibility of all human tribunals warrants us to expect.

Once divested of the halo which encompass its venerable presence, we can imagine no more unsatisfactory Court of Appeal in Equity than the House of Peers. The very form and construction of the house, however well adapted to a deliberative assembly, assuredly is inappropriate to a Court of Justice, and is calculated seriously to embarrass the management of the cause. The very bar at which the counsel must stand to address the house, affords a position better suited for a criminal or a suppliant, than for one demanding justice for his client. Even for Common Law appeals, in which their lordships are assisted by eminent judicial assessors, the House of Lords barely meets the requirements of the age. We do not, however, wish to oust the jurisdiction of that House in Irish appeals, although it is capable of a considerable reform in this part of its administration. What we do desire is, that a new intermediate tri-

bunal of appeal from the Court of Chancery in Ireland, should be constructed to sit in Ireland, consist of Irish Lawyers, and by their intimate knowledge of our Equity jurisprudence and general learning and intelligence, so to clear up the matter in dispute, as to render the further prosecution of ruinous litigation unreasonable and futile.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 80.)

And with respect to public bathing, be it enacted as follows :

LXXVII. Where any part of the sea-shore or strand of any river used as a public bathing-place is within the town, the commissioners may make byelaws for the following purposes; (that is to say,)

For fixing the stands of bathing machines on the sea-shore or strand, and the limits within which persons of each sex shall be set down for bathing, and within which persons shall bathe:

For regulating the occupation of such stands of bathing machines, and apportioning the same temporarily among the owners of such machines for the time :

For preventing any indecent exposure of the persons of the bathers :

For regulating the manner in which and the times at which the bathing machines shall be used, and the charges to be made for the same :

For ensuring that the bathing machines shall be kept in a proper state of repair :

For regulating the distance at which boats and vessels let to hire for the purpose of sailing or rowing for pleasure shall be kept from persons bathing within such prescribed limits.

And with respect to hackney carriages, be it enacted as follows :

LXXVIII. Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within four miles from the post office of the town, and every carriage standing upon any street within such distance, having thereon any numbered plate required by this Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act; and in all proceedings at law or otherwise the term "hackney carriage" shall be sufficient to describe any such carriage: provided that no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having thereon the proper numbered plates required by law to be placed on such stage coaches, shall be deemed to be a hackney carriage within the meaning of this Act.

LXXIX. The commissioners shall from time to time license to ply for hire, within such prescribed distance, such hackney coaches or carriages, of any kind or description adapted to the carriage of per-

sons, as shall be necessary; and for every such licence there shall be paid to the clerk, or other person appointed by them to receive the same, such sum as the commissioners direct, not exceeding five shillings: provided that before any such licence is granted, a requisition for the same, in such form as the commissioners may provide for that purpose, shall be made and signed by the proprietor or one of the proprietors of the hackney carriage in respect of which such licence is applied for, and in every such requisition shall be truly stated the name and surname and place of abode of the person applying for such licence and of every proprietor or part proprietor of such carriage; and any person who, on applying for such licence, states in such requisition the name of any person who is not a proprietor or part proprietor of such carriage, and also any person who wilfully omits to specify truly in such requisition as aforesaid the name of any person who is a proprietor or part proprietor of such carriage, shall be liable to a penalty not exceeding five pounds.

LXXX. In every such licence shall be specified the name and place of abode of every person who is a proprietor or part proprietor of the hackney carriage in respect of which such licence is granted, and also the number of such licence which shall correspond with the number to be painted or marked on the plates or marks to be fixed on such carriage, together with such other particulars as the commissioners think fit; and every licence so to be granted shall be signed by two or more of the commissioners, and shall not include more than one carriage so licensed, and shall be in force from one year only from the day and the date of such licence, or until the next general licensing meeting, in case any general licensing day be appointed by the commissioners; and every such licence shall be made out by the clerk of the commissioners, and duly entered in a book to be provided by him for that purpose, and in such book shall be contained columns or places for entries to be made of every offence committed by any proprietor or driver or person attending such carriage; and any person may at any reasonable time inspect such book without fee or reward; and if the proprietor or part proprietor of any carriage permits the same to be used as a hackney carriage plying for hire within such prescribed distance without having obtained a licence for such carriage, or during the time that such licence is suspended as herein-after provided, or if any person be found driving, standing, or plying for hire with any carriage within such prescribed distance for which such licence ought to be, but has not been, previously obtained, or without having the number of such carriage openly displayed on such carriage, every person so offending shall for every such offence be liable to a penalty not exceeding forty shillings.

LXXXI. So often as any person named in any such licence as the proprietor or one of the proprietors changes his place of abode, he shall, within seven days next after such change, give notice thereof in writing, signed by him, to the commissioners, specifying in such notice his new place of abode; and he shall at the same time produce

such licence at the office of the commissioners, who shall, by their clerk, or some other officer, endorse thereon and sign a memorandum specifying the particulars of such change; and any person named in any such licence as the proprietor or one of the proprietors of any hackney carriage, who changes his place of abode, and neglects or wilfully omits to give notice of such change, or to produce such licence in order that such memorandum as aforesaid may be endorsed thereon, as directed by this Act, shall be liable to a penalty not exceeding forty shillings.

LXXXII. No person shall act as driver of any hackney carriage licenced in pursuance of this Act, without first obtaining a licence from the commissioners, which licence shall be registered by the clerk to the commissioners, and a fee of one shilling shall be paid for the same; and every such licence shall be in force until the same is revoked, except during the time that the same may be suspended as after mentioned; and if any person acts as such driver without having obtained such licence, or during the time that his licence is suspended, or if he lend or part with such licence, except to the proprietor of the hackney carriage, or if the proprietor of any hackney carriage employ any person as the driver thereof who has not obtained such licence, or during the time that his licence is suspended as herein-after provided, every such driver and every such proprietor shall for every such offence respectively be liable to a penalty not exceeding twenty shillings; and the commissioners may, upon the conviction for the second time of the proprietor or driver of any hackney carriage for any offence under the provisions of this Act with respect to hackney carriages, or any byelaw made in pursuance thereof, suspend or revoke, as they deem right, the licence of any such proprietor or driver.

LXXXIII. No hackney carriage shall stand or ply for hire within such prescribed distance, unless the number of persons to be carried by such hackney carriage, in words at length, and in form following, (that is to say) "To carry persons" be printed on some conspicuous place on the outside of such carriage, in legible letters, so as to be clearly distinguishable from the ground whereon the same are painted; and the driver of any hackney carriage shall not be required to carry a greater number of persons than the number painted thereon, and if the proprietor of any hackney carriage permit the same to be used, or if any person stand or ply for hire with such carriage, without having the number of persons to be carried thereby painted in manner aforesaid, or if the driver of any hackney carriage refuse, when required by the hirer thereof, to carry in or by such hackney carriage such number of persons, or any less number, every proprietor or driver so offending shall be liable to a penalty not exceeding forty shillings; and any driver of a hackney carriage standing at any of the stands for hackney carriages, or in any street, who refuses or neglects, without reasonable excuse, to drive such carriage to any place within such prescribed distance, or any distance to be appointed by any byelaw of the commissioners, to which he is

directed to drive by the person hiring or wishing to hire such carriage, shall for every such offence be liable to a penalty not exceeding forty shillings.

LXXXIV. If the proprietor or driver of any hackney carriage agree beforehand with any person to take for any job a sum less than the fare allowed by this Act, or any byelaw made thereunder, such proprietor or driver shall be liable to a penalty not exceeding forty shillings if he exact or demand for such job more than the fare so agreed upon; and no agreement whatever made with the driver, or with any person having the care of any hackney carriage, for the payment of more than the fare allowed by any byelaw made under this Act, shall be binding on the person making the same, and any such person may, notwithstanding such agreement, refuse to pay any sum beyond the fare allowed; and if any person actually pay to the driver of any hackney carriage any sum exceeding the fare to which such driver was entitled, the person paying the same shall be entitled, on complaint made against such driver before a justice, to recover back the sum paid beyond the proper fare, and moreover such driver shall be liable to a penalty for such exaction not exceeding the sum of forty shillings; and in default of the repayment by such driver of such excess, or of payment of the said penalty, the justice shall forthwith commit such driver to prison, there to remain for any time not exceeding one month, unless the said excess of fare and the said penalty be sooner paid; and every proprietor or driver of any hackney carriage who is convicted of taking as a fare a greater sum than is authorized by any byelaw made under this Act shall be liable to a penalty not exceeding forty shillings, and such penalty may be recovered before a justice; and in the conviction of such proprietor or driver an order may be included for payment of the sum so overcharged, over and above the penalty and costs, and such overcharge shall be returned to the party aggrieved, whose evidence shall be admissible in proof of such offence.

LXXXV. If the driver or any other person having the care of any hackney carriage be intoxicated while driving, or if any such driver or other person by wanton and furious driving, or by any other wilful misconduct, injure or endanger any person in his life, limbs, or property, he shall be liable to a penalty not exceeding five pounds, and in default of payment thereof the justice before whom he is convicted of such offence may commit him to prison, there to remain for any time not exceeding two months; and any driver of any hackney carriage who suffers the same to stand for hire across any street or alongside of any other hackney carriage, or who refuses to give way, if he conveniently can, to any other carriage, or who obstructs or hinders the driver of any other carriage in taking up or setting down any person into or from such other carriage, or who wrongfully in a forcible manner prevents or endeavours to prevent the driver of any other hackney carriage from being hired, shall be liable to a penalty not exceeding twenty shillings; and in every case in which any hurt or damage has been caused to any person or property as aforesaid by the driver of any carriage let to hire, the justice

before whom such driver has been convicted may direct that the proprietor of such carriage shall pay such sum not exceeding five pounds as appears to such justice a reasonable compensation for such hurt or damage; and every proprietor who pays any such compensation as aforesaid may recover the same from the driver; and such compensation shall be recoverable from such proprietor, and by him from such driver, as damages.

LXXXVI. If the driver of any hackney carriage leave it in any street, or at any place of public resort or entertainment, without some one proper to take care of it, any constable may drive away such hackney carriage, and deposit it at some neighbouring livery stable or other place of safe custody; and such driver shall be liable to a penalty not exceeding twenty shillings for such offence; and in default of payment of the said penalty upon conviction, and of the expenses of taking and keeping the said hackney carriage and horse or horses, the same, or any of them, shall be sold by order of the justice before whom such conviction is made; and after deducting from the produce of such sale the amount of the said penalty, and of all costs and expenses, as well of the proceedings before such justice as of the taking, keeping, and sale of such hackney carriage, and of such horse or horses, the surplus (if any) of the said produce shall be paid to the proprietor of such hackney carriage.

LXXXVII. If any person refuse to pay, on demand, to any proprietor or driver of any hackney carriage, the fare allowed by any byelaw made under this Act, such fare may, together with costs, be recovered before a justice as a penalty; and any person using any hackney carriage plying under a licence granted by virtue of this Act who wilfully injures the same shall for every such offence be liable to a penalty not exceeding five pounds, and shall also pay to the proprietor of such hackney carriage reasonable satisfaction for the damage sustained by the same; and such satisfaction shall be ascertained by the justice before whom the conviction takes place, and shall be recovered by the same means as the penalty.

LXXXVIII. The commissioners may from time to time (subject to the restrictions of this Act) make byelaws for all or any of the purposes following; (that is to say,)

For regulating the conduct of the proprietors and drivers of hackney carriages plying within such prescribed distance in their several employments, and for regulating the conduct of the owners and boatmen of boats plying for hire, and determining whether such drivers and boatmen shall wear any and what badges, and for regulating the hours within which they may exercise their calling:

For regulating the manner in which the number of each carriage, corresponding with the number of its licence, shall be displayed:

For regulating the number of persons to be carried by hackney carriages and boats, and in what manner such number is to be shown on such carriage and boats, and what number of horses or other animals is to draw such carriage, and the placing of check-strings to the

carriages, and the holding of the same by the driver, and how hackney carriages and boats are to be furnished or provided:

For fixing the stands of hackney carriages, and the distance to which they may be compelled to take passengers, not exceeding such prescribed distance:

For fixing the rates or fares, as well for time as distance, to be paid for hackney carriages and boats plying for hire for the carriage of passengers within such prescribed distance, and for securing the due publication of such fares:

For securing the safe custody and re-delivery of any property accidentally left in hackney carriages and boats, and for fixing the charges to be made in respect thereof:

For licensing porters, and regulating their fares.

LXXXIX. It shall be lawful for the Lord Lieutenant of *Ireland*, on the application of the said commissioners, to increase the constabulary force stationed in such town to act as watchmen within such town by night, and also, upon any special occasions, by day, as they may be required by the commissioners, or any three of them; and the said commissioners shall provide a watch-house and all necessary articles for such watching, and pay out of the general assessments, upon the certificate of the receiver for the constabulary force in *Ireland*, such proper salaries and wages for such additional constables as shall be fixed by the said Lord Lieutenant; and it shall be lawful for such constables and all other constables to apprehend all such idle and disorderly or drunken persons as they or any of them shall find committing any breach of the peace or making any improper noise or disturbance during the night, or during their watch, and to detain any such persons till morning, and then, or if apprehended by day, as soon as conveniently may be, to take such person or persons before any justice of the peace for or acting in the borough, town, or place, to be dealt with according to law; and if any victualler, publican, or other person or persons selling beer or spirituous liquors shall entertain or harbour in his, her, or their house any such constable during his appointed hours of duty, such victualler, publican, or other person or persons shall forfeit for such offence any sum not exceeding twenty shillings.

And with respect to legal proceedings, be it enacted as follows:

XC. In all cases in which the amount of any damages, costs, and expenses is by this Act directed to be ascertained or recovered in a summary manner, the same may be ascertained by and recovered before one or more justices, together with such costs of the proceedings as the said justice or justices may think proper; and if the sums adjudged be not paid by the party against whom the adjudication is made, the same may be levied by distress and sale of his goods and chattels by warrant under the hand and seal of the said justice or justices making the adjudication; and any penalty imposed by or under the authority of this Act, or any byelaw made under this Act, the recovery whereof is not otherwise expressly provided for, may, upon proof on oath of the offence in respect of which the

penalty is alleged to have been incurred, be recovered before one or more justices, together with such costs of the proceedings as they may think proper; and if the sums adjudged be not paid by the party against whom the adjudication is made the same may be levied by distress and sale of his goods and chattels by warrant under the hands and seals of the said justice or justices making the adjudication; and such justice or justices may order that any offender convicted as last aforesaid be detained and kept in safe custody until return can be conveniently made to the last-mentioned warrant, unless he give security, by way of recognizance or otherwise, for his appearance on the day appointed by the return, such day not being more than eight days from the time of taking the security; and if before issuing such warrant, or upon the return thereof, it appear to the satisfaction of the last-mentioned justice or justices that no sufficient distress can be had within their jurisdiction, such justice or justices may, by warrant under their hands and seals, cause the offender to be committed to gaol, there to remain, without bail, for any term not exceeding three months, unless such penalty and costs be sooner paid.

XCI. In proceeding before any justice or justices under the provisions of this Act, in any case in which the mode of proceeding is not specially prescribed, any one justice may summon the party charged to appear before the justice or justices by whom the matter is to be determined, at a time and place to be named; and upon the appearance of the party charged, or in his absence upon proof of service of the summons upon him personally, or by leaving a copy thereof at his last known place of abode or business, the last-mentioned justice or justices may hear and determine the matter, and for that purpose examine the parties or any of them, and their witnesses, on oath; and the costs of all such proceedings shall be in the discretion of the last-mentioned justice or justices; and where in this Act any sum of money whatsoever is directed to be levied by distress and sale of the goods and chattels of any party, the overplus arising from such sale shall, after satisfying such sum, and the costs and expenses of the distress and sale, be returned to him, on demand; and no distress levied under the authority of this Act shall be unlawful, nor shall any party making the same be a trespasser, on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceeding relating thereto, nor shall he be a trespasser *ab initio* on account of any irregularity afterward committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction in an action upon the case; and the justices before whom any person is convicted of any offence against the provisions of this Act may cause the conviction to be drawn up according to the form and directions contained in the schedule (C.) annexed to this Act, or to the like effect; and any conviction so drawn up shall be valid and effectual; and justices of the peace, being commissioners or liable to assessment under this Act, may, if acting in petty sessions, notwithstanding their being such commissioners, exercise the jurisdiction

vested in them as such justices under this Act. Every person who, upon any examination upon oath under the provisions of this Act, shall wilfully give false evidence, shall be liable to punishment for perjury.

XCII. No proceedings for the recovery of any penalty incurred under the provisions of this Act shall be taken by any person other than by a party grieved, or the commissioners, without the consent in writing of her Majesty's Attorney-general first had and obtained; and no such penalty shall be recovered unless proceedings for the recovery thereof shall have been commenced within six calendar months after the commission or occurrence of the offence upon which the penalty attaches; and one half of such penalty shall go to the informer, and the remainder to the commissioners; and if the commissioners be the informers they shall be entitled to the whole of the penalty recovered; and all penalties or sums recovered on account of any penalty by them shall be paid over to the treasurer, and shall be placed to the credit of the general assessments fund for the purposes of this Act, any Act or Acts to the contrary notwithstanding, and notwithstanding the liability of any person to any penalty under the provisions of this Act, he shall not be relieved from any other liability to which he would have been subject if this Act had not been passed.

XCIII. Any person who shall think himself aggrieved by any order, conviction, judgment, or determination of, or by any matter or thing done by, any justice or justices, under the provisions of this Act, in any case in which the penalty imposed or the sum adjudged shall exceed the sum of twenty shillings, may appeal to the court of general or quarter sessions for the respective division or place holden next after the accrual of the cause of complaint; but the appellant shall not be heard in support of the appeal, unless within fourteen days after the accrual of the cause of complaint he give to the clerk of the commissioners and to the justice or justices by whose act he may think himself aggrieved notice in writing stating his intention to bring such appeal, together with a statement in writing of the grounds of appeal; and the said court, upon hearing and finally determining the matter of the appeal, shall and may, according to its discretion, award such costs to the party appealing or appealed against as they shall think proper, and its determination shall be conclusive and binding on all persons to all intents and purposes whatsoever; provided that, if there be not time to give such notice before such sessions holden as aforesaid, then such appeal may be made to and such notice and statement given for the next sessions for the respective division or place at which the appeal can be heard: provided also, that on the hearing of the appeal no grounds of appeal shall be gone into or entertained other than those set forth in such statement as aforesaid.

XCIV. The commissioners may sue and be sued in the name of the clerk for the time being for or concerning any contract, matter, or thing relating to any property, works, or things vested in them by reason of the provisions of this Act, or relating

to any matter or things whatsoever entered into or done by them under the provisions of this Act; and in proceedings by or on the part of such commissioners against any person for stealing or wilfully injuring or otherwise improperly dealing with any property, works, or things belonging to them or under their management, it shall be sufficient to state generally that the property or thing in respect of which the proceeding is instituted is the property of the said clerk, and all legal proceedings by or on the part of or against such commissioners under this Act may be preferred, instituted, and carried on in his name; and no proceedings whatever shall abate or be discontinued by the death, resignation, or removal of the clerk, or by reason of any change or vacancy in such commissioners, by death, resignation, or otherwise: provided, that the clerk in whose name any such action, or suit, complaint, information, or proceeding may be brought, preferred, instituted, or defended as aforesaid, shall be fully reimbursed out of the general assessments to be levied under this Act all such costs, damages, and expenses as he shall or may be or become liable to pay, sustain, or be put unto by reason of his name being so used.

XCV. No writ of summons and plaint shall be sued out against or served upon the commissioners or any of them, or their clerk, or other officer or person whomsoever acting under the direction of the commissioners, for anything done or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing shall have been delivered to him, or left at their or his office or usual place of abode, stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the last-mentioned notice; and unless such notice be proved, the jury shall find for the defendant; and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and not afterwards, and shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere; and it shall be a sufficient defence for the defendant to allege that he did what is complained of under the provisions of this Act, and to give this Act, and all special matter in evidence thereunder; and any person to whom any such notice of action is given as aforesaid may tender amends to the plaintiff, his attorney or agent, at any time within one month after service of such notice, and in case the same be not accepted may plead such tender as a defence, and if upon issue joined the jury find generally for the defendant, or if the plaintiff be nonsuited or discontinued, or if judgment be given for the defendant, then the defendant shall be entitled to full costs of suit, and have judgment accordingly.

XCVI. No rate nor any proceeding to be had touching the conviction of any offender against this Act, nor any order, award, or other matter or thing whatsoever, made, done, or transacted in or relating to the execution of this Act, shall be vacated, quashed, or set aside for want of form, or

be removed or removable by certiorari or other writ or process whatsoever into any of the superior courts.

XCVII. No matter or thing done or contract entered into by the commissioners, nor any matter or thing done by any commissioner, or by any officer or person whomsoever acting under the direction of the commissioners, shall, if the matter or thing were done, or the contract were entered into *bona fide* for the purpose of executing this Act, subject them or any of them personally to any action liability, claim, or demand whatsoever; and any expense incurred by any such commissioner, officer, or person acting as last aforesaid shall be borne and repaid out of the general assessments levied under the authority of this Act.

XCVIII. When this Act shall be adopted in whole or in part in any town which had previously adopted it in whole or in part, the powers and provisions of the said Act of the ninth year of King George the Fourth, chapter eighty-two, or in any town or place which had previously possessed a local Act or Acts aforesaid, all bonds, contracts, covenants, agreements, and securities made and entered into, and all assessments imposed or to be imposed under and by virtue of such first-mentioned Acts or of such local Act or Acts, in so far as regards anything done under such Acts or any of them previous to the adoption of this Act, shall remain in full force and effect, and shall continue available and binding on all concerned; and nothing herein contained shall be construed to affect the debts, rights, or claims of any creditor under such local Act or Acts; and the officers appointed under and employed on the first of *January*, 1854, in the execution of such first-mentioned Act and of such local Act or Acts, shall continue to be employed under the provisions of this Act so far as possible in offices of an analogous nature, until they are respectively superseded or removed for insufficiency or for other good or sufficient cause.

XCIX. That the Public Libraries Act, 1850, and an Act passed in a session held in the sixteenth and seventeenth years of the reign of her present Majesty, intituled *An Act to extend the Public Libraries Act, 1850, to Ireland and Scotland*, shall be incorporated with and read as part of this Act, and the chairman of the town commissioners for the time being shall exercise the powers and perform the functions appointed by the said recited Acts to be exercised and performed by the mayor, and the town commissioners shall have the powers thereby conferred on town councils; and the parties entitled to vote under said Act shall in *Ireland* be the parties entitled to vote at the meeting convened for the adoption of this Act, as herein-before provided; and the commissioners, when such Acts for the establishment of libraries shall be adopted, shall have the general management, regulation, and control of such libraries, and may from time to time purchase and provide the necessary fuel, lighting, and other similar matters, books, maps, and specimens of art and science, for the use of such libraries.

C. This Act shall extend only to *Ireland*; and nothing herein contained shall extend to or affect

the cities of *Dublin, Cork, Limerick, and London-derry*, and town of *Belfast*.

SCHEDULES to which this Act refers.

SCHEDULE (A.)

City [or town] } NOTICE is hereby given, that in
of } virtue of the powers contained in an
Act of Parliament passed in the session holden in
the seventeenth and eighteenth years of the reign
of her Majesty Queen Victoria, intituled "The
Towns Improvement (Ireland) Act, 1854," and by
the order of the Lord Lieutenant of Ireland in that
behalf, bearing date the day the rated
occupiers and lessors hereinafter mentioned of pre-
mises of the nett annual value of eight pounds and
upwards in the city [or town] of [or where
the boundaries have been ascertained by the Lord
Lieutenant's order under this Act, within the bound-
aries following, viz., repeat them as in the said or-
der,] are hereby required to meet upon
the day of next, at of the clock,
within [state exact place of meeting,] when the said
Act shall be laid before the meeting, with the view
of adopting it in whole or in part; that is to say,
the rated occupiers and lessors following are re-
quired to meet as aforesaid, viz.: every male per-
son of full age who shall have occupied as tenant
or owner, or shall have been the immediate lessor
(rated for such premises to the relief of the poor)
of any lands, tenements, or premises within the
said [city or town,] or within such boundaries as
aforesaid, and shall have been so rated in respect
of such premises for the period of months
preceding the said day of meeting, and shall have
paid all such poor rates as shall have become pay-
able by him in respect of such premises, except such
as shall have become payable within months
preceding such day of meeting.

Dated at the day of 18 .

(Signed)

E F, chief magistrate,
or justices [as the case may be.]

SCHEDULE (B.)

*Form of the book to be used in the elections of
commissioners.*

Names and designations of com- missioners voted for.	Qualifications of electors.	Signatures of electors.
1		

SCHEDULE (C.)—Form of conviction.

County of } BE it remembered, that on the
[or, borough, &c.] } day of in the year
to wit. } of our Lord A B is con-
victed before me [or us] one [or two] of
her Majesty's justices of the peace in and for the
county [or borough, &c.] of [here describe
the offence generally, and the time and place when
and where committed, in the words of this Act, or
as near thereunto as may be,] contrary to "The
Towns Improvements (Ireland) Act, 1854; and I
[or we] do adjudge that the said A B hath forfeited
for his said offence the sum of [amount of penalty
adjudged,] and that he do pay to C D the further
sum of as and for his costs in this behalf.

Given under my hand and seal [or our hands
and seals,] the day and year first above written

(Signed)

L. S.

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Wednesday, 28	Roscommon
Thursday, Mar 1	Monaghan	Cavan	Wexford	Limerick & City
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Monday, 12	Naas	Clonmel	Tralee
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Wednesday, 14	Belfast and
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NAMES OF THE CASES REPORTED IN THIS NUMBER.

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DUBLIN, MARCH 3, 1855.

We are happy to observe that the subject of Irish Chancery Reform has been introduced into Parliament. Several bills have been prepared and brought in with this view by Mr. Whiteside, Mr. Napier, and Mr. Malins (of the English Bar), and were, on the 21st of February, ordered by the House to be printed.

The titles of these proposed enactments are as follows: first, A Bill to amend the Practice and Course of Proceeding in the High Court of Chancery in Ireland; secondly, A Bill to make Provision for the more speedy and effectual Despatch of Business in the High Court of Chancery in Ireland; thirdly, A Bill to alter the Practice of the High Court of Chancery in Ireland in relation to the Appointment of Receivers and the Management of Estates under the Control of the said Court; 4thly, A Bill for securing the Title of Purchasers of Estates sold under the Court of Chancery in Ireland; 5thly, A Bill to facilitate and diminish the Expense of Appeals from the Court of Chancery in Ireland; sixthly, A Bill to amend the Act of 4 Geo. 4, cap. 78, with respect to Stamp Duties in the Court of Chancery and in the Equity Side of the Court of Exchequer in Ireland.

The object of these measures is to assimilate in degree the law and practice of the Irish Court of

Chancery with that in England, without, however, making any radical change in the system introduced by the 13 & 14 Vic. c. 89.

The two bills which principally relate to the modification of the general procedure of the court are the first and second which we have enumerated. Of these the first, on the one hand, alters and renders more explicit the details of the Chancery Regulation Act, whilst, on the other, it provides for the great revolution proposed to be effected by the second, namely, the abolition of the Masters' Offices and the appointment of additional Chancery judges to transact the judicial business of the court. This revolution has already taken place in England. It is, however, proposed by the third bill to retain and regulate the office of Receiver Master. The fourth bill, if enacted, will probably lead to the discontinuance *eo nomine* of the Incumbered Estates Court. The fifth measure, which proposes to erect an Irish Court of Chancery Appeals, to be final as against the party electing to refer his cause to its decision, will, if carried, supply a *desideratum*, the want of which we recently endeavoured to point out. It would obviously be impossible to give even a satisfactory summary of these most important schemes, within the brief compass of a single article, and we, therefore, defer the consideration of their details. We trust that they will be well digested before they are passed into law, and that their pro-

motors will make it their study to assimilate, as closely as expediency will admit of, the practice of our Courts of Equity with that prevailing on the other side of the channel, in order that we may have a more certain guide to direct us, than mere oral tradition, in the conduct of equity proceedings. Voluminous treatises on practice meet in England with a ready and extensive demand. Here the publication of such are almost certain to end in some pecuniary loss, and hence the practitioner is placed at a serious disadvantage. Let, however, the practice of both countries be assimilated, and the same authorities will govern both.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 87.)

CAP. CVII.

An Act to amend the Laws relating to the Militia, and for raising a Volunteer Militia Force, in *Ireland*.
[11th August, 1854.]

"WHEREAS it is expedient to amend the laws relating to the militia in *Ireland*, and to make provision for raising a militia force in *Ireland* by voluntary enlistment:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. It shall be lawful for the Lord Lieutenant of *Ireland*, by and with the advice of the Privy Council of *Ireland*, to raise and from time to time to keep up in *Ireland* any number not exceeding thirty thousand private militia men, to serve for the several and respective counties for which regiments or battalions of militia are under the Act of the forty-ninth year of King *George* the Third, chapter one hundred and twenty, required to be raised.

II. It shall be lawful for the said Lord Lieutenant, with the advice of the said Privy Council, forthwith after the passing of this Act, and afterwards from time to time as occasion may appear to him to require, to ascertain and fix the number of militia men who shall, until other quotas shall be fixed in like manner, serve for each county, and the number so fixed as aforesaid shall be transmitted to the lieutenant of such county from time to time, and notice of the same shall be published in the *Dublin Gazette*, and the number so from time to time appointed shall be the quota of such county, until some other quota is appointed in like manner.

III. It shall be lawful for the Lord Lieutenant, by order, signified by his chief or under secretary, from time to time to direct the lieutenants of counties in *Ireland* to form the militia of their counties into such companies, regiments, battalions, or corps as to the Lord Lieutenant may seem fit, and to direct what number of officers and of what respective

ranks shall be appointed thereto, and what shall constitute the staff thereof; and where the number of militia men required to be raised for any county appears to the Lord Lieutenant insufficient to be conveniently formed into a separate regiment, battalion, or corps, to direct the militia of such county to be united with the militia of any county adjoining.

IV. It shall be lawful for the Lord Lieutenant from time to time to make regulations limiting the ages at which persons may be appointed officers of the several ranks in the militia, and for securing the appointment of persons as such officers who are qualified to discharge the duties of officers of their respective ranks, and also for that purpose to prescribe by such regulations and conditions, as to drill, training, and exercise, or otherwise, under or subject to which any such appointment shall be made.

V. So much of any Act now in force as requires property qualifications in the case of persons to be appointed officers in the militia in *Ireland* shall, save as respects appointments to the rank of captain or any higher rank, be repealed.

VI. For the purposes of the qualification of any captain or officer of higher rank in the militia, it shall not be necessary that all or any part of the estate required to confer such qualification be situate in *Ireland*, but such estate may be situate in any part of the United Kingdom, and a clear yearly income arising from any personal estate within the United Kingdom, of or to which personal estate or the yearly income thereof such officer is possessed or entitled at law or in equity for his own use and benefit, in possession for his own life, or for the life of his wife, or for some greater estate or interest, shall be deemed equivalent to an estate in lands of a yearly value of the same amount with such yearly income, and such yearly income from personal estate shall be admitted in whole or in part of any such qualification accordingly.

VII. Any person holding or having held the rank of captain or any higher rank in her Majesty's other forces, or in the forces of the *East India* Company, may, without any property qualification, be appointed a captain or major of the militia; and any person holding or having held the rank of major or any higher rank in any of the said forces may, without any property qualification, be appointed a lieutenant-colonel or colonel of the militia; and any person who shall have been qualified to receive and shall have received a commission of major or lieutenant-colonel in the militia shall be qualified to receive and hold a commission of higher rank in the militia.

VIII. It shall be lawful for the Lord Lieutenant to appoint from time to time such persons as to him may seem proper to be adjutants, quartermasters, paymasters, serjeants major and serjeants of the militia; and the provisions of the Act of the forty-ninth year of King *George* the Third, chapter one hundred and twenty, applicable to adjutants appointed by the colonels as therein provided shall be applicable to adjutants to be appointed as aforesaid, and any person who shall actually have served three years in the forces of the *East India* Com-

pany may be appointed an adjutant; and the corporals and drummers of each regiment, battalion, or corps shall be appointed from time to time by the colonel or commandant thereof: provided always, that while any regiment, battalion, or corps of militia is drawn out and embodied, it shall be lawful for the colonel or commanding officer of such regiment, battalion, or corps to appoint from time to time the serjeant major and serjeants of such regiment, battalion, or corps, as occasion may require, for supplying any vacancy or vacancies, or completing the full number of such serjeants.

IX. Any person shall be qualified to serve in the militia as surgeon or assistant surgeon who shall possess a diploma, certificate, or qualification such as shall be held to qualify such person to act as surgeon or assistant surgeon in the army, anything in the said Act of the Forty-ninth of King George the Third, chapter one hundred and twenty, to the contrary notwithstanding.

X. All officers now holding commissions in the regular militia in *Ireland* may, subject to such regulations as may hereafter be made by the Lord Lieutenant, continue to hold such commissions in the militia to be raised under this Act, and to rank in the militia service according to the dates of the commissions now held by them respectively; and all officers now holding such commissions as aforesaid who shall not be so continued under this Act shall notwithstanding continue to hold their present titles and rank as officers of the militia; and nothing herein contained shall extend to deprive such officers not so continued of any allowances to which they may now be entitled in respect of having held commissions in the militia when the same was last disembodied, or otherwise in respect of past service, or to affect the provisions authorizing the grant of any retired or other allowances to such officers in respect of having held commissions or of past services as aforesaid.

XI. For the purpose of raising the number of men required to be raised under this Act, the Lieutenants of the said several counties shall, in the year 1854, as soon as conveniently may be after the passing of this Act, and in the year 1855 at such time as the Lord Lieutenant shall, by order made with the advice of the Privy Council of *Ireland*, appoint for that purpose, direct the colonels or commanding officers of the regiments, battalions, or corps of militia of their respective counties, without delay, to proceed to raise and enrol volunteers to serve for the term of five years in the militia of such counties, not exceeding the numbers of men for the time being authorized to be raised under this Act, and such colonels or commanding officers, and the commissioned and non-commissioned officers of the militia duly authorized by such colonels or commanding officers, shall forthwith proceed to raise such volunteers, being resident in the county in which such men are directed to be raised, or in any county immediately adjoining thereto, and being able-bodied men between such ages and of such height as shall be from time to time fixed by regulations made by her Majesty's Secretary-at-war, as herein provided, and for such bounties or other payments as shall be from time to time authorized

by such regulations; and the Deputy Lieutenants of counties shall severally aid the colonels or commanding officers of the regiments, battalions, or corps of militia of their respective counties in raising and enrolling volunteers for such militia in the several parishes and places where such Deputy Lieutenants may be resident, and otherwise as the Lieutenants of such counties may from time to time direct; but no general or subdivision meeting shall be holden for that purpose, unless such meeting shall be convened pursuant to any special order made in this behalf by the Lord Lieutenant of *Ireland*.

XII. Provided always, that where the number of men for the time being required to be raised under this Act for any county has not been raised by voluntary enlistment, it shall be lawful for the Lord Lieutenant, if it appear to him advisable so to do, by order signed by his Chief or Under Secretary, to authorize and direct all or any part of such number of men as shall be deficient to be raised by voluntary enlistment in and for any county in which the full quota may have been raised and kept up.

XIII. It shall be lawful for her Majesty's Secretary-at War from time to time to make regulations as to the amount of the sums to be paid to volunteers under this Act by way of bounty or periodical payment or allowance in consideration of their enlisting in the militia, such bounty in no case to exceed six pounds, and such periodical payment or allowance in no case to exceed after the rate of two shillings and sixpence *per* month during the term of service for which the volunteer is enrolled, and as to the time or respective times, conditions, and manner of the payment thereof, and as to the ages between which men may be received as such volunteers, and as to the height and for the examination and approval by medical men of all men to be raised for the militia under this Act, and as to all other matters which, under the provisions herein contained, are made subject to regulations to be made by such Secretary-at War; and all such bounties shall be paid out of such monies as shall be provided by Parliament in this behalf.

XIV. All regulations made under this Act shall be laid before both Houses of Parliament within twenty-one days next after the making thereof if Parliament be then sitting, or if Parliament be not then sitting, then within twenty-one days after the next meeting of Parliament.

XV. The colonels or commanding officers of the regiments, battalions, or corps of militia, shall from time to time, and so long before the expiration of the respective terms of service of the militia men belonging to their respective regiments, battalions, or corps as shall be directed by regulations to be made by the Secretary-at War, raise and enrol or caused to be raised and enrolled volunteers to supply the place of such militia men; and shall from time to time, subject to any regulations to be so made, raise and enrol or cause to be raised and enrolled volunteers for supplying casual vacancies by reason of militia men dying before the expiration of their term of service, or being promoted to be non-commissioned officers or drummers (except where they are so promoted in the room of non-

commissioned officers or drummers reduced to the ranks), or being discharged as unfit for service, or in pursuance of the sentence of a court martial, or having deserted.

XVI. Every volunteer so raised as aforesaid shall, when he has been examined and approved according to such regulations as shall be made by the Secretary-at-War, take the following oath :

"I, *A B*, do sincerely promise and swear, that I will be faithful and bear true allegiance to her Majesty Queen Victoria, and that I will faithfully serve in the militia in any part of the United Kingdom of Great Britain and Ireland, for the defence of the same during the time of five years for which I am enrolled, unless I shall be sooner discharged :"

inserting therein the name of the sovereign for the time being, which oath shall and may be administered by any justice of the peace or deputy lieutenant for the county in which such volunteer shall have been raised, or in which the regiment, battalion or corps for which he shall have been raised shall be at the time of his joining the same; and every such volunteer shall be enrolled in a roll, to be prepared and kept by or under the direction of the colonel or commanding officer, to serve in the militia for the county for which he is raised as a militiaman, for the space of five years.

XVII. The period of training and exercise of the militia in *Ireland* shall, save as hereinafter provided, be twenty-one days in every year; and such militia or any part thereof may be called out for training and exercise more than once in every or any year, so as the whole period of training and exercising of any militiaman do not exceed twenty-one days in any year, save as hereinafter provided; and the times and places of training and exercise of the militiamen serving for each county shall be appointed, with the approbation of the Lord Lieutenant of *Ireland*, by the lieutenant of such county.

XVIII. Provided always, that it shall be lawful for the Lord Lieutenant from time to time, where, with the advice of the Privy Council of *Ireland*, he may see fit, to order all or any part of the militia to be marched out of their own respective counties into any part of *Ireland*, for the purpose of training and exercise, and also where, with such advice as aforesaid, the Lord Lieutenant may see fit so to do, to extend or reduce the period of training and exercise of all or any part of the militia, so as the whole period of training and exercise in any year shall not exceed fifty-six days nor be less than three days; and no fresh notice shall be necessary where such extension or reduction is made during the time of actual training.

XIX. In case any of the commissioned officers or privates of any regiment, battalion or corps shall previously to the assembling of the same for training and exercise, have been sent to their head quarters or attached to any corps of her Majesty's regular forces for purposes of instruction, the time during which they shall have remained at their own head quarters or with the said corps for instruction as aforesaid shall not be reckoned as any part of the period during which any commissioned officers and privates may be kept assembled for training and exercise as hereinbefore provided.

XX. It shall be lawful for the lieutenants of the several counties, with the approbation of the Lord Lieutenant, to take on lease or hire, for or during such terms or periods as they may think necessary, pieces of ground convenient for the training and exercise of the militia of such counties.

XXI. Notices to men who are enrolled in the militia to attend training and exercise, or where any order is made for drawing out and embodying the militia or any part thereof, to attend at any place in pursuance of such order, shall be sent, by the order of the colonel or commanding officer or the regiment, battalion, or corps to which such men belong, by the post to the residences of the several men as stated on their attestations, or as subsequently notified by them; and public notices shall also be sent to the county inspector or other chief officer of the police of the county, or in the *Dublin* metropolitan district to the superintendent of police, who shall cause the same to be affixed by the constables of such county or district on the door or the outer wall near the door of every church and chapel in each parish or place in such county or district, including places of public worship which do not belong to the Established Church; and if any place have no church or chapel, then in such manner as public notices are usually made known in such places, and on the doors or outer walls as aforesaid of the churches or chapels of some parish or place adjoining; and such notice so affixed as aforesaid shall be deemed a sufficient notice to every person enrolled by virtue of this Act, notwithstanding any omission to send notices by post; and any such man not appearing at the time and place appointed in any such notice shall be subject to be punished and dealt with accordingly.

XXII. It shall be lawful for the Lord Lieutenant, if he think fit, to order and direct that any militiamen who shall be attached to the service of the artillery, and shall do duty as artillerymen, shall receive increased pay, not exceeding such and the like pay, during the time of their serving and doing duty as artillerymen as aforesaid, as any of the men serving in the royal corps of artillery are or may be entitled to, and it shall also be lawful for the Lord Lieutenant to direct the same to be paid for such periods, and under and subject to such regulations and restrictions as he may from time to time deem proper and necessary.

XXIII. Any militia volunteer who, before the expiration of his engagement as a militiaman in any regiment, battalion, or corps, enrolls or offers to enrol himself in any other regiment, battalion, or corps of militia, whether of the militia raised in *Ireland* or of the militia raised in any other part of the United Kingdom, or in the same regiment, battalion, or corps, whether by the same or by different names (save in the way of lawful renewal of his engagement,) shall, upon conviction thereof before any one justice of the peace, forfeit and pay any sum not exceeding ten pounds, and in default of such payment shall be imprisoned with or without hard labour, for any time not exceeding three months, and shall also be liable to the deduction out of the bounty which he might otherwise have received in respect of his original enlistment of a

sum equal to what he may have received upon his fraudulent re-enlistment, and of such further sum as the colonel or commanding officer of the regiment, battalion, or corps in which he may have originally enlisted shall think proper, or as the Secretary-at-war may from time to time direct, not exceeding the expenses of his attestation and enrolment on such fraudulent re-enlistment.

XXIV. The justice before whom a militia volunteer shall be convicted of having enrolled or offered to enrol himself in another regiment, battalion, or corps of militia, or more than once in the same regiment, battalion, or corps of militia shall send or cause to be sent to the Secretary-at-war a report of such conviction, stating the name of such volunteer, the regiment, battalion, or corps of militia to which he belongs, the offence of which he has been convicted, and the sentence or decision of the justice thereon, and where such volunteer shall be imprisoned in pursuance of such conviction, the period when the imprisonment will expire; and for such report as aforesaid the clerk of the said justice shall be entitled to a fee of two shillings, and no more; and the Secretary-at-war may transmit to the justice so convicting an order for the payment to any person who has apprehended and procured the conviction of such offender of such sum not exceeding twenty shillings as he shall think fit.

XXV. It shall be lawful for the Secretary-at-war at any time to discharge any militia volunteer for misconduct, unfitness, or other cause, upon such conditions as he may from time to time direct, and such volunteer shall have no claim to future pay or bounty, or to release from future attendance in the militia any volunteer who may have fraudulently enlisted into her Majesty's regular forces or into the forces of the *East India Company*, or who may have fraudulently entered into her Majesty's navy, and who has been sentenced to imprisonment, or to forfeiture for a period not exceeding eighteen calendar months of one penny a day from his pay in such forces or navy, and any man so released shall serve with the force which he may have enlisted into or entered in the United Kingdom or elsewhere, with the like liabilities in all respects as any soldier or seaman in such respective force, and his place in the militia shall be supplied in like manner as if his term of service as a militiaman had expired by efflux of time.

XXVI. Any bounty which, under the regulations made under this Act, may be payable during or in respect of attendance at training and exercise shall be forfeited by any man who wholly absents himself from such training and exercise without leave lawfully granted, or sickness, certified according to such regulations; and any such bounty which would otherwise be payable to any man who partially absents himself as aforesaid without such leave, or sickness, certified as aforesaid or who misconducts himself during the training, shall be wholly withheld, or issued only in such manner and in such portions as the Secretary-at-war, upon the report of the commanding officer, shall determine.

XXVII. No man by reason of his enrolment or service in the militia, shall loose or forfeit, or be

deemed to have lost or forfeited, any interest he may possess, or may have possessed at the time of his so being enrolled or serving, in any friendly or benefit society, any laws, rules, or regulations of such society to the contrary notwithstanding; and in case any dispute shall arise between any such society and any such man, by reason of such enrolment or service, it shall be considered as being a dispute directed by the rules of such society to be decided by justices of the peace, pursuant to the provisions of the Acts in force relating to friendly societies.

XXVIII. Every militiaman raised under this Act not labouring under any certified infirmity or incapacity, who shall not appear at the time and place appointed for his being exercised, (notice having been given as by this Act required,) or who, having joined the regiment, battalion, or corps to which he belongs, or any company or companies, or any detachment or division thereof, deserts or absents himself during the time of any such exercise, shall be deemed a deserter, and if not taken until after the time of such exercise, such deserter shall, upon conviction thereof before any justice of the peace, be liable to forfeit and pay a sum not exceeding ten pounds; and if such penalty be not immediately paid, the said justice shall sentence such militiaman to be imprisoned with or without hard labour, for any period not exceeding three months, unless the said penalty be sooner paid: provided, that any information may be laid against such militiaman under this section at any time within the period of his engagement in the militia.

XXIX. The commanding officer of any regiment, battalion, or corps of militia, shall notify to the Secretary-at-war and to the constables or other officers of the parishes and places in which militiamen reside who have not attended training and exercise, or who may have absented themselves during the time of training and exercise of their respective regiments, battalions, or corps, the names and descriptions of all such militiamen who have so absented themselves; and it shall be lawful for any constable or officer, or for any officer or soldier in her Majesty's service or in the militia, to apprehend or cause any such militiaman to be apprehended, and to bring him or cause him to be brought before any justice of the peace, at any time within the period of his engagement in the militia, to be dealt with as herein-before mentioned, if the battalion or corps to which he belongs has ceased training and exercise, or to be committed to safe custody until an escort can be sent for him, if such regiment, battalion, or corps be then out for training and exercise; and such justice shall transmit a report, in the form prescribed in the schedule annexed to this Act, to the Secretary-at-war, and the Secretary-at-war shall transmit to such justice an order for the payment to the person or persons by whom such militiaman was apprehended and secured, of such sum not exceeding twenty-shillings, as the Secretary-at-war may think fit.

XXX. Any person who by words or other means shall persuade any militiaman improperly to absent himself from his duty, and every person who shall assist or procure any militiaman improperly to absent himself as aforesaid, or shall conceal, employ, or continue to employ any militiaman, knowing him

to be so improperly absent, shall for every such offence forfeit and pay a sum not exceeding twenty pounds.

XXXI. The forty-fifth section of the Act of the forty-ninth year of King *George* the third, chapter one hundred and twenty, shall be repealed, and if any person shall knowingly and wilfully buy, take in exchange, conceal, or otherwise receive any militia arms, clothes, or accoutrements, or any such articles belonging to a militiaman as are generally deemed regimental necessities according to the custom of the army, being provided for the soldier, and paid for by deductions out of his pay, or any public stores or ammunition delivered for the militia, upon any account or pretence whatsoever, contrary to the true intent and meaning of this Act, and of the other Acts in force relating to the militia, the person so offending shall for every such offence forfeit and pay a sum not exceeding ten pounds; and if such penalty be not immediately paid, and the offender shall not have sufficient goods and chattels whereon to levy the same, the justice by whom such offender was convicted shall commit him to the house of correction or common gaol, there to be imprisoned, with or without hard labour, for any period not exceeding six months, unless the said penalty be sooner paid.

XXXII. All offences for which any pecuniary penalty or forfeiture is by this Act imposed shall and may be heard and determined by any justice of the peace in or near to the place where the offence shall be committed, or where the offender may at any time happen to be; and all such penalties and forfeitures, and also the reasonable costs attending the prosecution, to be duly ascertained and awarded by such justice, shall and may be enforced and recovered in the same manner as any pecuniary penalties may be recovered in *Ireland* under the provisions of an Act passed in the session holden in the twelfth and thirteenth years of her Majesty, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Quarter Sessions in Ireland with respect to summary Convictions and Orders*.

XXXIII. One moiety of every pecuniary penalty or forfeiture imposed under this Act upon any person duly convicted of buying, taking in exchange, concealing, or otherwise receiving contrary to law any militia arms, clothes, accoutrements, or regimental necessities belonging to any militiaman, or any public stores or ammunition for the service of the militia, and every pecuniary penalty or forfeiture imposed under this Act upon any person assisting, procuring, or persuading any militia volunteer improperly to absent himself from his duty, or concealing, employing, or continuing to employ any such volunteer, knowing him to be so improperly absent, shall go to the person who shall inform or sue for the same, and the other moiety, or where the offence shall be proved by the person who shall inform, then the whole of the penalty, shall be paid over and applied in such manner as the Secretary-at-War shall direct, anything in any other Act to the contrary notwithstanding; and every justice who shall adjudge any such penalty or forfeiture shall, within four days at the furthest, report the

same and his adjudication thereof to the Secretary-at-War.

XXXIV. All penalties imposed by this Act upon militiamen (except the deductions from bounty, which shall be brought to public credit) shall be paid to the commanding officers of the respective regiments, battalions, or other bodies of militia of the respective counties to which the militiaman belongs, and shall be made and accounted for as part of the public stock of such regiment, battalion, or other body of militia respectively.

XXXV. Any militia volunteer attached for a time for the purpose of instruction to any regiment, battalion, or depôt of her Majesty's force shall for such time be deemed to be under the operation of the Mutiny Act, in the same manner as any soldier enlisted in such regiment, battalion, or depôt.

XXXVI. All the provisions of the Act of the forty-ninth year of King *George* the Third, chapter one hundred and twenty, and of any Act amending the same, or otherwise applicable to the militia of *Ireland*, not hereby repealed, shall, subject to the provisions of this Act, and so far as the same are not inconsistent herewith, extend and be applicable to the militia to be raised under this Act, and to all the purposes thereof: provided always, that no general or other meeting of lieutenancy shall be held except when specially convened for such purposes as are by this Act directed to be carried into effect by a general meeting, or when convened under the authority of the Lord Lieutenant of *Ireland*.

XXXVII. Notices of the days and places of holding general meetings of lieutenancy shall be sent by the post by the clerk of the general meetings to the several deputy lieutenants of the county seven days at the least before the days appointed for holding such meetings respectively; and any notices of subdivision meetings required to be given to deputy lieutenants or others shall be sent by the clerk of general meetings by post.

XXXVIII. The cost of providing any house or place for the keeping of the arms, accoutrements, clothing, or other stores of the militia, in each county or county of a city in *Ireland*, when not embodied, shall be defrayed by the county and county of a city respectively, and the necessary sum for that purpose, and all arrears in respect of such cost which shall have become due before the certificate thereof shall be transmitted as hereafter mentioned, and all arrears which may be due in respect of the allowance payable by the county or county of a city, under the Act now in force, to the adjutant in respect of his residence and accommodation, and for the cost of providing a house or place for the purposes aforesaid, shall be raised by the presentment of the grand jury of such county and county of a city, and in the city of *Dublin* by the town council of the borough of *Dublin* under the provisions of an Act of the 12th and 13th of her present Majesty, chapter 97, which presentment the grand jury of the county or town council respectively shall pass, on a certificate of the sum required, signed by the chief secretary of the Lord Lieutenant, or in the absence of such chief secretary by the under secretary or by the assistant

under secretary, without any application at presentment sessions, and the certificate shall be transmitted by such chief or under secretary or assistant under secretary to the clerk of the crown for such county at any time prior to the first day of assizes for such county, or if in the county or county of the city of *Dublin*, then prior to the first day of the presenting term.

XXXIX. In order to distribute over a term of years such portion of the expenses of purchasing, building, enlarging, or altering such places as aforesaid as are hereby directed to be raised by such grand jury and town council respectively, the grand jury of such county, county of a city and county of a town, at the assizes, and in the city of *Dublin* the town council of the borough of *Dublin*, may, if they think fit, borrow all or any part of the money necessary for the aforesaid purposes upon mortgage of the county cess and rates of such county, county of a city and county of a town respectively; and every such mortgage may be in the form in the schedule (A.) to this Act annexed, or to the like effect, and shall be executed by the foreman of the grand jury present at the assizes at the time being, and in the city of *Dublin* by the lord mayor of *Dublin* and any two of the town council, and shall be effectual for securing to the person advancing the sum in such mortgage expressed, his executors, administrators, and assigns, the repayment thereof, with interest, after the rate, at the times, and in the manner in such mortgage specified; and any person entitled to any such mortgage may transfer his right and interest therein to any other person, such transfer being made according to the form in schedule (B.) to this Act annexed, or to the like effect; and the persons to whom such mortgages or the transfers thereof are made, their executors and administrators, shall be creditors upon the rates and funds thereby expressed to be charged, in an equal degree one with another according to the respective sums in such mortgages mentioned to be advanced by them.

XL. The said grand jury and town council respectively shall in every year provide for and cause to be paid out of the county cess of such county, county of a city and county of a town, and out of the rates of such borough of *Dublin*, in the manner and at the times in such mortgages specified, the moneys required for the time being to pay the interest on the several sums borrowed under this Act or the first-recited Act, and then unpaid, and shall also set apart and appropriate a further sum, not being less than one thirtieth part of the principal sum originally borrowed upon such mortgages, and shall apply the same in the repayment of so much of the said principal sums then unpaid as it will extend to discharge, year by year, until the whole of such principal sums have been repaid; and the said grand jury and town council respectively shall, by agreement with the parties entitled to such mortgages, or in default of agreement by such other means as they deem most equitable and convenient, determine the order of priority in which the several sums advanced shall be repaid.

XLI. It shall be lawful for the said grand jury

and town council respectively, with the consent of the parties entitled to such mortgages, to pay off from time to time any of the moneys so borrowed as aforesaid, and to reborrow from time to time the sums necessary for that purpose, but so nevertheless that all moneys borrowed under this or the first-recited Act shall be repaid within thirty years from the time of first borrowing the same.

XLII. In the construction of this Act the expression "Lord Lieutenant," or "Lord Lieutenant of *Ireland*," shall mean the Lord Lieutenant or other chief governor or governors of *Ireland*; and the expression "the Militia" shall mean the militia raised in *Ireland*.

XLIII. This Act may be cited for all purposes as "The Militia (*Ireland*) Act, 1854."

SCHEDULE (A.)

FORM OF MORTGAGE.

By virtue of the "Militia (*Ireland*) Act, 1854,"
I, *A B*, Foreman of the Grand Jury of
[or Lord Mayor and Town Councillors, *as the case may be*,] in consideration of the sum of
paid to the Treasurer of the said county [or city or borough] by *A B* of
for the purposes
of the said Act, do grant and assign unto the said
A B, his executors, administrators, and assigns, such proportion of the [*here describe the rates or property intended to be mortgaged*] as the said sum of
doth or shall bear to the whole
sum which is or shall be borrowed upon the credit
of the said
to hold to the said *A B*,
his executors, administrators, and assigns, from this
day until the said sum of
with interest
at
per centum per annum for the same,
shall be fully paid and satisfied (the principal sum
to be repaid within not less than
years from
the date hereof.) In witness whereof we have here-
unto set our hands and seals [or given under our
corporate seal], this
day of
18
(L. S.)

SCHEDULE (B.)

FORM OF ASSIGNMENT OF MORTGAGE.

I, *A B*, of
in consideration of the
sum of
paid to me by *C D* of
do hereby assign* to the said *C D*, his executors,
administrators, and assigns, a certain mortgage
numbered
made by the Foreman of the
Grand Jury of
[or the Lord Mayor
and Town Council of the Borough of *Dublin*, *as the case may be*,] bearing date the
day of
for securing the sum of
and interest
thereon, [or (*if such transfer be by indorsement*),*
the within security,] and all my right and interest
to and in the moneys thereby secured, and the rates
[or lands, tenements, and hereditaments] thereby
assigned. In witness whereof I have hereunto set
my hand and seal this
day of
18
(L. S.)

SCHEDULE (C.)

REPORT.

DESCRIPTIVE RETURN of committed
to confinement at on the day
of as an absentee from the train-
ing of the regiment of militia.

Age.....
Height..... feet inches
Complexion.....
Hair.....
Eyes.....
Marks.....
Probable date of enrolment and
where.....
Probable date of absenting him-
self, and from what place....
Name, occupation, and address
of the person by whom appre-
hended*.....

* It is important for the public service, and for the interest of the prisoner, that this part of the return should be accurately filled up, and the details should be inserted by

Particulars in the evidence on which the prisoner is committed, and showing whether he surrendered or was apprehended, and in what manner, and upon what grounds, and whether committed for safe custody only, or as a deserter under this Act, and if so, for what period.....

the magistrate in his own handwriting, or, under his direction, by his clerk.

"I do hereby certify, that the prisoner has been duly examined before me as to the circumstances herein stated, and has declared in my presence that he [insert did or did not as the case may be] absent himself from the before-mentioned corps.

signature and address of magistrate.

signature of prisoner.

signature of informant."

"I certify, that I have inspected the prisoner, and consider him [insert fit or unfit, as the case may be, and if unfit, state the cause of unfitness] for military service.

signature of military medical officer,
or of private medical practitioner."

No fee will be allowed to a private medical practitioner where a military medical officer is stationed, unless it is shown that his services were not available.

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DUBLIN, MARCH 10, 1855.

No doubt can be entertained that, in our present scheme of government, one essential element is yet lacking, namely, an office of minister of justice. To the absence of this department may be ascribed the tardy progress of law reform in past times and the crudities and absurdities which mar many otherwise useful measures, at the present time.

We have witnessed a wonderful increase in the products of civilization. New and unknown relations have been created by the multiplied agencies of mind over matter, and hence has arisen an irresistible demand for such a modification of our legal system, in its principles, maxims, and procedure as will suit the requirements of the age. Thus we have seen the laws which regulate the enjoyment, transfer, and transmission of real property gradually changing from their original, feudal, character, to a state consonant with the doctrines of modern political economy.

We have seen a code of laws, entirely created within the last two centuries, for the benefit of commerce, namely, those relating to bankrupts. The criminal laws have been fundamentally changed, by the adoption of milder and more evenly-imposed penalties, and the unfortunate debtor who has not wherewithal to pay, no longer looks forward to the dreadful alternative of "rotting in gaol." The alte-

rations, and, in many instances, real simplifications and improvements in the law of procedure have been equally memorable. It is, however, too apparent that our legal reforms are conducted in too unsystematic a manner. A particular grievance is felt, and a measure to rectify it is introduced, hastily conceived, and framed in a slovenly manner. The result is, perhaps, partially favourable, but the seeds of future mischief are sown. It is greatly to be feared that a good deal of this sort of legislation accumulates without having engaged that degree of attention in either House of Parliament which its importance merits.

Too much is at present left to private enterprise in this line; and, however sound the maxims of free trade may be in other respects, we question whether the eagerness of the legal members of the House to rear up for themselves a monument, *ære perennius*, in the shape of Acts, to be called familiarly by their proper names, may not materially add to the confusion of the statute-book. Conscious of this tendency, the legal members of the Government frequently intreat the promoters of their measures to submit them to the ordeal of a select committee; but that sort of tribunal is, at the best, a very unsatisfactory one. Better far to create a responsible minister, to be chosen from the ranks of the legal profession, whose duty it shall be to scrutinize the details and watch the progress of all propositions, as well as to originate from time to time, on behalf

of his government, whatever legal reforms appear to be wanted.

It is true that at the present time the Lord Chancellor of England, assisted by the law officers of the Crown, who are both expected to have seats in the House, is supposed to discharge such a function as we have described. This is, however, one of the many fictions of law, which we hope will soon share the fate of its fellows. It is true that the ministerial law reforms, such as they usually are, and that is not saying a great deal, are propounded by one or other of the ministers, but they certainly exercise a very partial supervision over the schemes brought forward by individual members. It is certain, at all events, that a minister, whose whole duty would be limited to this one department, would act more systematically and efficiently than those to whom such duties are merely collateral to their proper functions. Such an office as we have spoken of exists in other countries, and why we should not avail ourselves of its obvious advantage is wholly unaccountable.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

(Continued from page 96.)

CAP. CVIII.

An Act to Suspend the making of Lists and the Ballots for the Militia of the United Kingdom.

[11th August, 1854.]

"WHEREAS it is expedient to suspend for a further period the ballots for the militia of the United Kingdom:" Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. All general and subdivision meetings relating to the militia of the United Kingdom, and all proceedings relating to procuring any returns, or preparing or making out lists of such militia or any part thereof, for the purpose of a ballot, or relating to balloting for any militiamen or supplying any vacancies in such militia by ballot, save such proceedings as are or may be directed or authorised by or under the Act of the session of Parliament holden in the fifteenth and sixteenth years of her Majesty, chapter fifty, and the Acts amending the same, shall cease and remain suspended until the first day of October, 1855.

II. Provided always, that it shall be lawful for her Majesty, by any order in Council, to direct that any proceedings shall be had at any time before the expiration of such period as aforesaid, either for the giving of notices and making returns and preparing lists, and also for the proceeding to ballot

and enrol men for the filling up vacancies in the militia, as her Majesty shall deem expedient; and upon the issuing of any such order all such proceedings shall be had for carrying into execution all the provisions of the Acts in force in *Scotland* and *Ireland* respectively relating to the giving notices for and returns for lists, and for the balloting and enrolling of men to supply any vacancies in the militia, and holding general and subdivision meetings for such purpose, at such times respectively as shall be expressed in any such order in Council, or by any directions given in pursuance thereof to Lord Lieutenants or Deputy Lieutenants acting for Lord Lieutenants, of the several counties, shires, cities, and places in *Scotland*, or to the Governors and Deputy Governor of counties and places in *Ireland*; and all the provisions of the several acts in force in *Scotland* and *Ireland* respectively relating to the militia shall, upon any such order and directions given in pursuance thereof, become and be in full force and be carried into execution at the period specified in such order or direction as aforesaid, with all such penalties and forfeiture for any neglect thereof, as fully as if such periods had been fixed in the Acts relating to such militia.

III. Provided also, that nothing herein contained shall extend to prevent the holding before the expiration of such period as aforesaid of such general or other meetings relating to the militia of the United Kingdom as may be called under the authority of one of her Majesty's Principal Secretaries of State, or in *Ireland* under the authority of the Lord Lieutenant or other Chief Governor or Governors of *Ireland*, or of any meeting which may be called for the purpose of altering, enlarging, or providing any place for the reception of the arms, accoutrements, clothing, or other stores belonging to the militia.

CAP. CXII.

An Act to afford greater Facilities for the Establishment of Institutions for the Promotion of Literature and Science and the Fine Arts, and to provide for their better Regulation.

[11th August, 1854.]

"WHEREAS it is expedient that greater facilities should be afforded for procuring and settling sites and buildings in trust for institutions established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, and that other provisions should be made for improving the legal condition of such institutions:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

I. Any person in *England*, *Wales*, or *Ireland*, being seised in fee simple, fee tail, or for life of and in any manor or lands of freehold, copyhold, or customary tenure, and having the present beneficial interest therein, may grant, convey, or enfranchise, by way of gift, sale, or exchange, in fee simple or for a term of years, any quantity not exceeding one

acre of such land, whether built upon or not, as a site for any such institution as hereinafter described; provided, that no such grant made by any person seized only for life of and in any such manor or lands shall be valid, unless, if there be any person next entitled to the same in remainder, in fee simple or fee tail, and if such person be legally competent, he shall be a party to and join in such grant; provided also, that where any portion of waste or commonable land shall be gratuitously conveyed by any lord of a manor for any such purpose as aforesaid, the rights of all commoners and others having interest of a like nature in the said land shall be barred and divested by such conveyance.

II. The Chancellor and Council of her Majesty's Duchy of *Lancaster* for the time being by any deed or writing under the hand and seal of the Chancellor of the said duchy for the time being, attested by the clerk of the council of the said duchy for the time being, for and in the name of her Majesty, her heirs and successors, may, if they see fit, grant, convey, or enfranchise, to or in favour of such institution, any land forming part of the possessions of the said duchy, not exceeding in the whole one acre in any one parish, upon such terms and conditions as to the said chancellor and council shall seem meet; and where any sum or sums of money shall be paid for the purchase or consideration for such land so to be granted, conveyed or enfranchised as aforesaid, the same shall be paid into the hands of the receiver-general for the time being of the said duchy, or his deputy, and shall be by him paid, applied, and disposed of according to the provisions and regulations contained in an Act of the forty-eighth year of the reign of his late Majesty King George the Third, chapter seventy-three, or any other Act or Acts now in force for that purpose.

III. Any three or more of the principal officers of the Duchy of *Cornwall*, under the authority of a warrant issued for that purpose under the hands of any three or more of the special commissioners for the time being for managing the affairs of the Duchy of *Cornwall*, or under the hands of any three or more of the persons who may hereafter for the time being have the immediate management of the said duchy, if the said duchy shall be then vested in the Crown, or if the said duchy shall be then vested in a Duke of *Cornwall*, then under the hands of any three or more of the principal officers of the said duchy, or under the hands of any three or more of the persons for the time being having the immediate management of the said duchy, may, if they think fit, and are so authorized, by deed grant, convey, or enfranchise to or in favour of any existing or intended institution any land forming part of the possessions of the said Duchy of *Cornwall*, not exceeding in the whole one acre in any one parish, upon such terms and conditions as to the said special commissioners or principal officers, or such other person as aforesaid, shall seem meet.

IV. Provided, that upon any land so granted by way of gift as aforesaid, or any part thereof, ceasing to be used for the purposes of the institution, the same shall thereupon immediately revert to and become again a portion of the estate or manor or possessions of the duchy, as the case may be, to all

intents and purposes as fully as if this Act or any such grant as aforesaid had not been passed or made, except that where the institution shall be removed to another site the land not originally part of the possessions of either of the duchies aforesaid may be exchanged or sold for the benefit of the said institution, and the money received for equality of exchange or on the sale may be applied towards the erection or establishment of the institution upon the new site.

V. Where any person shall be equitably entitled to any manor or land, but the legal estate therein shall be vested in some trustee or trustees, it shall be sufficient for such person to convey the land proposed to be granted for the purpose of this Act, without the trustee or trustees being party to the conveyance thereof; and where it is deemed expedient to purchase for the purpose aforesaid any land belonging to or vested in any infant or lunatic, such land may be conveyed by the guardian or curator of such infant or the committee of such lunatic respectively, who may receive the purchase money for the same, and give valid and sufficient discharge to the party paying such purchase money, who shall not be required to see to the application thereof.

VI. Any corporation, ecclesiastical or lay, whether sole or aggregate, and any officers, justices of the peace, trustees, or commissioners, holding land for public, ecclesiastical, parochial, charitable, or other purposes or objects may, subject to the provisions hereinafter mentioned, grant, convey, or enfranchise for the purpose of this Act such quantity of land as aforesaid, in any manner vested in such corporation, officers, justices, trustees, or commissioners; provided, that no ecclesiastical corporation sole, being below the dignity of a bishop, shall be authorized to make such grant without the consent in writing of the bishop of the diocese to whose jurisdiction the said ecclesiastical corporation shall be subject; provided also, that no parochial property shall be granted for such purpose without the consent of a majority of the ratepayers and owners of property in the parish to which the same belongs, assembled at a meeting to be convened according to the mode pointed out in the Act passed in the sixth year of the reign of his late Majesty, intituled *An Act to facilitate the Conveyance of Workhouses and other Property of Parishes and of Incorporations or Unions of Parishes in England and Wales*, and without the consent of the Poor Law Board, to be testified by their seal being affixed to the deed of conveyance, and of the guardians of the poor of the union within which the said parish may be comprised, or of the guardians of the poor of the said parish where the administration of the relief of the poor therein shall be subject to a board of guardians, testified by the guardians of such union or parish being the parties to convey the same; and that no property held upon trust for charitable purposes shall be granted without the consent of the charity commissioners.

VII. Where any officers, trustees, or commissioners, other than parochial trustees, shall make any such grant, it shall be sufficient if a majority or quorum authorized to act of such officers, trustees, or commissioners, assembled at a meeting duly

convened, shall assent to such grant, and shall execute the deed of conveyance, although they shall not constitute a majority of the actual body of such officers, trustees, or commissioners; and the justices of the peace may give their consent to the making any grant of land or premises belonging to any county, riding, or division, by vote, at their General Quarter Sessions, and may direct the same to be made in the manner directed to be pursued on the sale of the sites of gaols by an Act passed in the seventh year of the reign of his late Majesty George the Fourth, intituled *An Act to authorize the Disposal of unnecessary Prisons in England*.

VIII. If part only of any land held in fee subject to a perpetual rent, or comprised in a lease for a term of years unexpired, shall be conveyed or agreed to be conveyed for the purpose of this Act, the rent payable in respect of the lands subject thereto, and any fine certain or fixed sum of money to be paid upon any renewals of the lease, or either of such payments, may be apportioned between the part of the said land so conveyed or agreed to be conveyed, and the residue thereof, and such apportionment may be settled by agreement between the parties following: that is to say, the person for the time being entitled to the rent where the land is held in fee, or the lessor or other the owner subject to such lease of the lands comprised therein, the person entitled to the fee subject to the rent, or the lessee or other party entitled to the land by virtue of such lease or any assignment thereof for the residue of the term thereby created, and the party to whom such conveyance as aforesaid for the purpose of this Act is made or agreed to be made; and when such apportionment shall so be made it shall be binding on all under lessees and other persons and corporations whatsoever, whether parties to the said agreement, or not.

IX. In case of any such apportionment as aforesaid, and after the lands so conveyed, or agreed to be conveyed, as aforesaid shall have been conveyed, the person entitled to the fee or other estate in the lands subject to the rent, the lessee, and all parties entitled under him to the lands not included in such conveyance, shall, as to all future accruing rent, and all future fines certain or fixed sums of money to be paid upon renewals, be liable only to so much of the rent, or of such fines or sums of money as shall be apportioned in respect of such last mentioned lands; and the party entitled to the rent charged or reserved shall have all the same rights and remedies for the recovery of such portion of the rent as last aforesaid as previously to such apportionment he had for the recovery of the whole rent charged or reserved; and all the covenants, conditions, and agreements, except as to the amount of rent to be paid, and of the fines or sums of money to be paid upon renewals, in case of any apportionment of the same respectively, shall remain in force with regard to that part of the land which shall not be so conveyed as aforesaid, in the same manner as they would have done in case such part only of the land had been subject to the rent, or included in the lease.

X. Any person or corporation may grant any number of sites for distinct and separate institu-

tions, although the aggregate quantity of land thereby granted by such person or corporation shall exceed the extent of one acre, provided that the site of each institution do not exceed that extent.

XI. Where the institution shall not be incorporated, the grant of any land for the purpose of such institution, whether taking effect under the authority of this Act, or any other authority, may be made to any corporation sole or aggregate, or to several corporations sole, or to any trustees whatsoever, to be held by such corporation or corporations or trustees for the purpose of such institution.

XII. The provisions of the Act of the fourteenth Victoria, chapter twenty-eight, shall be applicable to the conveyances of lands in *England, Wales, and Ireland*, made, or to be made, to trustees, not being corporations, for the purposes of such institutions.

XIII. All grants, conveyances, and assurances, of any site for an institution under the provisions of this Act may be made according to the form following, or as near thereto as the circumstances of the case will admit; (that is to say:)

"I or we, [or the Corporate Title of a Corporation,] under the authority of an Act passed in the

Year of the reign of her Majesty Queen Victoria, intituled do hereby freely and voluntarily, and without any valuable consideration [or do in consideration of the sum of

to me, or us, or the said paid], grant and convey [add, if necessary, enfranchise] to all [de-

scription of the premises] and all [my, or our, or the right, title, and interest, of the

to and in the same and every part thereof, to hold unto and to the use of the said corporation and their successors, or of the said and his or

their [heirs or executors or administrators or successors], for the purposes of the said Act, and to be applied as a site for and for

no other purpose whatever; such

to be under the management and control of [set forth the mode in which and the persons by whom the institution is to be managed and directed; in cases where the land is purchased, exchanged, or demised, usual covenants or obligations for title may be added]. In witness whereof the conveying and other parties have hereunto set their hands and seals, [or seals only, as the case may be,] this

day of Signed, sealed,

and delivered, by the said in the presence of of

And no bargain and sale or livery of seisin shall be requisite in any conveyance intended to take effect under the provisions of this Act, nor more than one witness to the execution by the conveying party.

XIV. Any deed executed for the purposes of any institution to which this Act applies, without any valuable consideration, shall continue valid, if otherwise lawful, although the donor or grantor shall die within twelve calendar months from the execution thereof.

XV. Where land of copyhold or customary tenure shall have been or shall be granted for the

purpose of such institution, the conveyance of the same by any deed wherein the copyholder shall grant and convey his interest, and the lord shall also grant and convey his interest, shall be deemed to be valid and sufficient to vest the freehold interest in the grantee or grantees thereof without any surrender or admittance or enrolment in the Lord's Court, but the fees (if any) payable by the custom of the manor upon enfranchisement shall be paid to the steward.

XVI. Where any land shall be sold by any ecclesiastical corporation sole for the purpose of this Act, and the purchase money to be paid shall not exceed the sum of twenty pounds, the same may be retained by the party conveying for his own benefit, but when it shall exceed the sum of twenty pounds it shall be applied for the benefit of the said corporation in such manner as the bishop in whose diocese such land shall be situated shall, by writing under his hand, to be registered in the registry of his diocese, direct and appoint; but no person purchasing such land for the purpose aforesaid shall be required to see to the due application of any such purchase money.

XVII. In cases not otherwise provided for in this Act, the clauses sixty-nine, seventy, seventy-one, seventy-two, seventy-three, seventy-four, and seventy-eight, of the Lands Clauses Consolidation Act, 1845, being the eighth and ninth *Victoria*, chapter eighteen, shall apply in respect of the application of the purchase money of all sites purchased from incapacitated persons, corporations, and trustees, hereby empowered to sell, other than the Chancellor and Council of the Duchy of *Lancaster* and the officers of the Duchy of *Cornwall*.

XVIII. If it shall be deemed advisable to sell any land or building not previously part of the possessions of the Duchy of *Lancaster* or *Cornwall* held in trust for any institution, or to exchange the same for any other site, the trustees in whom the legal estate in the said land or building shall be vested may, by the direction or with the consent of the governing body of the said institution, if any such there be, sell the said land or building, or part thereof, or exchange the same for other land or building suitable to the purposes of their trust, and receive on any exchange any sum of money by way of effecting an equality, and apply the money arising from such sale, or given on such exchange in the purchase of another site, or in the improvement of other premises used or to be used for the purposes of such trust; and such trustees may, with like direction or consent, let portions of the premises belonging to the institution not required for the purposes thereof, for such term, and under such covenants or agreements, as shall be deemed by such governing body to be expedient, and apply the rents thereof to the benefit of the institution.

XIX. The trustees of such institution who, by reason of their being the legal owners of the building or premises, shall become liable, to the payment of any rate, tax, charge, cost, or expenses, shall be indemnified and kept harmless by the governing body thereof from the same, and in default of such indemnity shall be entitled to hold the said building or premises and other property vested in them

as a security for their reimbursement and indemnification, and, if necessity shall arise, may mortgage or sell the same, or part thereof, free from the trusts of the institution, and apply the amount obtained by such mortgage or sale to their reimbursement, and the balance (if any) to the benefit of the institution, subject to the restriction herein-before contained with regard to lands given and lands belonging to the duchies aforesaid.

XX. Where any institution shall be incorporated, and have no provision applicable to the personal property of such institution, and in all cases where the institution shall not be incorporated, the money, securities for money, goods, chattels, and personal effects belonging to the said institution, and not vested in trustees, shall be deemed to be vested for the time being in the governing body of such institution, and in all proceedings, civil and criminal, may be described as the monies, securities, goods, chattels, and effects of the governing body of such institution by their proper title.

XXI. Any institution incorporated which shall not be entitled to sue and be sued by any corporate name, and every institution not incorporated, may sue or be sued in the name of the president, chairman, principal secretary, or clerk, as shall be determined by the rules and regulations of the institution, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion; provided, that it shall be competent for any person having a claim or demand against the institution to sue the president or chairman thereof, if, on application to the governing body, some other officer or person be not nominated to be the defendant.

XXII. No suit or proceeding in any civil court shall abate or discontinue by reason of the person by or against whom such suit or proceedings shall have been brought or continued dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same suit or proceeding shall be continued in the name of or against the successor of such person.

XXIII. If a judgment shall be recovered against the person or officer named on behalf of the institution, such judgment shall not be put in force against the goods, chattels, or lands, or against the body of such person or officer, but against the property of the institution, and a writ of revivor shall be issued setting forth the judgment recovered, the fact of the party against whom it shall have been recovered having sued or having been sued, as the case may be, on behalf of the institution only, and requiring to have the judgment enforced against the property of the institution.

XXIV. In any institution the governing body, if not otherwise legally empowered to do so, may, at any meeting specially convened according to its regulations, make any byelaw for the better governance of the institution, its members or officers, and for the furtherance of its purpose and object, and may impose a reasonable pecuniary penalty for the breach thereof, which penalty, when accrued, may be recovered in any local court of the district wherein the defendant shall inhabit or the institution shall be situated, as the governing body

thereof shall deem expedient: Provided always, that no pecuniary penalty, imposed by any bye-law for the breach thereof, shall be recoverable unless the bye-law shall have been confirmed by the votes of three-fifths of the members present at a meeting specially convened for the purpose.

XXV. Any member who may be in arrear of his subscription according to the rules of the institution, or may be or shall possess himself of or detain any property of the institution in a manner or for a time contrary to such rules, or shall injure or destroy the property of the institution, may be sued in the manner hereinbefore provided; but if the defendant shall be successful in any action or other proceeding at the instance of the institution, and shall be adjudged to recover his costs, he may elect to proceed to recover the same from the officer in whose name the suit shall be brought, or from the institution, and in the latter case shall have process against the property of the said institution in the manner above described.

XXVI. Any member of the institution who shall steal, purloin, or embezzle, the money, securities for money, goods, and chattels of the institution, or wilfully and maliciously, or wilfully and unlawfully, destroy or injure the property of such institution, or shall forge any deed, bond, security for money, receipt, or other instrument, whereby the funds of the institution may be exposed to loss, shall be subject to the same prosecution, and if convicted shall be liable to be punished in like manner, as any person not a member would be subject and liable to in respect of the like offence.

XXVII. Whenever it shall appear to the governing body of any institution (not having a royal charter, nor established by, nor acting under, any Act of Parliament) which has been established for any particular purpose or purposes, that it is advisable to alter, extend, or abridge, such purpose, or to amalgamate such institution, either wholly or partially, with any other institution or institutions, such governing body may submit the proposition to their members in a written or printed report, and may convene a special meeting for the consideration thereof according to the regulations of the institution; but no such proposition shall be carried into effect unless such report shall have been delivered or sent by post to every member ten days previous to the special meeting convened by the governing body for the consideration thereof, nor unless such proposition shall have been agreed to by the votes of three-fifths of the members present at such meeting, and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of one month after the former meeting.

XXVIII. If any members of the institution, being not less than two-fifths in number, consider that the proposition so carried is calculated to prove injurious to the institution, they may, within three months after the confirmation thereof, make application in writing to the lords of the committee of her Majesty's Privy Council for Trade and Foreign Plantations, who, at their discretion, shall entertain the application, and if, after due inquiry, they shall decide that the proposition is then calcu-

lated to prove injurious to the institution, the same shall not be then carried into effect; but such decision shall not prevent the members of such institution from reconsidering the same proposition on a future occasion.

XXIX. Any number not less than three-fifths of the members of any institution may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the institution, its claims and liabilities, according to the rules of the said institution applicable thereto, if any, and if not, then as the governing body shall find expedient; provided, that in the event of any dispute arising among the said governing, or the members of the institution, the adjustment of its affairs shall be referred to the judge of the county court of the district in which the principal building of the institution shall be situated, and he shall make such order or orders in the matter as he shall deem requisite, or, if he find it necessary, shall direct that proceedings shall be taken in the Court of Chancery for the adjustment of the affairs of the institution.

XXX. If upon the dissolution of any institution there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the said institution or any of them, but shall be given to some other institution, to be determined by the members at the time of the dissolution, or in default thereof by the judge of the county court aforesaid; provided, however, that this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company.

XXXI. For the purposes of this Act, a member of an institution shall be a person who, having been admitted therein according to the rules and regulations thereof, shall have paid a subscription, or shall have signed the roll or list of members thereof; but in all proceedings under this Act no person shall be entitled to vote or be counted as a member whose current subscription shall be in arrear at the time.

XXXII. The governing body of the institution shall be the council, directors, committee, or other body to whom by Act of Parliament, charter, or the rules and regulations of the institution, the management of its affairs is entrusted; and if no such body shall have been constituted on the establishment of the institution, it shall be competent for the members thereof, upon due notice, to create for itself a governing body to act for the institution thenceforth.

XXXIII. The Act shall apply to every institution for the time being established for the promotion of science, literature, the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs: provided that the Royal

Institution, and the *London Institution* for the advancement of literature and the diffusion of useful knowledge, shall be exempt from the operation of this Act.

XXXIV. The term "parish" shall signify herein any place separately maintaining its own poor.

XXXV. In all deeds, documents, proceedings, suits and prosecutions, this Act may be cited and described by the name of "the Literary and Scientific Institutions Act, 1854."

CAP. CXIII.

An Act to amend the Law relating to the Administration of the Estates of deceased Persons.

[11th August, 1854.]

"WHEREAS it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended:" be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

I. When any person shall, after the thirty-first day of *December*, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of *January*, 1855.

II. This Act shall not extend to *Scotland*.

CAP. CXV.

An Act to amend the Law relative to the Removal of Prisoners in Custody. [11th August, 1854.]

"WHEREAS by the several Acts of Parliament made and passed for regulating gaols and houses of correction in *England*, *Wales*, and *Ireland*, and for the better ordering of prisoners, provision is made for the custody and treatment of debtors as one of the classes of prisoners to be confined therein: and whereas in some counties prisoners for debt and for

contempt of court are confined in separate prisons not being gaols within the meaning of the said Acts for regulating gaols and houses of correction and for better ordering of prisons, and doubts have arisen whether such prisoners for debt and contempt of court may be lawfully removed to and confined in such last-mentioned gaols, and it is expedient that such doubts should be removed, and that the powers given by law for the removal of prisoners in custody should be enlarged and rendered more generally applicable:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

I From and after the passing of this Act, when the common gaol for any county in *England*, *Wales*, or *Ireland* shall be adapted for debtors as a class of prisoners to be confined therein, it shall be lawful for the sheriff of such county, or any other person having custody of persons for debt within any county, to remove to such common gaol all prisoners in his custody for debt or contempt of court from any prison in which they may be confined, and such common gaol shall be deemed the legal place of custody for such debtors, and no such removal shall be deemed or taken to be an escape.

II. Provided always, that no such removal shall take place until one of her Majesty's inspectors of prisons, acting for the county in which such common gaol is situate, on the application of her Majesty's justices of the peace for such county in quarter sessions assembled, shall have signed and transmitted to the clerk of the peace for the said county a certificate in the form or to the effect in the schedule to this Act annexed, nor until one of her Majesty's principal secretaries of state or the chief secretary for *Ireland* shall, by warrant under his hand, direct and authorize such removal.

III. From and after such removal as aforesaid, it shall be lawful for the sheriff of the county to send to and confine in such common gaol all future prisoners for debt or for contempt of court, which common gaol shall be deemed the legal place for their confinement, any local act or usage to the contrary notwithstanding.

IV. "And whereas in some counties in *England* and *Wales* the keeper or governor of the common gaol is by usage or under some legal authority appointed by the justices in quarter sessions assembled, and in *Ireland* by boards of superintendence and not by the sheriff:" be it enacted, that in all cases in which the keeper of any common gaol (in which debtors are or under this Act may be confined) shall be appointed by any authority other than that of the sheriff, it shall and may be lawful for the keeper so appointed to give security by bond or otherwise to the sheriff for the time being for the safe keeping of all such debtors as may be placed in his custody, and such bond or other security may be made and given to such sheriff for the time being, and shall and may be prosecuted by such sheriff in case of default of such keeper.

V. Provided nevertheless, that, except as aforesaid, nothing herein contained shall tend to relieve

the sheriff of any county from the duty of keeping the common gaol in the same manner as is now by law required from him.

VI. All the powers and provisions of the several Acts of Parliament in force authorizing the disposal of unnecessary prisons shall and may be exercised and applied for the sale and disposition of any prison rendered unnecessary by this Act having been carried into effect in any county, in the same manner as if such last-mentioned prison were a gaol or prison within the words or meaning of the said several Acts of Parliament or any of them.

VII. "Whereas by the Act fifty-five *George* the Third, chapter fifty, section two, the justices of the peace in quarter sessions are authorized to make allowances to certain gaolers by way of compensation for fees abolished by that Act: and whereas by the Act seventh and eighth *Victoria*, chapter ninety-six, section seventy, it is enacted, that every keeper or other officer of any debtors' prison whose emoluments should be diminished by that Act might make claim for compensation, and the commissioners of her Majesty's treasury were thereby authorized to award a gross or yearly sum in respect thereof:" be it enacted, that the justices of the peace assembled in quarter sessions may order and direct that the allowance (or such part thereof as they may think fit) hitherto made to the keeper of any gaol which may become unnecessary by virtue of the provisions of this Act may be continued for and during the life of such keeper, and the commissioners of her Majesty's treasury may continue the allowance (or such part thereof as they may think fit) hitherto made to the keeper of any such gaol for and during the life of such keeper.

SCHEDULE.

FORM OF CERTIFICATE.

I hereby certify that I have inspected the new common gaol or } of the county of the alterations and additions } made to the common gaol and particularly that portion of the building which it is proposed to appropriate for the custody of debtors; and I further certify, that the same is in a fit and proper state for the reception of such prisoners as are or may be confined in prison for debt or contempt of court within the jurisdiction of the sheriff of the said county.

(To be continued.)

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DUBLIN, MARCH 17, 1855.

THE case of *Dowdall in error v. Kelly*, (7 Ir. Jur., 183) is one in which, as one of the learned judges before whom it was argued in the Court of Exchequer Chamber truly observed, a most important question of practice was involved. That question related to the responsibility of a plaintiff who had caused the defendant to be arrested under a judge's *fiat*, which was subsequently set aside, and the defendant discharged out of custody. The facts of the case, as it stood upon the pleadings, were briefly these:—The defendant Dowdall had originally sued the defendant Kelly in an action of debt; and in the course of that suit had laid before Mr. Baron Richards an affidavit to ground a *fiat*, under the 1 and 2 Vic. c. 105, sec. 2, stating facts calculated to lead to the belief that Kelly was about to quit Ireland. Baron Richards accordingly granted a *fiat* to hold the debtor to bail in a sum of £387, and he was accordingly arrested. Kelly subsequently appealed to Crampton, J., in whose court the suit was pending, under sec. 5 of the same Act, who appears to have arrived at a different conclusion from that come to by the former judge, whether upon the same affidavit, or upon fresh and explanatory facts, it did not appear; and the result was, that he discharged the *fiat*, leaving, however, the writ of *capias* standing. Kelly then

commenced a retaliatory suit against Dowdall in the form of trespass for assault and false imprisonment, who pleaded a plea of justification under the *fiat* and writ of *capias*. The plaintiff Kelly replied to this plea, that after the suing out of the special order, which had been obtained on affidavits alleging that the plaintiff was about to quit the country, a rule of the court in which the action was pending was made by Mr. Justice Crampton, setting aside the special order (or *fiat*) of Baron Richards. The replication concluded with the averment, that the *fiat* was so set aside "on the grounds that the said Right Honourable Baron Richards had been induced to make said order, and had made said order upon a misrepresentation of facts touching and relating to the alleged intention of the said Michael Kelly to quit Ireland; and that the said Right Honourable Baron Richards had, by such misrepresentation, been induced to make said order improvidently, wherefore said order was, as aforesaid, set aside." The defendant demurred to this replication, assigning, as the two principal causes, that the form of action was misconceived, as it should have been *case*, not *trespass*, under the circumstances confessed in the pleadings; and, also, that the nature of the misrepresentation was not stated, nor was it stated to have been that of the defendant. Upon these pleadings judgment was given by the Court of Exchequer in favour of the plaintiff; and the defendant accordingly brought

his writ of error, and the cause was afterwards argued and determined in the Court of Exchequer Chamber, in Hilary Term last. It was our fortune to have been present during the delivery of the judgments; and we are free to confess that it has been seldom our lot to have heard more able ones upon both sides of a question than some of those which were then given. Out of a court of nine judges, five were in favour of the plaintiff in error, and four for affirming the judgment below. The great practical importance of the case determined us to deviate from our usual course of leaving the very lengthy cases to the regular reports, and we have therefore placed it at once in the hands of our readers. The fundamental principle, which appeared to divide the majority from the minority, was with reference to the existence or non-existence, at the present time, of that which *prima facie* would be a legal authority for the arrest. It seemed to be taken for granted, that if the writ of *capias* were still in force, and had not been reduced to a mere nullity, *case*, and not *trespass*, would have been the proper form of action. In other words, more applicable to the present procedure, where *mere* forms of action no longer exist, malice and want of probable cause would be the gist of the action, and should be both averred and proved. The question was, therefore, warmly debated as to whether the *capias* was in force or not. The judges who were in favour of that view of the case contended that there was no averment in the replication denying the present existence of the *capias*, or alleging that it had been set aside; that if the effect of the order of Mr. Justice Crampton had been to nullify the previous proceedings, it would have been enough to have denied their existence simply, without admitting that such an order had once existed and had been vacated; that no matter upon what grounds the order had been set aside, the *capias* had still a legal existence, being regular in form, and that order did not specially affect it, and that it was not analogous in this respect to a *ca. sa.* upon a final judgment, but, on the contrary, that the second principle which governed the ancient bailable process in this respect still applied; and hence *trespass* was not maintainable. They also argued that, at all events, nothing appeared upon the face of the replication to show that the misrepresentation alleged was otherwise than innocent, and that it was perfectly consistent with the facts pleaded that the second judge might have decided that the prior judge had arrived at a wrong conclusion; that inasmuch as the second judge was by statute constituted a tri-

bunal of appeal from the decision of the first judge, his reversal of the order was analogous to the judgment of a Court of Error, and would thereby leave intact whatever had been done prior to that reversal; so that, at all events, the former order still enured to validate all the former proceedings under the *capias*. The minority of the judges, on the contrary, declared their opinion to be in favour of holding that no analogy whatever existed between the ancient *mesne* process and the modern practice of holding to bail in the action; that the *capias*, since the 3 & 4 Vic. c. 105, was a collateral proceeding, and was wholly void *ipso facto* without a previous *fiat*, whence it followed that when that *fiat* was annulled, the *capias* fell to the ground for every purpose other than the protection of the sheriff or officer acting under it, and hence, as such a writ would no longer in any view afford to the party a legal justification, *trespass* was the proper remedy, malice being no essential ingredient. With regard to the other point, they denied that any analogy existed between the case of a mere interlocutory order, or *fiat*, like the present, and a proceeding upon which a writ of error would lie, distinguishing the present case from that of *Prentice v. Harrison*, (4 Q. B. 852); but even, if such existed, they considered that the replication sufficiently imputed the setting aside of the proceedings to the fault of the plaintiff in the former action, and not of the judge. Amidst such a conflict of sentiment on the part of eminent judges, it would be presumptuous for us to say anything as to the merits of the discussion. Suffice it to say, that the case, as it stands, has been decided upon the safe and equitable side. Several of the judges forcibly pointed out the extremely injurious consequences which must result from holding the proceedings a nullity, and that in such a case the plaintiff in the action by a mere difference of opinion between the judges, and without any fault of his own, would be exposed to a vexatious action. It was also truly observed that the real question, which a judge is called upon to decide *ex parte* in the first instance upon the best information which the plaintiff can afford him on affidavits, is one the answer to which is known only to the defendant, namely, the intention of the latter to quit the country. All that the plaintiff can do is to state such facts as make this intention matter of inference. The defendant may then come forward and show, if he can, that no such intention on his part exists, and if he do so, he will entitle himself to his discharge. Probably section 5 of the 3 & 4 Vic. c. 105, did not contemplate the setting

aside of the former order, but merely the discharge of the defendant, but assuming that the judge on appeal should adopt the course of discharging the fiat itself, is it not monstrous that the unfortunate plaintiff should be by that act of authority converted into a trespasser? It certainly has been the practice, in general, upon the setting such proceedings aside, to bind the defendant by an undertaking to bring no action, but it is the safer and better way to leave as little power of this sort as possible to be exercised at discretion upon the spur of the moment. It is remarkable how completely the court were left to the guidance of general principles in the investigation of this question, and how little direct authority could be found notwithstanding the existence in England of an analogous statute. We anticipate that the recent question, notwithstanding the scanty majority, will be considered as settled, as however evenly balanced the conflicting arguments may be considered, the view of the majority of the judges certainly commends itself to our sense of justice and convenience.

STATUTES PASSED IN THE SESSION 17 & 18 VIC. RELATING TO IRELAND.

CAP. CXXV.

An Act for the further Amendment of the Process, Practice, and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at *Westminster*, and of the Superior Courts of Common Law of the Counties Palatine of *Lancaster* and *Durham*.

[12th August, 1854.]

XIX. It shall be lawful for the court or judge, at the trial of any cause, where they or he may deem it right for the purposes of justice to order an adjournment for such time, and subject to such terms and conditions as to costs, and otherwise, as they or he may think fit.

XX. If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following; *videlicet*:

"I, A. B., do solemnly, sincerely, and truly, affirm and declare that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly, affirm and declare," &c.

which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

XXI. If any person making such solemn affirmation or declaration shall wilfully, falsely, and

corruptly, affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

XXII. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

XXIII. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

XXIV. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

XXV. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate, containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

XXVI. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instru-

ment may be proved by admission or otherwise, as if there had been no attesting witness thereto.

XXVII. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writings in dispute.

XXVIII. Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court whose duty it is to read such document to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid.

XXIX. Such officer of the court shall, upon payment to him of the whole or (as the case may be) of the deficiency of the stamp duty payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds; and an entry of the fact of such payment, and of the amount thereof, shall be made in a book kept by such officer; and such officer shall, at the end of each sittings or assizes, (as the case may be,) duly make a return to the commissioners of the inland revenue of the moneys, if any, which he has so received by way of duty or penalty, distinguishing between such moneys, and stating the name of the cause and of the parties from whom he received such moneys, and the date, if any, and description of the document for the purpose of identifying the same; and he shall pay over the said moneys to the receiver-general of the inland revenue, or to such person as the said commissioners shall appoint or authorize to receive the same; and in case such officer shall neglect or refuse to furnish such account, or to pay over any of the moneys so received by him as aforesaid, he shall be liable to be proceeded against in the manner directed by the eighth section of an Act passed in the session of Parliament holden in the thirteenth and fourteenth years of the reign of her present Majesty, intituled *An Act to repeal certain Stamp Duties, and to grant others in lieu thereof, and to amend the Laws relating to the Stamp Duties*; and the said commissioners shall, upon request and production of the receipt hereinbefore mentioned, cause such documents to be stamped with the proper stamp or stamps in respect of the sums so paid as aforesaid: provided always, that the aforesaid enactment shall not extend to any document which cannot now be stamped after the execution thereof on payment of the duty and a penalty.

XXX. No document made or required under the provisions of this Act shall be liable to any stamp duty.

XXXI. No new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.

XXXII. Error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing a special case before the Court of Error shall, as nearly as may be, be the same as in the case of a special verdict; and the Court of Error shall either affirm the judgment, or give the same judgment as ought to have been given in the court in which it was originally decided, the said Court of Error being required to draw any inferences of fact from the facts stated in such special case which the court where it was originally decided ought to have drawn.

CIII. The enactments contained in Sections Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, Twenty-six, Twenty-seven, and Twenty-eight, Twenty-nine, Thirty, Thirty-one, and Thirty-two of this Act shall apply and extend to every court of civil judicature in *England and Ireland*.

FINAL NOTICE TO CLAIMANTS.

INCUMBERED ESTATES COURT.

In the Matter of the Estate of Frederick Augustus Hartford, Owner and Petitioner. } ALL parties interested are hereby required to TAKE NOTICE, that the Commissioners have Sold Shortall's Grange, situate in the Barony of Cranagh, and County of Kilkenny; and that the *Draft Schedule of Incumbrances* is now lodged in the Office of the General Clerk of this Court; and if any person have a claim not therein inserted and admitted, or any objection to said Schedule, either on account of the amount or priority of any charge therein mentioned as due to him or any other person, or because he claims any lien on the purchase money, or otherwise; and particularly if any persons claim any sum of money upon foot of the judgment in the Schedule hereto, upon which nothing is admitted to be due. Notice is hereby given that a statement, duly verified, of the particulars of such claim, objection, or lien, must be lodged by such person with the General Clerk of this Court, on or before the 16th day of May next, and on the following Monday, the 1st day of May, at the hour of eleven o'clock. Mr. Commissioner Hargreave, Q.C., will give directions for the final settlement of said Schedule. And all persons interested are hereby further required to take Notice, that within the time aforesaid any person may file an objection to any demand contained in said Schedule.

Dated this 22nd day of March, 1855.

JOHN OSBORN WOODHOUSE, Solicitor, 15, College green.

ROBERT K. PIERS, Notice Clerk.

SCHEDULE.

Judgment obtained in Court of Exchequer by James Power against Bibby Hartford, in Michaelmas Term, 1810, for £400.

Just Published, price 7s. 6d., by Post, 8s.

THE LAW OF JUDGMENTS AND EXECUTIONS, together with the DUTIES and OFFICE OF SHERIFFS, in relation to WRITS of EXECUTION and INTERPLEADER; with INDEX, NOTES, and CASES.
By ROBERT W. OSBORNE, Esq., Barrister-at-law.

Orders for the IRISH JURIST left with E. J. MILLIKEN, 15, COLLEGE GREEN, or by letter (post-paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the day of publication.

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THE

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MARCH 24, 1855.

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DUBLIN, MARCH 24, 1855.

We are not in the habit of canvassing merely political appointments, nor do we think it our duty on ordinary occasions to criticize the mode in which the prerogative of the Crown, in the distribution of its patronage, is exercised, even when it affects the department of justice; still less do we wish to bandy personalities or to discuss the merits or demerits of individuals. But there is a system of promotion resorted to for some time past which requires to be noticed by a legal journal, inasmuch as its seeming tendency is to ignore the legitimate claims of professional standing and experience at the Bar, and to substitute some other standard of merit, the nature of which we confess we are unable to comprehend.

There are six principal law offices of the Crown which hitherto constituted fair objects of ambition to the ablest men at the Bar, and which, in former times, were conferred upon none but the most distinguished in the profession for their legal accomplishments and their eminence in practice. These six offices are, the offices of Attorney and Solicitor General; the three Crown Serjeantcies; and the office of Adviser at the Castle. A most extraordinary fact, and almost incredible if it were not too true, is, that, at this present moment, four out of

these six great offices are held by non-practising barristers—men who do not even pretend to look for practice, and whose faces are never seen in the Hall of the Four Courts except as occasional loungers. The Attorney General, Mr. Keogh, (except in *Birch v. Somerville* and *Delacour v. Handcock*,) the Sergeants Howley and Berwick, and the Adviser, Mr. Corballis, have been for several years past upon the list of non effectives, whether as deserting absentees or superannuated pensioners, but upon the strength of the Bar they have ceased to be, until now they are suddenly placed in the highest offices of command over the heads of all the distinguished practitioners of the several courts. Of the entire six only one single individual can be said to be in anything like first rate practice, namely, Mr. J. D. Fitzgerald. This is to say the least of it, anomalous, when the Hall of the Four Courts has no lack of practising barristers of distinguished talents, and fully qualified in every sense to do honour to the appointments. We are almost led to the conclusion that practice at the Bar has become a matter of disqualification for the high legal offices of the Crown, or that the law offices are become so many comfortable consolations for gentlemen who have not succeeded in obtaining any other encouragement at their profession.

Now we ask, in all seriousness, is her Majesty, or rather the public, to be served by an inferior

class of barristers, by men of less talent and experience to those who serve the ordinary suitor? Are the rejected of the public good enough for the Crown? Or is the only avenue to promotion at the Irish Bar to be through the gates of St. Stephens? We think there is a grievous wrong done to the profession, and a still greater injustice done to the public, when the right man is not put in the right place, and we cannot but think that a profession which, of all others, requires an intimate knowledge of the varieties of details and decided cases of which the law is made up, can scarcely be successfully followed in its higher departments without some portion of that experience and practised facility which is acquired in the intermediate stages. Our Blackburnes, Joys, Plunketts, Burkes, O'Grady's, were not made exclusively by Parliamentary and by hustings declamation, or by presiding at Sessions, and it is a novelty in the system of promotion which translates gentlemen to the summit of the ladder who have never been able to ascend any one of the lower grades by themselves. Although it may be difficult to suggest a remedy, yet we think the grievance has attained such proportions that it may well engage the serious attention of the Bar collectively, whether it is not possible to give an appropriate expression to their sense of the injustice and public injury which is being done. Mr. Sergeant Christian's resignation, if it is on this ground, was a step in the right direction; and if the several practising counsel to her Majesty, as a body, were prepared to tender the resignation of their offices of Queen's counsel to the Lord Chancellor, it might probably cause the Government to pause, and for the future to consult the public welfare and public opinion a little more in the selection of the Law Officers of the Crown.

A B I L L

TO MAKE PROVISION FOR THE MORE SPEEDY AND EFFECTUAL DESPATCH OF BUSINESS IN THE HIGH COURT OF CHANCERY IN IRELAND.

(Prepared and brought in by Mr. Whiteside, Mr. Napier, and Mr. Malins.)

[NOTE.—The words printed in *Italics* are proposed to be inserted in Committee.]

WHEREAS the present mode of proceeding in the High Court of Chancery in Ireland by orders of reference, reports, and exceptions, is attended with delay, expense, and other inconvenience, and it is expedient that every cause or matter should be prosecuted through all stages before and under the direction of the same judge or judicial officer; be it therefore enacted by the Queen's most excellent

Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this Parliament assembled, and by the authority of the same, as follows:

I. The existing senior three Masters in ordinary of the said Court of Chancery shall be and are hereby constituted judges of the said court under the style of Vice Chancellors, with power severally to exercise such jurisdiction and authority as herein-after provided; and it shall be lawful for her Majesty from time to time, when and as any vacancy shall occur in the office of any of the said Vice Chancellors, or of any of their successors, for the time being, by death, resignation, or removal from office, by letters patent under the Great Seal of Ireland, to appoint a fit person, being a barrister of at least *fifteen* years standing, to supply such vacancy: provided, that it shall not be necessary for any of the said Masters to obtain letters patent for their said appointments to such office of Vice Chancellor, but they shall be deemed capable of exercising such office as if the same were held by letters patent under the provisions of this Act: provided also, that when any vacancy shall occur in the said office of Vice Chancellor while the present existing junior two Masters in ordinary or either of them hold such office of Master, the senior of such junior masters or the survivor of them (as the case may be) shall be appointed to fill such vacancy; and if the survivor of such two existing junior Masters be so promoted, then upon the next vacancy in the office of Vice Chancellor the junior of the said two Masters shall succeed to such last-mentioned vacancy; and every such Vice Chancellor shall hold his office during good behaviour: provided always, that it shall be lawful for her Majesty to remove any such judge from his office, upon an address of both Houses of Parliament.

II. Every Vice Chancellor to be appointed in pursuance of this Act shall, previous to his executing any of the duties of his office, take the following oath, which the Lord Chancellor of Ireland for the time being is hereby authorized and required to administer:

"I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and power, execute the office of Vice Chancellor. So help me GOD."

III. The said Vice Chancellors hereby appointed and their successors in office respectively shall have rank and precedence next after the Lord Chief Baron of her Majesty's Court of Exchequer in Ireland.

IV. The Master of the Rolls and each of the Vice Chancellors shall severally have full power to hear and determine all causes, matters, and things which are or shall be at any time depending in the Court of Chancery in Ireland, as a Court of Equity, or which have been or shall be submitted to the jurisdiction of the said court in relation to infants or lunatics, or by the authority of any Act of Parliament, (except the Acts relating to bankruptcy,) and all decrees, orders, and acts of the said Master of the Rolls or Vice Chancellors severally, shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders, and acts

of the said Court of Chancery, subject nevertheless to appeal to the Lord Chancellor.

V. The Master of the Rolls and each of the said Vice Chancellors shall and may severally exercise all or any of the powers, authorities, and jurisdiction, now or heretofore exercised by the Masters in ordinary, or by the Master of the Rolls, including the power of attachment or committal for contempt.

VI. The Master of the Rolls and each of the said Vice Chancellors shall severally have full power, authority, and jurisdiction, as well in relation to causes and matters which shall be heard before them as to those which may be referred to them respectively, by order or decree of the Lord Chancellor, to direct and control the conduct of the same; and make all proper and necessary inquiries, adjudications, decrees, and orders, in course of the prosecution of the same, from such original hearing or reference to the final determination thereof, and without making any report thereon, subject nevertheless to appeal to the Lord Chancellor.

VII. So soon as this Act shall come into operation the office of Master shall stand abolished, except as and for the purposes herein-after specially provided; the junior two existing Masters shall have full power and authority, not only as heretofore to continue the control and direction of the several causes and matters which shall be pending before them, when this Act shall come into operation, but shall have jurisdiction to institute such inquiries and make such decrees, orders, and adjudications in relation to the same throughout their several stages to the final determination thereof, including orders for payment of money, as such Vice Chancellors may institute and make in the several causes and matters before them under the authority of this Act, but subject to the like appeal to the Lord Chancellor.

VIII. All causes, matters, and things, which at the time of the commencement of this Act shall be attached to the offices of the said three Masters hereby appointed Vice Chancellors (save and except matters of minority and lunacy), and also all references under decrees or orders of the court (except in matters of minority and lunacy) depending before them, shall be transferred to and prosecuted before the said junior two Masters, and shall be distributed between them in such manner as the Lord Chancellor shall direct, and such junior two Masters shall have and exercise with respect to all such business, such jurisdiction, powers, and authorities respectively as is herein-before reserved to or vested in them with respect to the business heretofore depending before them at the time of the commencement of this Act: provided always, that in case any cause, matter, or thing shall have progressed so far before any of such senior three Masters that the transfer thereof as aforesaid would be attended with delay and expense to the parties, it shall be lawful for the Lord Chancellor to authorize and direct such Master to continue the prosecution of such cause, matter, or thing, and such Master shall prosecute the same accordingly, and with the same powers in every respect as if this Act had not passed.

IX. The senior three Masters respectively shall hand over and transfer to the office of the respective junior Masters all deeds, papers, and documents necessary for the prosecution of the causes, matters, or things to be transferred to such junior Masters, under the provisions of this Act, on receiving a requisition and receipt therefor from the Master requiring same.

X. In order as expeditiously as may be to wind up the several causes, matters, and things, which may be depending before or transferred to such junior two Masters in ordinary of the said court as herein-before provided, it shall be lawful for each of such Masters at any time after the passing of this Act to summon, as he shall deem fit, all or any of the parties to any cause, matter, or thing so depending, or their solicitors, and thereupon to proceed with such cause, matter or thing, and give such directions, and make such order, as he may think necessary, for settling and winding up the same; but any such order shall be subject to be discharged or varied by the court upon application made for that purpose; and the Master shall be at liberty to proceed for the purposes aforesaid in the absence of any of the parties or solicitors neglecting or refusing to attend the summons.

XI. In case the Master shall be unable by reason of the conduct of parties or otherwise to finally dispose of any cause, matter, or thing, he shall be at liberty to dispose of any part thereof within his power, and to report or certify on the whole of the case; and upon such report or certificate the court shall make such order as it shall think proper on all or any of the parties for the further prosecution of the suit or matter, or for the final disposal thereof, and for the payment of the costs thereof, including any of the costs which may have been incurred by reason of the conduct of the parties.

XII. In the event of the parties in any cause, matter, or thing, or their solicitors, refusing or neglecting within a time to be fixed by the Master to bring the Master's report or certificate before the court, the same may by direction of the Master be brought before the court by the general solicitor for the time being for minors and lunatics, wards of the court; and the court is hereby empowered to order payment of the costs and expenses of the solicitor to the suitors fund out of such of the funds in the cause, matter, or thing, or by such parties as to the court shall seem just; and in case payment thereof cannot be obtained by any of the means aforesaid, the same by the direction of the court may be paid out of the suitors fee fund.

XIII. All matters of minority and lunacy which at the time of the commencement of this Act shall be attached to the respective offices of the said senior three Masters, shall thenceforth be attached to their respective courts as Vice Chancellors, and all future proceedings in such matters shall be by notice to be moved before such Vice Chancellors, instead of by petition as heretofore; and all references pending in such matters at the time of the commencement of this Act shall be continued to a final termination before the Vice Chancellor in whose office as a Master such references had been pending, and such Vice Chancellors shall instead

of making reports in such pending matters, make orders which shall be of the same force and effect as orders of the Lord Chancellor, and shall be final and conclusive unless appealed from.

XIV. The said junior two Masters shall on or before the *first day of Michaelmas Term* which will be in the year one thousand eight hundred and fifty six, transmit or cause to be transmitted to the office of the Chief Secretary of the Lord Lieutenant, or other Chief Governor or Governors of Ireland, a report in writing under the hands or hand of the said Masters or one of them, containing the names of the several causes, matters, and things so transferred to them from the offices of the said senior three Masters as aforesaid, together with the names of the several solicitors having the carriage of the proceedings in the said causes, matters, and things respectively, and the said junior two Masters, or their respective successors in office, shall within the first four days of Michaelmas Term in each and every year after the said year one thousand eight hundred and fifty-six, so long as any of said causes, matters, or things shall remain pending or undisposed of in the respective offices of the said Masters or their successors, transmit or cause to be transmitted to the office of such Chief Secretary a report in writing under their respective hands of the names of such of the said several causes, matters, or things from time to time remaining undisposed of, the names of the solicitors respectively having the carriage of the proceedings, and the date and object of the last meeting which shall have taken place in each of such causes, matters, or things, from the period of the next preceding report, together with the cause, so far as can be ascertained why the same have not been disposed of.

XV. The Master of the Rolls and each of the Vice Chancellors shall severally on the *first day of November* in every year, or within *one week* after the said day, deliver or cause to be delivered at the office of such Chief Secretary, a return in writing under their respective hands, stating the number of days on which they respectively shall have attended at the respective offices in the performance of their duties for and during twelve months next preceding such return, specifying the number of hours occupied in each of such days attendance; and each of said judges shall annex to such his report a list or schedule of the several causes, petitions, or matters of every description then pending in his court, so far as the same can be ascertained, with the names of the respective solicitors having the carriage of the proceedings therein, and the date and object of the last proceeding which shall have taken place in each of such causes, matters, or things respectively, either before such judge or his chief clerk.

XVI. From and after the commencement of this Act it shall be lawful for the Master of the Rolls and the Vice Chancellors for the time being, and they are hereby required to sit at chambers for the despatch of such part of the business of the said court as can, without detriment to the public advantage arising from the discussion of questions in open court, be heard in chambers, according to the directions herein-after in that behalf specified or re-

ferred to; and the times at and during which they respectively shall so sit shall be from time to time fixed by them respectively.

(To be continued.)

FINAL NOTICE TO CLAIMANTS. INCUMBERED ESTATES COURT.

In the Matter of the Estate of Frederick Augustus Hartford, Owner and Petitioner. } ALL parties interested are hereby required to TAKE NOTICE, that the Commissioners have sold Shortall's Graigue, situate in the Barony of Crannagh, and County of Kilkenny; and that the Draft Schedule of Incumbrances is now lodged in the Office of the General Clerk of this Court; and if any person have a claim not therein inserted and admitted, or any objection to said Schedule, either on account of the amount or priority of any charge therein mentioned as due to him or any other person, or because he claims any lien on the purchase money, or otherwise; and particularly if any persons claim any sum of money upon foot of the judgment in the Schedule hereto, upon which nothing is admitted to be due. Notice is hereby given that a statement, duly verified, of the particulars of such claim, objection, or lien, must be lodged by such person with the General Clerk of this Court, on or before the 16th day of May next, and on the following Monday, the 17th day of May, at the hour of eleven o'clock. Mr. Commissioner Hargreave, Q.C., will give directions for the final settlement of said Schedule. And all persons interested are hereby further required to take Notice, that within the time aforesaid any person may file an objection to any demand contained in said Schedule.

Dated this 22nd day of March, 1856.

JOHN O'NEILL WOODHOUSE, Solicitor, 15, College-green.

ROBERT K. PIERS, Notice Clerk.

SCHEDULE.

Judgment obtained in Court of Exchequer by James Power against Bibby Hartford, in Michaelmas Term, 1840, for £400.

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This grateful Syrup combines with the balsamic and restorative properties of Smilax Aspera, the soothing virtues of the Garden Lettuce, and the efficacious principles of the Ipecacuanha and other expectorants. It is found most useful in affections of the chest, allaying the troublesome irritation which provokes coughing, and removing phlegm, difficulty of breathing, and hoarseness. It is also a nice medicine for children.

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THE

IRISH JURIST.

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MARCH 31, 1855.

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NAMES OF THE CASES REPORTED IN THIS NUMBER.

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DUBLIN, MARCH 31, 1855.

We felt it to be our painful duty last to comment upon the recent selection of the principal law officers of the Crown in this country. We endeavoured to show that the actual standing of the greater number of these gentlemen in the profession was wholly out of character with the elevated posts now assigned to them; in other words, that contrary to all just precedent they had been put over the heads of their more deserving brethren. It is, however, not with the men themselves that our quarrel lies, but with those ministers in whose hands the patronage of these offices are vested. It is of those British ministers we complain, to whom the honour and interests of that great body, the Irish Bar, and consequently of the public as interwoven therewith, appeared to be as a thing of nought, and whose sole aim is to smooth down any present difficulties which may beset their political path. We do not desire in our editorial capacity to plunge into vexed and party politics. The charge with which we assail the authors of the recent promotions applies more or less to all previous administrations, indeed some of the officers in question owe their posts to previous governments, but when one glaring instance of this abuse has been committed in our view, we are unable to keep silence; we protest in the name of the Bar of

Ireland against this outrage, and we say to our rulers, "Strip us of every thing else but leave us our honour; if you must conciliate support from a quarter where you have hitherto encountered a reckless opposition, buy that at any price you please but not at our cost." While we are compelled in some degree to treat all these appointments in a mass, we are, at the same time, sensible that the disqualifications of the holders are not wholly on a par; neither does the objection which we last noticed, as to political motives influencing the appointments, apply to all with the same force.

Putting out of question the immediate claim of the Solicitor General to preferment, and the comparatively short time that he has been in the profession, we must admit that the nomination was that of an able man and, at all events, the least objectionable of the lot.

Then, with regard to the Sergeantcies; if Mr. Sergeant O'Brien's appointment alone had been in question, these remarks would certainly have been spared. With regard to the other two learned gentlemen of the *coif*, they have both of them earned the reputation of being good Assistant Barristers, we think that that distinction which confers little else than standing at the Bar, and a title on its possessor, is all but thrown away upon them, as they have retired from general practice in our courts, and hence the privilege of being entitled to move

in order next after the Solicitor General is to them of no value. Surely the bestowal of such a dignity upon these gentlemen is tantamount to a practical abolition of the office.

Then, with regard to the Castle Adviser; no one esteems and admires the private character and virtues of Mr. Corballis more than ourselves, but it will be regarded as no detraction to say that many men of less general ability, but more conversant with the quirks and quibbles of the law, would more satisfactorily discharge the troublesome duties of Castle Adviser.

Now we come to the man whose appointment we candidly confess to be the most reprehensible of all those which have passed before us in review. In order succinctly to express our views of his unfitness for the high office of Attorney General for Ireland, it is only needful to contrast him with his two immediate predecessors in that post. That he possesses great talents, no one can deny; and we will go further and say, that had he not, in his legal noviciate, and when upon the threshold of getting into business, exchanged the *forum* for the senate, he would probably at this day have held a high position at the Bar. But it is one thing to be a lawyer, and another thing to have the requisite capacity. It is the solemn duty of a Government, when casting about for an Attorney General, to choose the ablest man who is willing to work with them, to whom the Bar will cheerfully look as their acknowledged leader, and to whom, if in the ordering of Providence during the tenure of his office, one of the judges of the land shall be removed, his mantle of ermine may not unworthily fall. Is the present Attorney General the leader whom the Bar would have chosen for themselves, had that privilege been conceded?

When we look at these things, it must be confessed that the anticipations which they give rise to are dismal enough. Does it not argue, on the part of our rulers, a total disregard of our national interests? Would this be borne elsewhere? Alas! the moral of the fable of the bundle of sticks has been thrown away upon us; our voice of national protestation is lost amid the clamour of our party strifes, and hence we are treated as a mere province.

“At tu, victa provincia, ploras.”

A BILL

TO MAKE PROVISION FOR THE MORE SPEEDY AND EFFECTUAL DESPATCH OF BUSINESS IN THE HIGH COURT OF CHANCERY IN IRELAND.

(Prepared and brought in by Mr. Whiteside, Mr. Napier, and Mr. Malins.)

[NOTE.—The words printed in *Italics* are proposed to be inserted in Committee.]

(Continued from page 112.)

XVII. The chamber business of the Master of the Rolls and of every Vice Chancellor shall be carried on in conjunction with his court business; but as no rooms are attached to the courts of the said Masters hereby created Vice Chancellors in which such chamber business can be transacted, it shall be lawful for the Lord Chancellor to cause chambers to be provided for every of them respectively for that purpose until courts with proper rooms attached can be provided for them.

XVIII. It shall be lawful for the Master of the Rolls and every of the Vice Chancellors respectively when sitting in open court to adjourn for consideration in chambers any matter which, in the opinion of such judge, may be more conveniently disposed of in chambers, or when sitting in chambers to direct any matter to be heard in open court which he may think right to be so heard.

XIX. The mode of proceeding before the Master of the Rolls and Vice Chancellors respectively at chambers shall be by notice, subject, however, to the same rules and regulations as to the entry and service thereof, as heretofore applicable to the service of summonses, unless the same shall be altered by any General Rule to be made in pursuance of the powers for that purpose in this Act contained.

XX. The Master of the Rolls and every of the Vice Chancellors respectively when sitting in chambers shall have the same power and jurisdiction in respect of the business to be brought before them, as if they were respectively sitting in open court.

XXI. The orders made by the Master of the Rolls and Vice Chancellors respectively when sitting in chambers shall be drawn up there by their respective clerks, to be appointed as herein-after mentioned.

XXII. All orders of the Master of the Rolls or of any Vice Chancellor, made by him at chambers, shall have the force and effect of orders of the Court of Chancery, and such orders may be signed and enrolled in like manner.

XXIII. From and after the commencement of this Act the Master of the Rolls and the Vice Chancellors respectively shall have the sole power (subject to any rules which may be made by the Lord Chancellor, with the advice and assistance of them or any two of them,) to order what matters and things shall be investigated by and before their respective chief clerks, either with or without their direction, during their progress, and what matters and things shall be heard and investigated by themselves; and particularly, if the judge shall so direct, his chief clerk shall take accounts and make inquiries; and the judge shall give such aid and directions in every

or any such account or inquiry as he may think proper, but subject nevertheless to the right of the auditor to bring any particular point before the judge himself.

XXIV. From and after the commencement of this Act all or any of the powers, authorities, and jurisdiction given to the Masters in ordinary of the said court by any Act or Acts then in force may be exercised by the Master of the Rolls and Vice Chancellors respectively.

XXV. It shall be lawful for the Lord Chancellor, with the advice and assistance of the Master of the Rolls and Vice Chancellors, or any two of them, and they are hereby required forthwith to make and issue General Rules and Orders for regulating the times and form and mode of procedure before the Master of the Rolls and Vice Chancellors respectively, sitting at chambers, and their respective chief clerks, and generally the practice of the said court, in respect of the matters to which this Act relates, and for regulating the fees and allowances to solicitors of the said court in respect to such matters; and such rules and regulations, as aforesaid, shall take effect as General Orders of the said court.

XXVI. The said existing junior two Masters, or such person as may be from time to time nominated for the temporary discharge of such duty by the Lord Chancellor, shall exercise exclusive jurisdiction in the appointment and control of receivers, in passing receivers accounts, and otherwise, in relation to estates under their management, and the application of funds in their hands, in like manner as such powers are already vested in Masters in ordinary and the Master of the Rolls for that purpose by the law and practice of the said court, subject nevertheless to appeal to the Lord Chancellor, and without prejudice to any jurisdiction heretofore exercised by the Lord Chancellor by the law and practice of the said court; and the said Masters so retaining their office under this Act shall continue to discharge the duties imposed upon the Masters of the Court of Chancery, under the statute passed in the fifth and sixth years of the reign of William the Fourth, chapter sixteen, intituled "An Act for altering and amending the law regarding commitments by Courts of Equity for contempts, and the taking bills pro confesso in Ireland."

XXVII. Upon the occurrence of the first vacancy in the office of such Receiver Masters, the situation of such second Master shall not be filled up unless the Lord Chancellor shall certify under his hand to the Commissioners of her Majesty's treasury that the state of the business of such court requires the appointment of such second Master, in which case it shall be competent to her Majesty on a like certificate from time to time to appoint such second Master; but nothing in this Act contained shall deprive her Majesty of the power of appointing, from time to time, one Receiver Master, as the office may become vacant, who shall be called the Receiver Master.

XXVIII. From and after the commencement of this Act the annual salary heretofore payable to the said three Masters who are hereby created Vice Chancellors shall cease, and in lieu thereof there

shall be issued and paid and payable to each and every of such Vice Chancellors, so long as they shall hold their respective offices, and also to every succeeding Vice Chancellor in Ireland for the time being, out of such funds as may be provided by Parliament, the annual sum of *three thousand five hundred pounds* sterling; and every such annual sum shall from time to time from henceforth be payable and paid quarterly, free and clear from all taxes and deductions whatsoever (income tax excepted,) on every twenty-fifth day of March, twenty-fourth day of June, twenty-ninth day of September, and twenty-fifth day of December; the first payment thereof to be made on the first of said quarterly days which shall immediately next follow the commencement of this Act, and in proportion only to the time which shall have then elapsed from the commencement of this Act: provided always, that nothing herein contained shall extend to affect or prejudice the right of William Henn, Esquire, one of such Masters, to receive certain annual sums heretofore payable to him for compensation, as one of the Masters of the said court.

XXIX. Whenever any person who shall hold the office of Vice-Chancellor in Ireland shall, during the course of any quarter, resign or quit his said office, or shall die, then the person so resigning or quitting, or the executors or administrators of such person so dying, (as the case may be,) shall be entitled to such proportionate part of such salary as shall have accrued during such part of the said quarter as such person shall have executed the said office; and every Vice-Chancellor to be hereafter appointed shall, on the quarter day next after his appointment, be entitled to have and receive out of the said funds such proportion of such salary as shall have arisen from the date of the letters patent of his appointment.

XXX. It shall be lawful for her Majesty by any letters patent under the great seal of the United Kingdom to give and grant unto any person executing the office of Vice-Chancellor in pursuance of this Act, an annuity not exceeding *three thousand pounds* sterling, to commence and take effect immediately after the period when the person to whom such annuity shall be granted shall resign the said office of Vice-Chancellor, and to continue from thenceforth during the life of the person to whom the same shall be granted; and such annuity shall be payable out of such funds as may be provided by Parliament; and such annuity shall be paid quarterly, free from all taxes and deductions whatsoever, on the four usual days of payment in the year, (that is to say,) the fifth day of January, the fifth day of April, the fifth day of July, and the tenth day of October in every year, by equal portions; and the first quarterly payment, or a proportionate part thereof, to be computed from the time of the resignation of the said office, shall be made on such of the same days as shall next happen after the resignation of the said office; and the executors or administrators of the person to whom the same annuity shall be granted as aforesaid shall be paid such proportionate part of the said annuity as shall accrue from the commencement or the last quarter payment thereof, as the case may be, to the day of his death:

provided always, that it shall be lawful for her Majesty in and by such letters patent to limit the duration of payment of such annuity, or any part thereof, to such periods of time during the natural life of such person in which he shall not exercise any office of profit under her Majesty, so that such annuity, together with the salary and profits of such other office shall together not exceed in the whole the said sum of *three thousand pounds sterling*: provided also, that no annuity granted to any person having executed the office of Vice-Chancellor under this Act, shall be valid unless such person shall have continued in the said office for the period of *fifteen years*, or shall be afflicted with some permanent infirmity disabling him from the due execution of his office, which shall be distinctly recited in said grant: provided also, that in estimating the period of service of the said Masters in ordinary, who are hereby constituted and appointed Vice Chancellors, or who may succeed to such office under the provisions of this Act, with a view to the amount of such superannuation allowance, it shall be lawful to reckon the number of years during which they have respectively filled the office of Master in ordinary of the court, along with those during which they may respectively fill the office of Vice Chancellor; and in estimating the period of service of Acheson Lyle, Esq., one of the junior Masters, hereby appointed one of the receiver Masters, in case he shall succeed to the office of Vice Chancellor, with a view to the amount of such superannuation allowance, it shall be lawful to reckon the number of years during which he has successively filled the offices of Chief or Second Remembrancer of the Court of Exchequer and Master in ordinary of the Court of Chancery in Ireland, along with those during which he may fill the office of Vice Chancellor of the said Court of Chancery.

XXXI. The Master of the Rolls and each of the Vice Chancellors shall have in and attached to their respective offices, to assist in the despatch of business as herein-after mentioned, the following clerks and assistants, that is to say, one chief clerk for the purpose of taking accounts in detail in subordination to and under the direction of such judge, issuing postings for sales or creditors, signing official documents, and otherwise assisting in the general business of each court respectively, and the causes and matters therein; a second clerk or registrar, whose duty it shall be to attend the sittings and take notes of orders and decrees pronounced by the respective judges, to have such orders and decrees prepared from such notes and transmitted to the registrar's office of the Court of Chancery, and otherwise assist in the general business of such court; and two junior clerks to be attached respectively to each of such courts, and assist in the general business thereof, and such chief clerks and junior clerks shall be respectively under the control of the judge to whose court they shall respectively be attached, and shall perform such duties in connexion with their respective courts as such judge shall from time to time direct; and all such clerks and assistants shall hold their respective offices during good behaviour and so long as they shall personally give their attendance upon their respective duties, and shall conduct themselves diligently and faithfully in the due execution of the

duties of their said offices respectively, and shall not be removed except by the order of the Lord Chancellor, who is hereby empowered, by order made by him, to remove any such chief, second, or assistant clerk or clerks for some sufficient cause to be stated in such order.

XXXII. It shall be lawful for the Master of the Rolls to appoint a chief clerk, a second clerk or registrar, and two junior clerks, to be attached to his said court and to his successors in office, whose duties shall correspond with those herein-before assigned to the like officers under the Vice Chancellors, and who shall hold their offices for the same term and subject to the like regulations.

XXXIII. The examiner now attached to the office of each senior Master hereby appointed Vice Chancellor as aforesaid, shall be and become and he is hereby appointed the chief clerk to be attached to the court of such Vice Chancellor and of his successors in office, and shall be deemed the chief clerk of such judge; the assistant clerk now attached to the office of each senior Master hereby appointed Vice Chancellor, shall be and become and he is hereby appointed registrar to be attached to the court of such Vice Chancellor and his successors in office, and it shall be lawful for each of the said Masters so appointed Vice Chancellors to appoint two persons each to be the junior clerks in their respective offices, and in the offices of their respective successors.

XXXIV. When and so often as any vacancy shall occur by death, resignation, or otherwise, of any of the clerks hereby appointed or to be appointed pursuant to the provisions of this Act, attached to the courts of the Master of the Rolls and Vice Chancellor respectively, such vacancy shall be filled by the clerk next in seniority in the court wherein such vacancy shall occur, to whom no sufficient objection to the satisfaction of the Lord Chancellor shall be made; and in all future vacancies in the office of junior clerk in each court, the judge of the court in which such vacancy shall occur, shall appoint some proper person to be such junior clerk.

XXXV. Every solicitor or attorney who shall be appointed to and shall accept any office under this Act, shall cease to be an attorney or solicitor, and shall forthwith procure himself to be struck off the roll of solicitors of the high Court of Chancery, and off the roll of any of her Majesty's Courts of Record in Ireland on which his name may be.

XXXVI. It shall be lawful for each and every of the Vice Chancellors for the time being respectively to appoint a person, to be respectively attached to each of their said courts constituted under this Act, for the purpose of keeping order therein and performing the duties of crier and tipstaff.

XXXVII. Nothing in this Act contained shall prejudice, affect, or alter the precedence, rank, power, patronage, emoluments, or other rights, privileges, and powers incident to or heretofore enjoyed by the Master of the Rolls.

XXXVIII. Provided that nothing in this Act contained shall affect the rights of Yelverton O'Keeffe as one of the joint registrars of the Court of Chancery.

XXXIX. The salaries of the said chief clerks

shall be the yearly sum of *eight hundred pounds* sterling each; the salaries of the said second clerks or registrars shall be the yearly sum of *six hundred pounds* sterling each; the salaries of such junior clerks shall be the yearly sum of *three hundred pounds* sterling each; and the salaries of such criers and tipstiffs shall be the yearly sum of *sixty pounds* sterling each; and all the said salaries shall be paid out of such funds as may be provided by Parliament, and shall be paid and payable in such manner and on such and the same quarterly days, and subject to such regulations as to proportionable parts at the commencement and termination thereof, as is herein-before provided in respect to the payment of the salaries of the Vice Chancellors herein-before provided.

XL. All and every the said several clerks hereby appointed and to be from time to time appointed under the authority of this Act, in the respective courts of the Master of the Rolls and Vice Chancellors respectively, who shall hereafter resign his office with the sanction and under the authority of the Lord Chancellor, or shall be removed therefrom by the Lord Chancellor in consequence of his being permanently incapable from infirmity of mind or body to discharge the duties thereof, shall be entitled to receive such superannuation allowance as the Commissioners of her Majesty's Treasury shall think proper to direct; and in ascertaining and awarding the amount of such superannuation allowance the said Commissioners shall take into consideration the whole period during which any such person shall have been permanently employed in the said court, and shall proceed according to the principle laid down by an Act passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled "An Act to alter, amend, and consolidate the laws for regulating the pensions, compensations, and allowances to be made to persons in respect of their having held civil offices in his Majesty's service;" and all such sums and allowances which shall be so awarded and granted under the authority aforesaid shall be paid and payable and be charged and chargeable in the same way as is herein-before provided in respect of the salaries of the said several clerks: provided always, that nothing herein contained shall prejudice the right of the examiners of the three senior Masters in ordinary of the said court hereby appointed Vice Chancellors, and which examiners are hereby appointed chief clerks to such Vice Chancellors, to retire from the respective offices to which they are appointed by this Act, after the period of service and upon the other terms contained in an Act passed in the fifteenth year of her present Majesty's reign, intituled "An Act to regulate the proceedings in the High Court of Chancery in Ireland."

XLJ. From and after the commencement of this Act it shall and may be lawful for the several chief clerks, and also the second clerks or registrars to the Master of Rolls and Vice Chancellors respectively, and all other persons who may hereafter be appointed chief clerks, and second clerks or registrars to the Master of the Rolls respectively, or to any future Master of the Rolls or Vice Chancellor, while they shall respectively continue to hold their

respective offices; and they are hereby fully authorized, empowered, and directed to administer oaths, and to take affirmations, declarations, or attestations of honour, examinations, or other matters whatever to be put in on oath in the said Court of Chancery; and all persons swearing, declaring, affirming, or attesting before any of such persons so by this Act authorised to administer oaths and take declarations, affirmations, or attestations of honour, shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing, declaring, affirming, or attesting contained therein, as if the same had been sworn, declared, affirmed, or attested before any person now by law authorised to administer oaths, and to take declarations, and receive affirmations.

XLII. It shall be lawful for the chief clerks of the Master of the Rolls, Vice Chancellors, and Receiver Masters respectively, to ask, demand, and receive in their respective offices, for and on account of the matters and things to be done in or concerning the business of their several and respective offices, the fees and sums of money in the schedule to this Act annexed, mentioned, and none other or greater fees or sums of money whatever; and no officer, deputy, or clerk, or any of such officers, shall ask, demand, or receive, from any of the suitors of the said court, or from any person whatsoever on their behalf, any fee or sum of money whatever on account of, or for performance of, or under pretence of performing any act, matter, or thing whatsoever, in anywise relating to the business of the said offices, or any of them; and the said schedule, and the matters and things therein, shall be taken as part of this Act.

XLIII. The said chief clerks shall severally keep or cause to be kept in their offices accurate accounts of all sums of money received for fees in pursuance of this Act, and shall out of the sums received for such fees pay to the scrivenerly clerks employed by them respectively in pursuance of this Act, for all copies made by such clerks at the rate of *three halfpence* per folio of seventy-two words, and shall also retain and pay for stationery, coals, office keeper, and such other incidental expenses such sums as shall appear necessary to the Commissioners for auditing public accounts, and shall quarterly and every quarter on every twenty fifth day of March, twenty-fourth day of June, twenty-ninth day of September, and twenty-fifth day of December, or within *ten* days next after, transmit to the Commissioners of her Majesty's Treasury an account on oath of their respective receipts and disbursements, and shall upon such account being audited pay into the exchequer to the credit of the consolidated fund such balance, if any, as may be in their respective hands on foot of such accounts, and if at any time any balance shall appear due to any of the said chief clerks on account of expenses of their said offices, it shall be lawful for the Commissioners of her Majesty's Treasury or any *three* or more of them, and they are hereby empowered from time to time if they shall think fit, to cause to be issued and paid out of the said consolidated fund to such chief clerks such sum of money as shall be necessary to defray the expenses incurred in their respective offices as aforesaid.

XLIV. In the construction of this Act the expression "Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper, and Lords Commissioners of the Great Seal of Ireland for the time being.

XLV. This Act shall commence and take effect from and after the

SCHEDULE of Fees to be received in the respective offices of the Chief Clerks of the Master of the Rolls, Vice Chancellors, and Receiver Masters under the foregoing Act.

Copies of pleadings, statements, accounts, and all other documents of every description required from said offices or any of them, for each folio containing seventy-two words, or concluding fraction of a folio,	d. 0 4
For engrossing decrees and orders for signature of the officer, previous to same being transmitted to the Registrar's office, for each folio of seventy-two words, or concluding fraction of a folio,	d. 0 4
Search for papers or documents for any period exceeding one year, and not exceeding three years, antecedent to the time of making such search, where the party requiring the search to be made shall not take out a copy of the document or documents searched for,	1 0
Search for papers or documents for any period exceeding three years antecedent to the time of making such search, where the party requiring the search to be made shall not take out a copy of the document or documents searched for,	3 0

A BILL

TO AMEND THE PRACTICE AND COURSE OF PROCEEDING IN THE HIGH COURT OF CHANCERY IN IRELAND.

(Prepared and brought in by Mr. Whiteside, Mr. Napier, and Mr. Malins.)

[Note — The words printed in *Italics* are proposed to be inserted in Committee.]

WHEREAS an Act was passed in the thirteenth and fourteenth years of the reign of her present Majesty, intituled "An Act to regulate the proceedings in the high Court of Chancery in Ireland:" and whereas it is expedient further to amend the practice thereof: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. The said recited Act, and all orders made thereunder or by virtue of any other authority, shall be continued in full force, except where the same shall be altered, amended, or are inconsistent with the provisions of this Act.

II. Where any person shall apply to the Lord Chancellor by petition under the provisions of the

said recited Act, in any case where the petitioner is or claims to be,

A legal or equitable mortgagee or person entitled to a charge or incumbrance affecting property, seeking foreclosure and sale, or sale, or otherwise to enforce his security:

A person entitled to a rent-charge, and seeking to have the arrears thereof paid by the appointment of a receiver, or by the sale of the lands on which the rent-charge is charged:

A person entitled to redeem any legal or equitable mortgage or any lien seeking to redeem same:

A creditor upon the estate of a deceased person seeking payment of his debt out of the deceased's real and personal assets:

A legatee upon the estate of a deceased person seeking payment of his legacy out of the deceased's real and personal assets:

A creditor upon the estate of a deceased person seeking payment of his debt out of the deceased's personal assets:

A legatee under the will of any deceased person seeking payment or delivery of his legacy out of the deceased's personal assets;

A residuary legatee, or one of the residuary legatees, of any deceased person seeking an account of the residue and payment or appropriation of his share therein:

The person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate and payment of his share thereof:

An executor or administrator of any deceased person seeking to have the personal estate of such deceased person administered under the directions of the court:

A person entitled to the specific performance of an agreement for the sale or purchase of any property seeking such specific performance:

A person entitled to an account of the dealings and transactions of a partnership dissolved or expired seeking such account:

A person entitled to an equitable estate or interest and seeking to use the name of his trustee in prosecuting an action for his own sole benefit:

the petition in the said several cases shall be in the form and to the effect set forth in Schedule A hereto annexed, as applicable to the particular case, or as near thereto as circumstances may permit; but if any of the cases herein-before enumerated involve or are attended by such special circumstances affecting either the estate or the personal conduct of the respondent as to require special relief, or if it be necessary that other matters should be stated and put in issue in addition to those contained in the said forms respectively, the petitioner shall be at liberty to frame his petition accordingly.

III. If a petition for any of the purposes to which the forms set forth in Schedule A are applicable shall be framed otherwise than in accordance with the form applicable thereto, and it shall appear to the court on the hearing of such petition that the petition should have been framed to the effect of the

form in said schedule applicable to the case, the court may order that the increased costs occasioned by such proceeding beyond the amount of costs which would have been sustained in proceeding according to the said forms shall be borne and paid by the petitioner.

IV. Every petition herein-before enumerated which shall not be in the form or to the effect set forth in Schedule A, as applicable to the particular case, and also all other petitions and all affidavits filed under said Acts, shall be drawn without repetitions, impertinence, prolixity, or scandal; and such parts of records, deeds, and documents as shall be pertinent and material shall be alone set out therein; and such parts so set out, as well as all other matters contained in any petition or affidavit, shall be abstracted and stated as concisely as possible, consistently with a clear statement of the facts; and every petition filed under the said Act shall be signed by counsel; and if the court shall, on the hearing of the petition, be of opinion that any petition or affidavit is prolix or scandalous, the court may make such order in respect to the costs occasioned by such prolixity or scandal as to the court shall seem fit.

V. The statements in all petitions under the said Act shall be divided into short and separate paragraphs as conveniently as may be, which shall be numbered consecutively 1, 2, 3, &c.; and the interrogatories, if any, which shall be annexed to the petition or filed shall also be divided in like manner and numbered consecutively, beginning from the last number of the paragraphs in the statement; and such of the interrogatories, if any, as each respondent is required to answer shall be specified in a note at foot of the interrogatories or petition, in the form or to the effect following; that is to say, "the respondent C D is required to answer the interrogatories numbered respectively 11, 12, 13, &c. (or as the case may be); and the respondent E F is required to answer the interrogatories numbered respectively 14, 15," &c. (or as the case may be.)

VI. It shall not be competent to any respondent in any suit in the said court to take any objection for want of parties to such suit in any case to which the rules next herein-after set forth extend; and such rules shall be deemed and taken as part of the law and practice of the said court, and any law or practice of the said court inconsistent therewith shall be and is hereby abrogated and annulled:

Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.

Rule 2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.

Rule 4. Any one of several cestuis que trust under any deed or instrument may, without serving any other cestuis que trust, have a decree for the execution of the trusts of the deed or instrument.

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

Rule 6. Any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or cestui que trust for the administration of the estate or the execution of the trusts.

Rule 7. In all the above cases, the court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the respondent on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 8. In all the above cases, the persons who according to the present practice of the court would be necessary parties to the suit shall be served with notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may, by an order of course, have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the general order of the Lord Chancellor, apply to the court to add to the decree.

Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.

VII. If in any suit or other proceeding before the court it shall appear that any deceased person who was interested in the matters in question has no legal representative, it shall be lawful for the court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the court shall think fit, either specially or generally by public advertisement; and the order so made by the court, and any orders conse-

quent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the court.

VIII. If a motion shall be made under the 8th section of the said recited Act for liberty to annex interrogatories to any petition presented under said Act, or to any affidavit filed by way of answer to such petition, or to file interrogatories to be answered by the petitioner or respondent respectively, and the court shall make an order giving liberty to annex or file same, the court may by such order direct that the consideration of the costs of the said motion, and order, and of such interrogatories and the proceedings thereon, and of the liability of the petitioner to pay the additional costs occasioned by such interrogatories, shall stand over until the hearing of the said petition.

IX. In all cases in which the petition prays for the foreclosure and sale, or for the sale of land for the payment of incumbrances, it shall not be necessary for the petitioner to make any person respondent in the said petition save the owner of the land, and where such petition seeks an account of personal estate the person representing such personal estate; and it shall not be necessary to serve any other person with notice of such petition, unless the court shall otherwise direct; and if the petitioner shall make any other person a respondent, the costs occasioned thereby, and the costs of all proceedings consequent thereon shall be paid by the petitioner, unless the court shall otherwise direct.

X. The term "the owner of the land," as herein-before used, shall mean any person, save as herein-after mentioned, who by the rules and practice of Courts of Equity in Ireland is a necessary party to a suit for the foreclosure and sale, or for the sale of lands for the payment of incumbrances: provided always, that no incumbrancer, whether by mortgage or otherwise, or any person in whom any estate shall be vested solely as a trustee for such incumbrancer, shall be deemed to be "the owner of the land" as aforesaid, unless such incumbrancer shall be in the actual possession or receipt of the rents and profits of said lands otherwise than by a receiver or sequestrator appointed by the court.

XI. Petitions under said Act shall be verified by the affidavit of the petitioner, unless as herein-after mentioned.

XII. Petitions under said Act filed by the Attorney or Solicitor General in his official character, and where there shall be no relator, need not be verified, but where there shall be a relator, the petition may be verified by the affidavit of such relator.

XIII. Petitions under said Act filed in the name of a person found to be of unsound mind may be verified by the affidavit of the committee of such person, when filed by a corporation, by the affidavit of any officer of said corporation.

(To be continued.)

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APRIL 7, 1855.

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DUBLIN, APRIL 7, 1855.

In deference to a certain class of public opinion, seconded by a considerable section of the press, the Government have resolved upon the abolition of the stamp duties upon newspapers, except as an equivalent for transmission through the post.

Convinced as we are of the essential advantages of direct over indirect taxation, we, of course, hail every remission of the latter description of duties as a step in the right direction. We, however, do not regard the proposed innovation with the enthusiasm with which it has been received in certain quarters, and indeed for more than one reason we are inclined to question its policy. In the first place, we think that it is very questionable whether it is altogether wise at the present moment to give up £200,000 hitherto yielded to the Exchequer from this source, merely to satisfy a craving for cheap news. Of course, the plea for thus doing is the necessity for popular education. If the extension of the press in the direction likely to be engendered by this relaxation did tend to promote the spread of useful knowledge, we should be the last to say a word to discourage so beneficial a scheme, even though the loss of national income were likely to be considerably greater. But it may well be questioned, by

appealing to past experience, whether newspapers are the best primary instructors of the people.

The treatises which will best impart elementary education are those which are written calmly and impartially, in the spirit of a judge, not of a partisan. Their object should be to communicate truth to the best of the author's ability, not merely to enlist the reader in a particular faction. The press, on the other hand, usually assumes rather the function of an advocate, whose aim is, at all hazards, to carry his point.

A good educational foundation should be laid before indiscriminate newspaper reading can be at all beneficial, or indeed free from serious abuse. We are convinced that very few experienced instructors of youth would desire that the junior classes should become "constant readers;" and there is a strict analogy for many purposes between the uneducated mind of the youth and the adult. Again, we feel assured that those who have gained a competent share of education will feel little difficulty in gaining access to the leading newspaper organs of the day, even under the incubus of a penny stamp. If the object be to encourage popular education by means of the press, we should much prefer that additional postal facilities should be given to what we regard as the real instructors of the people, namely, such works as Chamber's Journal, Dickens' Household Words, &c. Let

drawbacks on paper duties be freely given to books of this class, as the information which they contain is solid nutriment for the mind, not merely fuel for political and personal prejudices.

In making these remarks we would not wish to be supposed to be insensible to the obligations which the British public owe to the leading newspaper journals, not only as bulwarks of liberty and progressive advancement, but likewise as popular instructors; but it is no disparagement to these leaders of public opinion to say that the elementary education of the people should be confided to hands other than those of the Fourth estate. It is nevertheless evident that there has been too general an expression of public sentiment in favour of the proposed measure, and that it finds too much favour with a class which a struggling Administration find it their interest to conciliate, to render it probable that the scheme will be abandoned in deference to the remonstrances of the leading organs of the metropolitan Press, which have protested against it. We only hope, therefore, that, whilst in committee, and before it passes the third reading, it will undergo a slight modification, which would, at all events, obviate the chance of a positive mischief. As the bill stands, it provides that for those journals which continue to avail themselves of the right of transit, *per post*, on a privileged basis, the stamp shall be retained, and therewith the stamp office regulations. The proprietors of such journals will still have to enter into preliminary securities, liable to be estreated in case of conviction for libel. The petty journals, however, who are satisfied with a merely local circulation, may, by foregoing the postal privilege, escape the inconvenience of entering into cautionary bonds. Now, much as we admire the principles of free trade, we must avow our abhorrence of any thing which is calculated to promote free trade in slander, and we cannot regard without dismay the risk to which this enactment may expose the public, in having character placed at the mercy of a set of petty scribblers, perhaps not worth the value of the paper, ink, and types with which they blacken their neighbours' reputation. The wholesome restriction of the present law, which is to be partially continued, while it operates as no check upon the legitimate freedom of the press, affords some guarantee against a traffic in libel, and we are really at a loss to know why that should be dispensed with. No respectable publisher or editor will incur the slightest risk of not being able to comply with the requisite conditions, and, on the other hand,

such would be a decided stumbling-block in the way of a disreputable journalist. We sincerely trust that this condition will not be dispensed with, except in the case of those purely literary, scientific, or technical journals, which have been deemed as coming constructively within the scope of the present law, and the relief of which is, perhaps, the most unexceptionable object of the measure before the House.*

A BILL

TO AMEND THE PRACTICE AND COURSE OF PROCEEDING IN THE HIGH COURT OF CHANCERY IN IRELAND.

(*Prepared and brought in by Mr. Whiteside, Mr. Napier, and Mr. Malins.*)

[Note.—The words printed in *Italics* are proposed to be inserted in Committee.]

(*Continued from page 120.*)

XIV. Every petition to be presented under the said Act, save as next herein-after mentioned, may be verified by affidavit annexed thereto or subscribed at foot thereof, to the effect set out in the schedule annexed to the said Act, and no costs of any further or additional affidavit in verification in the first instance shall be allowed, except in injunction petitions, unless specially allowed by the court.

XV. Where the petitioner or other person herein-before authorized to verify the petition is unable, by reason of absence from the United Kingdom, or from being an infant, or from any other cause, to verify the same, any person acquainted with the facts shall be at liberty to make the affidavit to verify; but such affidavit shall not be in the short form set forth in the schedule to the Act, and the party making such affidavit shall state the reason why it is not verified in the manner directed by the preceding orders; and the written authority of the petitioner or other person who shall have directed the solicitor to present such petition shall be also verified; and if the court shall be of opinion, on the hearing of the petition, that the petition should not have been verified in the manner herein-before mentioned, the court may make such order as to the further verification of the petition, and as to the costs consequent thereon, as to the court shall seem just.

XVI. In every case in which there shall be more than one defendant to a bill or respondent to a petition, and in which an application shall be made to the court to oblige the plaintiff or petitioner residing out of the jurisdiction to give security for costs; the judge or officer who shall fix the amount of such security shall estimate a sufficient sum as

* In the debate upon the second reading of the Bill the Attorney General is reported to have said, in reply to an objection urged against the measure similar to what we have been stating, that "it must be remembered that the proposition for doing away with the safeguards of securities and registration formed no *integral* part of the measure, and *could* be dispensed with."—*Times*, Friday, March 27.

such security for the costs of all the defendants or respondents, unless any party shall forego his right to such security, in which case an adequate sum shall be fixed as security for the costs of the remaining parties, and no further application for such purpose shall be entertained; and all further proceedings in such cause shall be stayed until such security be given.

XVII. Before the name of any person shall be used in any suit or matter to be instituted in the said court as next friend of any infant, married woman, or other party, or as relator in any information, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the cause petition.

XVIII. From and after the time herein-after appointed for the commencement of this Act, every cause, cause petition, or proceeding, whether in minor or lunatic matters, or under any statute, or otherwise, except matters in bankruptcy, which from their nature would in the ordinary course of the court before the passing of this Act have required or involved a reference to a Master in ordinary to take an account or to make any other investigation, inquiry, or report, shall be heard in the first instance, or shall be moved (as the case may be) before the Master of the Rolls or one of the Vice Chancellors of the court; and all such causes, matters, or proceedings shall be so set down before the said judges respectively in rotation as each case shall be presented to the Registrar of the judge in whose court such cause, cause petition, matter, or thing shall have been attached for that purpose; provided nevertheless, that no cause or cause petition shall be so set down unless counsel for the petitioner or other person so applying shall certify under his hand that such cause, matter, application, or other proceeding is of such nature as aforesaid, and that no such cause, matter, application, or proceeding shall be heard or set down to be heard by such judge if the Lord Chancellor shall direct the same to be heard before himself, whether by a general order or by special order in the particular case obtained upon an application for that purpose.

XIX. Every petition or motion not being in a cause or matter which may have been attached in the courts of the Master of the Rolls or one of the Vice Chancellors, in manner herein provided, shall be heard before, or an order made thereon by, the Lord Chancellor, unless otherwise provided by a general order of the court, or by the special direction of the Lord Chancellor in the particular case.

XX. In all causes or cause petition matters, which from their nature are to be heard before the Master of the Rolls or one of the Vice Chancellors as aforesaid, the clerk of the appearances shall stamp the bill or cause petitions, as for that purpose, with the name of some one of such judges according to rotation, as such bills or petitions shall be presented to him; and the solicitor, on filing every such bill or petition, shall lodge in the Rolls office a fair copy of the same, also stamped by the clerk of appearances with the name of the judge of the court to which the same shall be so attached, and such copy shall be forthwith transmitted from the Rolls office to the office of the registrar of such judge.

XXI. In all cases where petitions are to be heard before the Lord Chancellor, the clerk of appearances shall stamp the same accordingly, and shall at the same time stamp the name of one of the judges in rotation to whose court it shall be attached for performance of the interlocutory duties prior to the hearing, heretofore discharged by a Master in ordinary, and also in case the Lord Chancellor shall make any reference at the hearing thereof.

XXII. All petitions (not being cause petition matters) which from their nature are to be moved before the Master of the Rolls or one of the Vice Chancellors as aforesaid, and which according to the present practice of the court are presented through the secretary to the Lord Chancellor, or the secretary to lunatics, shall be stamped by the clerk of appearances with the name of some one of such judges, according to rotation as such petitions shall be produced to him for that purpose; and if the Lord Chancellor shall not direct the same to be moved before himself, or shall make a reference thereon, the petition shall be forthwith transmitted to the registrar of the judge to whose court such matter has been attached in manner aforesaid.

XXIII. Upon the filing of every petition in the Rolls office, an entry shall be made in a book, to be kept for that purpose, of the date of the filing, the names of the parties, and of the counsel and solicitor who signed it, the judge to whose court the same has been attached, and the number of folios contained in it, which book shall be open to the inspection of the public during office hours without fee; and to enable the officer to make such entry, the solicitor who files the petition shall cause to be endorsed legibly on the back thereof the names of the parties, petitioner, and respondents therein, and the number of folios contained in such petition.

XXIV. Upon the filing of every cause petition (whether the same shall fall within the cases enumerated in the fifteenth section of the said recited Act or not) a notice shall be served upon all the respondents thereto, in the form as herein-after next is provided, and all the respondents who shall be so served with such notice shall be bound by the proceedings in such case from the time of such service, and any respondent who shall have been served with such notice, and shall not enter or cause to be entered an appearance according to the usual practice of the court, shall not be entitled to any further notice of the proceedings in such cause petition matter until an appearance shall be entered in manner herein-before mentioned, and any such respondent shall be at liberty to enter an appearance at any stage of the proceeding without any rule or order for that purpose, and thereupon, and after service of notice of such appearance, the party entering such appearance shall be entitled to be served with notice of all proceedings in the petition matter which may be taken subsequent to entering such appearance without prejudice to any proceeding prior thereto.

XXV. The notice of filing a petition under the said Act shall be in the form and to the effect in that behalf set forth in Schedule B hereunto an-

nexed, with such variations as circumstances may require; but the court shall not be bound to set aside or stay the proceedings in consequence of any inaccuracy in the notice, unless the court shall consider that the respondent was misled thereby, and unless the court shall so think fit.

XXVI. Where a respondent in any suit is out of the jurisdiction of the court,

1. The court, upon application, supported by such evidence as shall satisfy the court in what place or country such respondent is or may probably be found, may order that the notice of moving the cause petition may be served on such respondent in such place or country, or within such limits as the court thinks fit to direct :
2. Such order is to limit a time (depending on the place or country within which the notice is to be served) after service of the notice, within which such respondent is to file his affidavit by way of answer to the petition :
3. At the time when such notice shall be served the petitioner shall also cause such respondent to be served with a copy of the order giving the petitioner liberty to serve the notice, and if the respondent shall reside out of the United Kingdom, the petitioner shall also cause a copy of the petition to be served on the respondent.

XXVII. That when a respondent shall be served with notice of filing a petition, the petitioner shall cause an affidavit of the service thereof to be filed in the proper office of this court; and the clerk of the appearances, on production of an attested copy of such affidavit, shall permit the petitioner's solicitor to enter in a book, to be kept in the office of the clerk of the appearances for that purpose, a memorandum of such service, and of the time when such service was made, which memorandum shall be in the following form :

<p>A B, Petitioner; C D, Respondent; and in the matter of the Court of Chancery (Ireland) Regulation Act, 1850. Dated this</p>	}	<p>Memorandum that the respondent C D was on the day of 185 duly served with notice pursuant to the nineteenth (or twentieth, as the case may be,) general order of the court, as appears by the affidavit of filed the day of 185 . E F, Solicitor for petitioner, (Residence.)</p>
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XXVIII. Every respondent shall be at liberty to file an affidavit by way of answer to such petition within the periods following, that is to say, within (twenty) days after the service of notice of the petition, if served with notice in Ireland, and if the respondent is resident out of Ireland, within such time after the service of notice of the petition as the court shall, in the order made under the twenty-first section of this Act, direct, and if no affidavit by way of answer shall be filed within the said periods respectively, or in case of interrogatories being filed or annexed to the petition within such period as shall be stated in the order of the court, made as herein before mentioned, the petitioner

shall be at liberty, at the expiration of the said periods respectively, or if there are several respondents, at the expiration of the period within which the affidavits by way of answer of all the respondents should be filed, to set down the said petition to be heard, and upon such hearing the affidavit to verify shall be considered sufficient evidence of the several matters of fact and documents in the petition stated or referred to, unless the court shall otherwise direct, and the respondent shall not be at liberty to file an affidavit after the petition shall be set down to be heard without the leave of the court upon special motion: provided always, that if the petition shall be amended in pursuance of the fiftieth section of this Act, the petition shall not be set down until the additional time, if any, allowed to the respondent to file his affidavit by way of answer to the petition so amended, shall have expired.

XXIX. If a motion shall be made under the eighth section of the said Act, for liberty to annex interrogatories to any petition presented under the said Act, or to any affidavit filed by way of answer thereto, or to file interrogatories to be answered by the petitioner or respondent respectively, and the court shall make an order giving liberty to annex or file the same, the court shall, by such order, direct the time within which such interrogatories shall be answered; and if such interrogatories are to be answered by the respondent, and an order shall be made giving liberty to annex or file the same before the respondent shall have filed his affidavit by way of answer, the said respondent shall answer such interrogatories in the said affidavit so to be filed by way of answer in the manner directed in Schedule C. hereunto annexed.

XXX. The affidavit filed by the respondent by way of answer to the petition shall be prepared according to the directions contained in Schedule C. hereunto annexed, and shall be signed by counsel, and the several matters of fact and documents stated and referred to in the petition which the respondent shall not by his said affidavit require the petitioner to prove, shall be taken to be admitted by the respondent, and notice of the filing of such affidavit shall be given to the petitioner without delay; and when the respondent shall require to have such proof of the petition, or any part thereof, made *vivâ voce*, he shall add a requisition to that effect, and if the respondent shall only require a portion of such proof to be made *vivâ voce*, he shall specify such part in such requisition, which portions shall be shortly referred to by the numbers of the paragraphs in such petition.

XXXI. If in any of the cases herein-before enumerated a respondent shall file an affidavit by way of answer, and the court shall, upon the hearing of the petition, consider that such respondent had not any probable ground of defence, or that the respondent put the petitioner on proof of any matter or document which ought not to have been disputed; or if the court shall consider that the affidavit by way of answer was filed for the purpose of delay, in the said several cases the court may make an order at the first or other hearing of the petition, declaring such respondent or his solicitor liable to pay all or such part of the costs incurred up to and including

such hearing as the court may think just; and the court shall be at liberty to make such order although the respondent may be a trustee or personal representative, or a party to whom costs are usually awarded.

XXXII. The petitioner shall, at or before the time of filing his cause petition, lodge with his solicitor all deeds, documents, and papers stated or referred to in his petition, or the schedules thereto, which shall be in his power, custody, or possession, and the respondent shall be at liberty, at all reasonable times and without any order of the court, to inspect such deeds, documents, and papers so lodged with the petitioner's solicitor, and to take extracts therefrom; and the respondent shall be at liberty, without filing a cross petition, to move that the petitioner shall furnish the respondent with copies of all or any of the said deeds, documents, or papers, upon payment to the petitioner's solicitor therefor, at the rate of *one penny halfpenny* for each office sheet of the copies so required, and the court shall thereupon make such order as shall appear to the court to be just.

XXXIII. If the affidavit filed by way of answer by the respondent does not put the petitioner upon proof of any matter of fact or document stated or referred to in the petition or the schedule thereto, and if the petitioner does not dispute any matter of fact or document stated or referred to in such affidavit or the schedule thereto, the petitioner may, when the period within which all the respondents should file such affidavit by way of answer has elapsed, set down the said petition for hearing; and a respondent who shall not have filed such affidavit shall not be at liberty to do so after the cause shall have been so set down, without the order of the court on special motion.

XXXIV. If the affidavit filed by way of answer by the respondent shall put the petitioner upon proof of any matter of fact or document stated or referred to in the petition or the schedule thereto, or if the petitioner shall dispute any matter of fact or document stated or referred to in the affidavit filed by way of answer, or the schedule thereto, the petitioner shall be at liberty to serve a notice upon any respondent who shall have filed such affidavit in the form or to the effect in Schedule D. hereunto annexed; but such notice, if there shall be more than one respondent, shall not be served until after the expiration of the time allowed to the other respondent or respondents who shall not file any such affidavit to file the same, and a respondent who shall not have filed such affidavit shall not be at liberty to do so after such notice shall have been served, unless by leave of the court on special motion, and from and after the service of such notice the cause in which same has been served shall be deemed at issue.

XXXV. The several matters of fact and documents stated and referred to in the affidavit filed by the respondent by way of answer, which the petitioner shall not by such notice require the respondent to prove, shall be taken to be admitted by the petitioner.

XXXVI. If the respondent shall put the petitioner, or the petitioner put the respondent, on proof

of any matter of fact or document, and the court shall at the hearing of the petition consider that any matter of fact or document upon proof of which the petitioner or respondent respectively shall have been put, ought not to have been disputed, the court may make such order in relation to the costs of such proof as to the court may seem just.

XXXVII. When a petitioner shall serve a respondent with such notice as last aforesaid he shall cause an affidavit of the service thereof to be filed in the proper office of the court, and the Deputy-keeper of the Rolls on production of an attested copy of such affidavit shall permit the petitioner's solicitor to enter in a book to be kept for that purpose a memorandum of such service, and of the time when such service was made, which memorandum shall be in the following form:

<p>A. B. Petitioner; C. D. Respondent; and in the matter of the Court of Chan- cery (Ireland) Regu- lation Act, 1850.</p>	}	<p>Memorandum that the re- spondent, C. D., was on day of 185 , duly served with a notice as appears by the affidavit of filed the day of 185 , and which notice is as fol- lows:</p>
---	---	---

(Set out the notice.)

dated this day of 185 .

E. F. Solicitor for Petitioner.
(Residence.)

XXXVIII. Every party to the cause who shall have been put upon proof of facts or documents as aforesaid by such notice shall be at liberty at his election to prove such facts or documents by affidavit or *vivâ voce*, or partly by affidavit and partly *vivâ voce*, unless the party so putting him or her upon such proof shall require him or her to make such proof or any part thereof *vivâ voce* under the provisions of this Act.

XXXIX. The mode of examining witnesses in causes or cause petition matters in the said court, and all the practice of the said court in relation thereto, so far as such practice shall be inconsistent with the mode herein-after prescribed of examining such witnesses, and the practice in relation thereto, shall, from and after the time appointed for the commencement of this Act, be abolished, save as herein-after otherwise specially provided, and all such witnesses shall be examined orally in manner herein-after provided: provided always, that the court may, if they shall think fit, order any particular witness or witnesses within the jurisdiction of the said court, or any witness or witnesses out of the jurisdiction of the said court, to be examined upon interrogatories in the mode now practised in the said court, and that with respect to such witness or witnesses the practice of the said court in relation to the examination of witnesses shall continue in full force, save only so far as the same are varied by the provisions of this Act, or as same may be varied by any general order of the Lord Chancellor in that behalf, or by any order of the court with reference to any particular case.

XL. The examination of witnesses *de bene esse*, and in suits to perpetuate testimony, shall be conducted orally in manner herein provided instead of upon interrogatories, unless the court shall otherwise order.

XLI. All witnesses to be examined orally under the provisions of this Act shall be so examined before one of the examiners of the court, or by or before an examiner to be specially appointed by the court, the examiner being furnished by the plaintiff or petitioner with a copy of the bill or petition and of the answers or answering affidavit or affidavits, if any, in the cause; and every such examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination, and such examination, cross-examination, and re-examination, shall be conducted as nearly as may be in the mode now in use in Courts of Common Law in relation to witnesses not expected to be present at the trial of a cause, and every party to the suit may have a copy thereof, or any part thereof, in like manner as examinations upon interrogatories.

XLII. The practice of the said court of issuing commissions to special examiners for the examination of witnesses in causes and matters depending in the said court be and the same is hereby abolished, and in lieu thereof, whenever it shall be necessary to appoint a special examiner for the purpose of examining witnesses, either in chief or in aid of any inquiry in any cause or matter, the judge before whom such cause or matter shall be pending, or to whose court the cause or matter shall be attached, shall appoint such examiner according to the present practice of the court relating to the appointment of commissioner examiners, so far as such practice is applicable thereto; but such appointment is to be made by the order of such judge, and such order is to state the rate of payment to such examiner and the time within which the examination is to be closed, wherever he shall deem it necessary or expedient so to do; and every such examiner when so appointed, and on taking the oath herein-after mentioned, is to have full power and authority, subject to the present rules and practice in that behalf, to summon for examination and to examine all witnesses produced before him for examination in such cause or matter, and to call for documents and to administer oaths; and all persons examined before such examiner so appointed as before mentioned shall be subject and liable to all such penalties, punishment, and consequences for any wilful and corrupt false swearing, affirming, or declaring, as if such witnesses had been examined under the authority of a commission issued forth of the same court and under the seal thereof.

XLIII. Before proceeding to examine witnesses the examiner so appointed is to take and subscribe, before some person duly authorized to take affidavits in or for the said court, the following oath, which shall be annexed to and returned with the depositions taken by such examiner, that is to say,

"I, A B, do swear that I will, according to the best of my skill and knowledge, truly and faithfully perform the duty of an examiner to examine witnesses pursuant to the powers vested in me by the annexed order of appointment, and that I will truly, faithfully, and without partiality to any or either of the parties in this cause, take and write down the examinations and depositions of all and every witness

and witnesses who shall be produced before and examined before me; and further, that I will fairly and truly enter and set down in writing in the dominical of such examination, the hours of the day on each day that I shall be employed as such examiner, at which I shall respectively commence and conclude the examination of the witnesses under such order, as also the real and true cause or causes of my not commencing such examination at or before eleven of the clock in the forenoon, if such should be the case; as also of my not continuing such examination until four o'clock in the afternoon, if such should be the case; as also by whose delay or default, so far as I can judge, such examination was not commenced and continued (as the case may be) from eleven o'clock in the forenoon till four o'clock in the afternoon. So help me GOD."

XLIV. When the examination shall be closed, the depositions shall be made up by the examiner and forwarded with the said affidavit by post or by hand, under the seal of the said examiner, to the office of the examiner of the same court, where they are thenceforward to remain of record, and all parties requiring them shall be entitled to copies thereof upon payment of the legal fees for same.

XLV. When an examination of witnesses is to take place in England or in Scotland, such examination shall take place and be conducted in the manner pointed out in the thirty-ninth section of this Act by the Master extraordinary as at present, and the depositions of the witnesses shall be returned by post or by hand according to the present course of practice.

XLVI. All pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court of Chancery in Ireland, and also acknowledgments required for the purpose of enrolling any deed in the said court, shall and may be sworn and taken in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorized to administer oaths in such colony, island, plantation, or place, or before any of her Majesty's Consuls or Vice-Consuls in any foreign parts out of her Majesty's dominions, and the judges and officers of the said Court of Chancery shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, Consul, or Vice-Consul, attached, appended, or subscribed to any such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or other documents to be used in the said court.

XLVII. All persons swearing, declaring, affirming, or attesting before any person authorized by this Act to administer oaths and take declarations, affirmations, or attestations of honour, shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing, declaring, affirming, or attesting contained therein as if the matter sworn, declared, affirmed, or attested had been sworn, declared, affirmed, or attested before any court or persons now by law au-

thorized to administer oaths, and take declarations, affirmations, or attestations upon honour.

XLVIII. If any person shall forge the signature or the official seal of any such judge, notary public, or other person lawfully authorized to administer oaths under this Act, or shall tender in evidence any plea, answer, disclaimer examination, affidavit, or other judicial, or official document, with a false or counterfeit signature or seal of any such judge, court, notary public, or other person authorized as aforesaid attached or appended thereto, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall be liable to the same punishment as any offender under an Act passed in the eighth and ninth years of the reign of her present Majesty, intituled "An Act to facilitate the admission in evidence of certain official and other documents."

XLIX. The practice of the said court of issuing subpoenas ad testificandum and subpoenas duces tecum to compel the attendance of witnesses or the production of documents shall be and the same is hereby abolished; and in lieu thereof, when the attendance of any person is required as a witness, or to produce deeds, records, or other documents, a summons, signed by the examiner of the court when the examination is to take place in Dublin, or by a special examiner appointed as before mentioned, when the examination is to take place out of Dublin, and, when requiring the production of documents, stating the documents required, shall be duly served on such person in the manner in which subpoenas are now served, and such notice shall have the effect of a subpoena ad testificandum or subpoena duces tecum; and all persons who shall be duly served, and shall not attend pursuant to such notice, shall be subject to the same penalties, punishment, and consequences as if they had been served with a subpoena ad testificandum or a subpoena duces tecum.

L. The summons to compel the attendance of any party or witness to be examined orally before the court or any judge thereof at any hearing shall be signed by the registrar of the court if the attendance is to be before the Lord Chancellor, and if the attendance is to be before any of the other judges of said court the notice shall be signed by the registrar of such judge.

LI. That whenever a vivâ voce examination shall be required, the petitioner shall be at liberty, after the expiration of one fortnight from the cause being put at issue as aforesaid, and the respondent shall be at liberty, after the expiration of three weeks from such cause being so put at issue, to serve notice of examination of witnesses before the examiner, naming some day for the commencement of same, not earlier than one fortnight or later than three weeks from the service of such notice: provided, however, that the respondent shall not be at liberty to serve such notice if the petitioner shall have previously served a like notice; and the examiner shall commence such examination on the day so named, if required so to do, or so soon thereafter as the general state of business before him may admit, and, having so commenced such examination, proceed with same without intermission, during the

usual office hours, until the examination of all the witnesses for petitioner and respondent be completed, and shall grant a certificate that such examination has been completed, or that no witnesses had been tendered for examination when so required by any of the parties to the said cause: provided, nevertheless, that the court may make such special order for having such evidence or any part thereof taken vivâ voce, or otherwise as to the time or mode of taking such examination or for re-opening such examination.

LII. The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties or such of them as may think fit to attend: provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the court as he shall think fit: provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide on the materiality or relevancy of any question or questions; and the court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just.

LIII. If any person produced before any such examiner as a witness shall refuse to be sworn, or so answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said court upon written interrogatories, and refusing to be sworn or to answer some lawful question: provided always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the record office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the court, and the costs of and occasioned by such demurrer or objection shall be in the discretion of the court.

LIV. The evidence on both sides in any suit in the said court, whether taken orally (and including the cross-examination and re-examination of any witness or witnesses) or taken upon affidavit, shall be closed within nine weeks after issue joined therein, but with power to the court to enlarge such period as it may seem fit; and after the time fixed for closing the evidence, no further evidence, whether oral or by affidavit, shall be receivable, without special leave of the court previously obtained for that purpose: provided always, that any witness who has made an

affidavit filed by any party to a cause shall be subject to oral cross-examination within one month after such period of nine weeks, by or before an examiner, in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed; but such re-examination shall immediately follow such cross-examination, and shall not be delayed to a future period; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of subpoena ad testificandum before such examiner; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the court shall think fit otherwise to direct.

LV. Any party desiring to cross-examine a witness who has made an affidavit in any cause intended to be used at the hearing thereof shall give forty-eight hours notice to the party on whose behalf such affidavit was filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party may, if he shall think fit, be present at such cross-examination.

LVI. Upon the hearing of any cause depending in the said court, whether by petition or bill, the court, if it shall see fit so to do, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party to be paid by such of the parties to the suit or in such manner as it may think fit; and the examination in such case shall be conducted and the evidence recorded in like manner as examinations are conducted and evidence as at present recorded in the Bankrupt Court.

LVII. Any party in any cause or matter depending in the said court may, by notice to be issued by an examiner of the said court or before an examiner specially appointed for the purpose, require the attendance of any witness before such examiner, and examine such witness orally, for the purpose of using his evidence upon any motion, petition, or other proceeding before the court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party, having made an affidavit to be used or which shall be used on any motion, petition, or other proceeding before the court, shall be bound, on being served with such notice, to attend before an examiner for the purpose of being cross-examined: provided always, that the court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case.

(To be continued.)

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DUBLIN, APRIL 14, 1855.

We are glad to observe that, amidst the confusion and agitation of men's minds consequent upon the war, the subject of Law Reform has not been lost sight of. The English Solicitor General has introduced a measure for the consolidation and reform of testamentary jurisdiction. This measure differs from that of last session chiefly by the retention of a separate judicature for this purpose, instead of transferring the business to the Court of Chancery. Probably, the new expedient will be the most feasible, as it would certainly require an additional staff in the Court of Chancery to do the business thus cast upon it; and it is better, when practicable, to avoid coming into contact with popular prejudice, however misdirected. It is also understood that a similar measure for Ireland will be shortly introduced under the auspices of the present Attorney General, Mr. Keogh.

It seems hard to understand how the strange anomaly of the existing testamentary system could have been so long borne with, so obvious was the inconvenience which resulted from the numerous petty local jurisdictions which had cognizance of these matters, but whose judgments were always taken at the peril of the parties. We hope that henceforward every grant of administration will carry a "Parliamentary title."

While we deprecate the idea of imposing new burdens on land already cruelly taxed, we would venture to suggest, that in these courts, wills of *real* as well as personal estate should be admitted to probate, without, however, subjecting the former to more than a slight stamp duty, just commensurate with the additional trouble imposed upon the court. We would allow the direction of issues of *devisavit vel non* to Courts of Common Law, in case of contested probate of such wills, and in case the will included real estate in both England and Ireland, we would give concurrent jurisdiction to the Court of Probate in either country, provided that the property in either exceeded a certain limit. If there were estates of considerable value in either country, a provision might be made by which such issues might be tried concurrently in both countries, in order that local influence might be neutralized. The effect of thus establishing *in limine* the validity of such wills would be that an investigation as to the state of the testator's mind and the circumstances of the execution might take place, whilst everything was fresh, and the witnesses most competent to give evidence. There certainly cannot be, apart from fiscal considerations, any reason why wills of real estate should not be the subject of a judgment *in rem*, and thereby established once for all against all the world, and we trust that in the preparation of these new measures this principle will not be lost sight of.

A BILL

TO AMEND THE PRACTICE AND COURSE OF PROCEEDING IN THE HIGH COURT OF CHANCERY IN IRELAND.

(Prepared and brought in by Mr. Whiteside, Mr. Napier, and Mr. Malins.)

[Note.—The words printed in *Italics* are proposed to be inserted in Committee.]

(Continued from page 128.)

LVIII. The examination of witnesses upon interrogatories shall be regulated by the present practice of the court in relation thereto, save so far as same is varied by this Act.

LIX. The petitioner or respondent may, at any time after leave of the court or of the judge to whose office the case has been attached in manner aforesaid obtained for examination on interrogatories, and before the passing of publication, proceed with such examination.

LX. The court, or any of the judges as aforesaid, shall be at liberty to disallow the expenses of any witness or witnesses examined *vivâ voce* as to matters which could have been proved with less expense and equal advantage by affidavit or examination upon interrogatories.

LXI. Publication shall pass without rule or order at the expiration of nine weeks after the service of the notice in the section mentioned, unless such time shall be enlarged by order of the judge to whose court such cause or matter is attached.

LXII. A petition shall not be amended except by a special order, and in the manner which may be thereby directed; and if time is to be allowed to answer such amendment, the order shall specify the time so to be allowed; and no supplemental petition shall be filed without the leave of the court.

LXIII. In every case where the jurisdiction of the court in any matter shall attach upon petition, it shall not be necessary to present any further petition after the first, which confers such jurisdiction, but all applications in such matters shall be made upon notice without petition.

LXIV. The solicitor for the petitioner, when he shall set down a cause petition for hearing under the section, shall lodge with the registrar of the judge before whom it is to be heard the rolls certificate, and a docket containing the names of the parties to the cause petition, and of the solicitor for any respondent who shall have entered an appearance, and the docket shall state that the petition is set down under the section, as the case may be; and if to be set down under the section, the docket shall state the date of the service of the notice of the petition upon each respondent, and that the time for filing the affidavit by way of answer, or for answering the interrogatories (if any) by each respondent, has expired; and if the petition is to be set down under the section, the docket shall state the date of the service of the notice of the petition upon each respondent who shall not have filed an affidavit by way of answer, and that the time for filing the affidavit by way of answer, or for answering the interrogatories (if any) by each

such respondent, has expired; and the registrar of such judges as aforesaid shall at all times set down such cause petition without any order, and according to the priority that each docket is lodged with him, and such petition shall be heard accordingly, unless the court or judge shall otherwise direct; and notice that the cause has been set down for hearing shall be served four days before the hearing of said petition on any respondent who shall have filed an affidavit by way of answer, or shall have entered a special appearance.

LXV. In cases not falling within the sections, the solicitor for the petitioner shall cause the solicitor for any respondent who shall have filed an affidavit by way of answer or entered an appearance, with notice to the effect and at the time herein-after mentioned; and such notice shall state that the petition has been set down to be heard, and such notice shall be served ten days before the said petition shall be heard.

LXVI. The solicitor for the petitioner, when he shall set down a cause petition for hearing in cases not within the sections, shall lodge with the registrar the rolls certificate, and an office copy of the memorandum entered under the section, and a docket containing the name of the cause petition, and the solicitor for any respondent who shall have filed an affidavit by way of answer or entered an appearance; and the docket shall state the date of the service of notice of the petition upon any respondent who shall not have filed such affidavit or entered such appearance, and that the time for filing the affidavit by way of answer, or for answering the interrogatories, if any, by each such respondent, has expired; and the docket shall also state the date of the service of the notice in the section mentioned, and the certificate of the examiner; and the registrar of the court or judge thereupon shall at all times set down such cause petition without any order, and according to the priority that each docket is lodged with him; and any cause petition, except cause petitions set down under the sections, which shall be set down after the second day of term, or, where the notice under the section shall not have been served ten days before the second day of term, shall not be entitled to be heard in that term, unless by order of the court, but such cause petitions shall stand in the list to be heard according to their priority in the next term.

LXVII. A respondent shall not be entitled to the costs of appearing at the hearing of a cause petition, on the ground that notice of such petition or notice under the section may have been served on such respondent, unless the court shall consider that there was reasonable cause for the said respondent so appearing.

LXVIII. The practice as to exceptions for insufficiency of the affidavit filed by the respondent by way of answer to interrogatories, whether filed by petitioner or respondent in a matter or cause, or answers to bill or interrogatories by plaintiff, defendant, or other person or party, shall be regulated by the seventy-fourth, seventy-fifth, ~~seventy-sixth~~, seventy-seventh, seventy-eighth, seventy-ninth, and eightieth of the General Orders of the twenty-

seventh day of March, one thousand eight hundred and forty-three, save that the period of six weeks in the seventy-fifth of the said orders shall be reduced to twenty-one days.

LXIX. Provided always, that exceptions taken to such answers or affidavits as in the last section mentioned shall not set out the interrogatories at length which it is alleged are insufficiently answered, but shall only refer to the numbers annexed to the interrogatories; and provided also, that the party or person answering shall not be at liberty to decline answering any interrogatories merely because the same relate to or interrogate as to matters not expressly stated in the bill or answer, or in the petition or the affidavit filed by way of answer thereto, as the case may be; but the court, at the hearing of the petition, may reject the answer to any interrogatories which relate to matter not relevant or in issue, and may make such order as to the costs incurred by such irrelevant interrogatories as to the court shall seem just.

LXX. All references for prolixity or impertinence, except where the matter shall be scandalous, shall be abolished; but nevertheless the court, on the hearing of the cause or matter in which such prolix or impertinent matter may appear to have been put on the files of the court, shall have regard to such prolixity or impertinence in disposing of the question of costs.

LXXI. If at the expiration of *one year* after the filing of a cause petition the said petition shall not have been heard by the court, the same and all the proceedings thereon shall at the expiration of such year, and without any order of the court for that purpose, stand dismissed without costs for want of prosecution, unless upon application to the court by motion before such period the court shall think fit to allow the petitioner further time to prosecute his said petition: provided always, that the court shall have authority, on special motion, in cases dismissed under this order, to restore such cause petition, and the several proceedings had thereon, on such terms as the court shall consider just.

LXXII. If the petitioner shall not proceed with the said cause petition, the respondent shall be at liberty, after the expiration of *one month* after the time when the petitioner might have served the notice in the section mentioned, or might have set down the cause to be heard under the provisions contained in this Act, to move, upon notice, that the said petition be dismissed with costs for want of prosecution; and the court shall thereupon dismiss such petition, unless the petitioner shall appear upon such notice, and satisfy the court that due diligence has been used by him, or unless the court shall think fit to allow the petitioner to serve such notice as in the section mentioned, or to set down the said petition for hearing, or to take such other proceedings as may be necessary for the hearing of said petition without further delay.

LXXIII. In every case where proofs have been made, any respondent may, after the expiration of one month from the period when the petitioner, according to the practice of the court, might have set down such cause for hearing, if he shall not elect to dismiss the petition for want of prosecution un-

der the section of this Act, set the same down to be heard, and the same shall be heard accordingly, and every decree pronounced thereon shall operate as a bar to any suit for the same matter, in like manner and so far as such decree would have been if such cause had been set down for hearing by the petitioner.

LXXIV. The court may, upon special motion, order and direct any person, not being a party to a petition under the said Act, to bring into court for the purposes of such matter or cause any deeds, documents, or papers in his custody, power, or possession, subject to his lien thereon, if any, or to allow inspection and copies or extracts to be taken of the same, in the like manner in which if such person had been named a respondent in such matter he might have been ordered to bring the same into court or to allow inspection as aforesaid; and if the court shall be of opinion that the affidavit made by such party shall be evasive, or shall omit to answer any material fact stated in the affidavit on which the motion shall be grounded, the court may reserve the costs of such motion, and may permit interrogatories to be filed for the examination of such party; and in case of exceptions being taken to the affidavit filed in answer to such interrogatories, the practice as to such exceptions shall be the same as is provided by the sections: provided always, that nothing in this order contained, or the pendency of the proceedings thereunder, shall prevent or delay the petitioner proceeding with the cause petition under any other order of the court.

LXXV. In any case where a petition shall be presented under the said Act, the court may from time to time, whether any order, interlocutory or final, shall have been made upon the said petition, or any proceedings taken thereon, direct such further service of notice of the said petition as the court may think fit, such notice to be in the form and to the effect in that behalf set forth in Schedule F hereunto annexed, with such variations as circumstances may require; but any inaccuracy in such notice shall not invalidate the proceedings, or render the same void, unless the court shall otherwise direct; and service of such notice being made, the party so served shall from the time of such service become a party to the said proceedings as effectually as if he had been named a respondent in the petition; and the court may make an order that such party shall be bound by the proceedings already had, or such other order as to the court may seem just.

LXXVI. Whenever an order shall be made for liberty to serve a notice whereby it is sought to bind a person by the proceedings after the filing of a petition and without amendment thereof, the solicitor shall lodge a certified copy of such order with the deputy keeper of the rolls, and until such copy be so lodged the said order shall not have any operation to bind such person; and the said officer shall enter the name of such person in pleading book of the said office, so as to enable him to give a certificate of the names of the parties to the suit or bound thereby.

LXXVII. Every person who shall file a claim

under any order to be made under said recited Act or this Act, shall be deemed to be a party to such petition as fully and effectually as if he had been made a respondent thereto and served with notice of such petition; but the death, marriage, bankruptcy or insolvency of such person or any change of interest shall not cause such petition to become either abated or defective.

LXXVIII. Every notice of motion made in the matter of any petition presented under the said Act shall in the title thereof, over the name of the parties, petitioner and respondent, be further entitled "cause petition," and every order made on such notice shall be entitled in like manner.

LXXIX. All cause petitions and all affidavits of the respondent filed by way of answer, and interrogatories and answers to interrogatories in the matter of any such petition, shall be filed in the office of the deputy keeper of the rolls in Ireland, as directed by the tenth section of the said recited Act; and all other affidavits shall be filed in the office of the clerk of affidavits according to the present course of the court.

LXXX. The several side-bar rules set forth in the Appendix to the General Orders of the twenty-seventh of March, one thousand eight hundred and forty-three, shall and may be adopted in proceeding under the said recited Act, so far as same are applicable to the proceedings thereunder and consistent with this Act, and the registrar of the Court of Chancery shall be at liberty to render such side-bar orders applicable to proceedings under the said recited Act, by inserting the word "petition" instead of "bill," "petitioner" instead of "plaintiff," "respondent" instead of "defendant" in such side-bar orders, and to make such other clerical amendments as may be necessary in entering such side-bar orders; and the registrar shall be at liberty to apply to the court in any case of difficulty which may arise.

LXXXI. The court may, in its discretion, allow any proceeding to be taken or act done, although the period limited by this Act or any General Order of the court for taking such proceedings or doing such acts may have elapsed, or the court may enlarge such time, and the court may supply an omission in any proceeding; and whenever any proceeding fails to conform in any respect to this Act or to any General Orders or to the said recited Act, the court shall have power to permit an amendment of the proceeding.

LXXXII. From and after the commencement of this Act no reference shall be made, except by the Lord Chancellor, in any cause, matter, or proceeding which are or shall be hereafter depending in the Court of Chancery as a Court of Equity, or which have been or shall be submitted to the jurisdiction of the said court in relation to infants or lunatics, or by the authority of any Act (except the Acts relating to bankruptcy) where from the nature of the case he shall deem it expedient to make same; and no report shall be made in any such cause, matter, or proceeding by the Master of the Rolls, or any of the Vice Chancellors in any cause or matter, whether the same shall have been originally heard by any of such judges, or by the Lord

Chancellor himself; but the said Master of the Rolls and the several Vice Chancellors, as well in respect of causes and matters now pending, as those which shall hereafter be heard by any of them, or referred to them by the Lord Chancellor, shall make all necessary decrees and orders, such as have been heretofore made by the Lord Chancellor, Master of the Rolls, or Masters of the court, and shall conduct all inquiries incident to such causes and matters as have been heretofore conducted by the said Masters, and shall make such decrees or orders on the result of such inquiries, without any report, as the Lord Chancellor or the Master of the Rolls could have heretofore made on reports submitted to them.

LXXXIII. The petitioners and respondents in any cause or matter to be heard before the Master of the Rolls or any of the Vice Chancellors shall, upon the hearing thereof, be prepared to proceed forthwith to enter upon any inquiry which may be necessary to enable the court to make a final adjudication of such cause without delay, and the judge before whom such cause or matter shall be heard shall proceed to make such final adjudication at such original hearing, unless he shall consider that the case ought to stand for the parties to make proofs, or for publishing advertisements, or for the first clerk to examine the detail of any account incident to such cause or matter in manner hereinafter provided, or unless such judge shall consider that such cause or matter ought for any other just or reasonable cause to stand over; provided, that notwithstanding such cause or matter shall be so directed to stand over, the said judge shall have full power, by interlocutory order or decree, to decide any question or questions which may have arisen between the parties, and give such incidental or supplemental directions as he may deem right and expedient.

LXXXIV. The judge before whom such cause or matter shall be pending as aforesaid, if he shall direct the same to stand over for any reason, save for taking an account, he shall name a day upon which such cause or matter shall be ready for further hearing, in the order as of which day same shall accordingly be placed in a list of cases for further hearings, to be kept for that purpose, and the same shall accordingly be called on in such order without any summons or notice to any of the parties for that purpose, and the judge before whom such cause or matter may be so pending shall be at liberty, in the absence of the parties or any of them, to make such order as he may think right and necessary for finally disposing of the same or any part of the same, or make such other order as may to him seem just, and the nature of the cause or matter may require: provided always, that nothing herein contained shall preclude such judge from then, or previously on motion, making such order for varying the day so named, and directing such cause or matter to take its place in the said list of further hearings accordingly.

LXXXV. Whenever such judge shall, at the hearing of any such cause or matter, deem it necessary and proper to direct or allow the parties, or any of them, to make any proofs or further proofs, he shall

do so accordingly; and declare the mode in which such proofs shall be made, whether in part or wholly by affidavit or examination *viva voce*, or on interrogatories, and also the time within which such affidavits shall be made, or such examination be closed, or publication passed, and such examination, whether the same be on interrogatories or *viva voce*, shall be conducted by such examiners as herein-before referred to, and shall be conducted in the manner herein-before directed in relation to examinations in chief: provided nevertheless that such judge if he shall see fit may require that any witness shall be examined *viva voce* before himself, in which case the examination shall be conducted and the evidence of such witness recorded in like manner as examinations are conducted and evidence is at present recorded in the Bankrupt Court.

LXXXVI. If upon the hearing of any cause or matter the judge before whom such may be heard shall consider it necessary to have an account taken, he shall be at liberty to direct the same to be taken before his chief clerk, under his own directions and with his advice, which account the said chief clerk shall proceed to take accordingly, but he shall not be at liberty to make any formal report thereon; and said chief clerk, in taking such account, shall be at liberty to reserve questions as to particular items or classes of items which may involve points of law, or be disputed in fact, for the decision of such judge, or may in the course of such account take the opinion or direction of the said judge in relation to same; and the said chief clerk shall be at liberty, if he shall see fit, to require affidavits to be made as to matters of fact connected with such account; but nevertheless that it shall be lawful for such judge, on summary application on notice, to grant liberty to any party to have such matter proved on examination of witnesses, and when such account shall be so taken the said chief clerk shall place the cause or matter in which such account shall have been so directed in such list of causes for further hearing, as of the day when such account shall be so concluded.

LXXXVII. The course of proceeding in the offices of the several judges of the court shall be the same as the course of proceeding on motion; no statement of facts, charges, or discharges are to be brought in, but when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents and pedigrees, and concise statements are to be supplied for the use of the judge, and when so directed, copies are to be handed over to the other parties; but no copies to be made of deeds or documents when the originals can be brought in without special direction.

LXXXVIII. In all proceedings in the several courts of the Master of the Rolls and the Vice Chancellors, or before their chief clerks, the practice of bringing matters forward by summons shall be discontinued, and notices shall be substituted in place thereof as upon motions.

LXXXIX. Whenever the relief sought by any petition filed under this Act, or the said recited Act of the fourteenth and fifteenth Victoria, chapter eighty-nine, shall consist either in whole or in part of an account from any partner, agent, executor,

administrator, trustee, or other similar accounting party, and also in every matter in which the judge shall deem it necessary or proper that an account shall be taken, the judge before whom such case shall be pending, on directing such account, may order that the accounting party shall by a day to be specified in any order for that purpose, bring in and lodge in the office of such judge on oath, without any previous charge being filed, such an account, the items on each side to be numbered consecutively, and which account shall be subsequently vouched before the chief clerk of such judge; and in case the party so directed to bring in such account shall not do so within the time specified in such order, or having lodged such account shall not proceed with due diligence and vouch and pass it within such time as may be limited for that purpose, or such further time as may under special circumstances be allowed, the party so making default shall be liable to the penalty of an attachment for contempt for not complying with the rules or orders of the judge in that respect, and shall be also subject to all other penalties and powers now exercised by the High Court of Chancery in Ireland for the purpose of enforcing obedience to and performance of decrees and orders of the said court; but nothing in this Act contained shall prevent such judge, if he shall deem it just and expedient so to do, to direct a charge or discharge to be filed as heretofore.

XC. Any party interested in any such account as in the next foregoing section mentioned, shall be at liberty to object thereto, within such time as the judge shall limit for that purpose, and such objections shall be drawn in a *suocinet* form, and where they relate to any item of such account shall only refer to it by the number of the item objected to.

XCI. Postings for creditors and for sales and advertisements for next of kin, legatees, and incumbrancers, and of every other description, shall be prepared by the solicitors and submitted to the chief clerk, who is to examine and sign same, and to direct how and how often they are to be published, and such postings for creditors, legatees, incumbrancers, and next of kin shall fix a time for such to come in and prove their claims, and such chief clerk shall by an inspection of the public papers in which such advertisements shall have been so directed to be published, or by such other means as may appear reasonable and sufficient for the purpose, ascertain whether the direction for such publication have been complied with.

XCII. All creditors and third persons coming in to claim any debt, charge, or incumbrance, under any decree or order or in pursuance of any advertisement to that effect shall file a claim in the tabular form prescribed in Schedule F hereunto annexed, or as near thereto as the nature of the case may admit; if the sum claimed be a balance on any running or unsettled account, or involves the question of rests in the calculation of interest, the party filing it is to be at liberty to annex to such claim by way of schedule the particulars of the account relied on, and every such claim shall be verified by the affidavit of the person on whose behalf it may be filed, or in the manner prescribed in the several

cases herein-before provided in relation to verification of petitions by sections eleven, twelve, thirteen, and fourteen of this Act, or otherwise, as the judge before whom the case may be pending or the court may direct.

XCIII. All claimants coming in pursuant to an advertisement shall file their claims and give notice thereof to the solicitors in the cause or matter on or before the day limited by such advertisement for that purpose, and no claim shall be received after such day unless with the leave and on such terms as may be prescribed by the judge, and there shall be no separate hearing of claims before such appointed day unless by direction of the judge.

XCIV. All parties interested shall be at liberty to lodge objections to any claim brought in under any advertisement, such objections to be lodged before the case shall be entered for proceeding before the chief clerk of the judge as herein-after mentioned, verified by the affidavit of the person on whose behalf they shall be lodged, unless such person be either absent abroad, or a minor, or be incapacitated by mental or bodily infirmity, in any of which cases such objections may be verified in the manner herein-before provided with respect to the verification of cause petitions; the costs of such objections, and all costs occasioned thereby, to be paid by or to such person as the judge on disposing thereof shall order.

XCV. After the expiration of the time limited by any advertisement for lodging claims, in case any have been brought in, the solicitor for the petitioner or the person having the carriage of the proceedings shall be entitled to *one month* after the time mentioned in such advertisement to investigate the claims filed, and when necessary file objections thereto, and after the expiration of such month it shall be the duty of such solicitor to set down the case for a primary examination of all such claims by the chief clerk of the judge and to give notice thereof to all parties and claimants, and on the day so appointed for that purpose, or so soon after as may be convenient according to the state of business in his office, such chief clerk shall investigate in the presence of all such parties as shall attend, and their counsel and solicitors, all such claims as may be then filed, and shall mark and pass as proved such as shall be unobjected to, provided he shall be of opinion they are proper to be so dealt with, and he shall also pass all claims objected to where the objection relates to matter of detail or calculation, making such alterations in the amount claimed as the circumstances require; but if any question shall arise on the investigation of such claims, or any of them, either of law or of fact, or otherwise requiring in the opinion of such chief clerk the decision of the judge, he shall forthwith, whether required by the parties or not, enter the case in the judge's list of causes for hearing, and upon such case so coming on, the judge shall when practicable decide all the questions in controversy either between the parties or claimants, and make such decree or order therein as the circumstances may require; but if any further proofs appear to be necessary, the judge shall direct in what manner such proofs shall be made, and limit the par-

ties to a time for making same: provided always, that nothing herein contained shall limit the power of the judge when any exceptional case shall arise to give such further time or make such rule therein as the justice of the case may require.

XCVI. If the solicitor having the carriage of the proceedings shall not within *one month*, to be computed from the expiration of the time limited for filing objections to claims, as in the next foregoing section mentioned, set down the case for investigation before the chief clerk of the judge as before mentioned, any respondent who has entered an appearance or any person who has filed a claim shall be at liberty to do so, giving the notice herein-before provided to the several parties and claimants in the case.

XCVII. In case no claim shall be lodged pursuant to any such advertisement as before mentioned, the solicitor for the petitioner or person having the carriage of the proceedings shall be at liberty, at any time after the expiration of the time limited by any such advertisement, to set down the case for hearing before the judge for a final decree therein, and if he shall not do so within *one month* from the time next aforesaid, any respondent who has entered an appearance shall be at liberty to set down same for that purpose; and when any case shall be set down for hearing before the judge by the petitioner or any other party in pursuance of the powers in this section for that purpose, a period of ten days shall elapse between the service of notice of setting down same, and the day appointed for the hearing thereof.

XCVIII. All decrees and orders of the Master of the Rolls, or any of the Vice Chancellors, including orders for payment of costs, shall be made up by the Registrar of such judge and transmitted to the registrar of the Court of Chancery, and may be appealed from by motion on notice, without objections or exceptions, and an appeal shall lie upon such matters from the Lord Chancellor to the House of Lords: such appeals to be within such time and subject to such conditions as have been enacted by the said recited Act in relation to such appeals, save that the party appealing shall specify in the notice of appeal the matter or matters in respect of which such order or decree is objected to, whether such objections have been the reception or rejection of evidence, or the decision of matters of law or fact.

XCIX. The appointment of perambulators, and persons to perform all the duties heretofore discharged by commissioners in partition causes, shall take place before the judge to whose court the several causes or matters in which such appointments shall be made shall be attached as aforesaid, and such appointments shall be made without commission in such manner as is herein-before provided with respect to special examiners, and the persons so appointed shall thereby be invested with all the powers conferred by the commissions heretofore issued for such purpose.

C. The chief clerk of the judge under whose authority a sale is to be made shall direct all proper postings and advertisements for sale, and shall not proceed with any sale until satisfied that the direc-

tions given have been complied with, and for that purpose the solicitor having the carriage of the sale shall, on some convenient day before the day of sale, attend at the office of the chief clerk, and by production of the papers and other reasonable means satisfy such chief clerk that the advertisement and publication of the posting and circulation of the rentals have taken place as directed.

CI. All sales under the court shall be held by the chief clerk of the judge, who shall order same, or by such other person as the judge in the particular case shall direct for that purpose, and such sale shall be held at the chambers of such chief clerk, or at such other place as the judge shall appoint; but nothing herein contained shall affect the power of the court to have biddings taken in the country in accordance with the existing practice.

CII. When a purchaser shall have been declared, an order shall be forthwith prepared on the application of the purchaser's solicitor, or any other party, as of course, to confirm such sale on lodgment of the purchase money; and on the entire purchase money (which shall be lodged in one sum) being lodged in court, the sale shall stand confirmed without further order; and if the purchaser do not lodge his purchase money within a reasonable time, that proceedings by attachment may be taken to compel him to do so.

CIII. Every purchaser under the court shall be at liberty, without rule or order, to lodge objections to the title to the lands purchased by him, and such objections shall be forthwith set down for argument before the judge in his list of causes, and the cost of such objections shall be in the discretion of the judge.

CIV. If a purchaser under the court, having lodged his purchase money, shall not proceed to complete his purchase, the solicitor having the carriage of the sale shall be at liberty to serve a notice calling on him to do so; and if objections to the title shall not be filed within *one month* from service of such notice, the title shall be considered as accepted, and the purchaser shall be thenceforward precluded from objecting thereto.

CV. That the conveyance of lands sold under the court shall be prepared in form as between the parties, but shall be executed solely by the judge, whose signature shall have the same operation to pass to the purchaser the estates and interests in the lands of the several parties in the cause, and shall otherwise bind them, as if same had been executed by the said several parties.

CVI. That all such conveyances shall be entitled to the like exemptions as to stamp duty as purchase deeds under the court for the sale of Incumbered Estates in Ireland.

CVII. Whenever a sale of lands or premises shall be had under the court, the purchaser at such sale shall not be at liberty to object to the title on the ground of want of parties to the suit, if from its nature such persons under the foregoing rules shall not be deemed necessary parties, and such persons shall be deemed bound by the said suit as if they had been parties thereto, and shall be bound by such conveyance as if they had been parties to the same.

CVIII. All affidavits shall be taken and expressed

in the first person of the deponent; and any solicitor, party, or person filing an affidavit not taken and expressed in the first person of the deponent shall not be allowed the costs of preparing and filing such affidavits in any taxation of costs.

CIX. Every affidavit is to be divided into paragraphs, and every paragraph is to be numbered consecutively, and as nearly as may be confined to a distinct portion of the subject.

CX. No suit in the said court shall be dismissed by reason only of the misjoinder of persons as petitioners therein; but whenever it shall appear to the court that, notwithstanding the conflict of interest in the co-petitioners, or the want of interest in some of the petitioners, or the existence of some ground of defence affecting some or one of the petitioners, the petitioners, or some or one of them, are or is entitled to relief, the court shall have power to grant such relief, and to modify its decree according to the special circumstances of the case, and for that purpose to direct such amendments, if any, as may be necessary, and at the hearing before such amendments are made to treat any one or more of the petitioners as if he or they was or were a respondent or respondents in the suit, and the remaining or other petitioner or petitioners was or were the only petitioner or petitioners on the record; and where there is a misjoinder of petitioners, and the petitioner having an interest shall have died leaving a petitioner on the record without an interest, the court may at the hearing of the cause order the cause to stand revived as may appear just, and proceed to a decision of the cause, if it shall see fit, and to give such directions as to costs or otherwise as may appear just and expedient.

CXI. No suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief.

CXII. It shall be lawful for the court to adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument to be executed under the direction of the court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen: provided always, that if the court shall be of opinion that the application is fraudulent or collusive, or for some other reason ought not to be entertained, it shall have power to refuse to make the order prayed.

CXIII. If after a suit shall have been instituted in the said court in relation to any real estate it shall appear to the court that it will be necessary or expedient that the said real estate or any part

thereof should be sold for the purposes of such suit, it shall be lawful for the said court to direct the same to be sold at any time after the institution thereof, and such sale shall be as valid to all intents and purposes as if directed to be made by a decree or decretal order on the hearing of such cause; and any party to the suit in possession of such estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser or such other person as the court shall direct; and all parties having charges on such estate, or an interest in the produce thereof, shall have the same lien upon the purchase money that they had upon the estate; and such purchase money shall be brought into and remain in court to abide the event of any accounts which may be necessary for ascertaining such charges: provided nevertheless, that the court shall be at liberty pending such account to order payment of any portion of the fund in court to any party or creditor who may appear to be entitled thereto pending such accounts.

CXIV. Where any real or personal property shall form the subject of any proceedings in the Court of Chancery, and the court shall be satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in such suit, it shall be lawful for the said court, at any time after the commencement of such proceedings, to allow to the parties interested therein, or any one or more of them, the whole or part of the annual income of such real property, or a part of such personal property, or a part of the whole of the income thereof, up to such time as the said court shall direct, and for that purpose to make such orders as may appear to the said court necessary or expedient.

CXV. For the purpose of allocating and paying out funds, the solicitor having the carriage of the proceedings shall prepare in a tabular form an allocation schedule showing the names of the several parties and creditors entitled to be paid, the sum due to each, according to priority, and the sums to be respectively allocated and paid in discharge thereof; and such schedule shall be submitted for inspection to the chief clerk of the judge, who shall see that all the parties and creditors properly entitled have been placed therein, and that the same is, so far as he can judge, substantially correct, and, when approved of, such schedule shall be lodged in the office of the chief clerk, and notice thereof given to all parties interested, or their solicitors, and a day shall then be appointed for the hearing thereof, being not less than one month from the time of the lodgment of such schedule, and the case shall be entered in the judge's list of causes for hearing on such day accordingly; and if such schedule shall be unobjected to, the judge shall, on the day appointed for the hearing thereof, or as soon after as the state of business in his office will permit, make an order for payment or transfer (in the case of stock) of the several sums to the parties entitled thereto.

(To be continued.)

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DUBLIN, APRIL 21, 1855.

THERE is no matter connected with the practice of our Courts of Law and Equity which more imperatively requires reform than the mode of framing affidavits. We are glad to find that the Courts of Westminster have recently taken the initiative in this line, and they have promulgated a very wise regulation upon the subject. By Reg. Gen. Michaelmas Vacation, 1854, Rule 2, it is provided that affidavits sworn in and after the approaching Easter Term, are to be expressed in the first person and divided into paragraphs; each paragraph to be numbered consecutively, and as nearly as may be confined to a distinct portion of the subject. No costs are to be allowed for any affidavit or part of an affidavit substantially departing from this rule.

These new regulations are, in our opinion, excellent, and ought to be adopted by us without delay. The numbering of the respective paragraphs of the affidavit will tend, if not to get rid of prolixity, at all events to check it, as it will be rendered more apparent. The declaration in the first person is a most important change, as it will call the attention of the defendant more pointedly to the facts to which he pledges his oath, than the rambling mode in which these averments are at present couched. It must be admitted, however we seek to disguise from

ourselves the fact, that our present system of affidavit making is the reproach of the practice of the law. The paramount object sought to be obtained in their composition is, to make them consistent with mere verbal or literal truth, however suggestive they may be of what is the reverse of truth or at least of a state of facts, to which the defendant would hesitate *directly* to swear. Why should not the maker of an affidavit give his written evidence with the same obligation to tell the *whole* truth, as if tendered for verbal examination in the witness box? We believe that the form of the oath to verify the contents of the affidavit, refers only to the literal truth of the contents, and this, with many persons, would appear to be sufficiently observed, even though facts were wholly suppressed, which would tend materially to qualify the principal allegations. We do not mean to say that the new rule in England will wholly rectify the abuse we have alluded to, but it will certainly tend, by divesting the contents of an affidavit of a cloud of legal jargon, calculated to confuse the mind of the deponent, to place more pointedly before him the facts to which he is called upon to swear, and, by making it obligatory to make their statements in the first person the Act will possess a more individual character than at present. It is probable that advantage would result from requiring the insertion of a clause stating that the information given to the court re-

specting the subject-matter of the affidavit was candidly stated, and that no qualifying matters within the knowledge of the deponent had been suppressed.

Review.

Sketches, Legal, and Political, by the late Right Honorable RICHARD LALOR SHEIL, edited, with Notes, by M. W. SAVAGE, Esq. 2 vols. London: Hurst and Blackett, Successors of Colburn, 1855.

THESE "Sketches" consist of papers contributed by their distinguished author to the "New Monthly Magazine" at a period, as the editor observes in his preface, "when that periodical, edited by Thomas Campbell, was particularly distinguished by the interest and brilliancy of its articles. The Sketches of the celebrities of the Irish Bar attracted much attention at the time, and were admired, wherever they were read, as well for their fidelity as portraiture, as for the spirit and elegance with which they were written."

These papers divide themselves into two classes, those descriptive of the eminent legal contemporaries of the author and his personal associations in connection with the Profession, and those illustrative of his own political career and commemorative of that mighty politico-religious struggle in which he bore so prominent a share. The present attempt to rescue from oblivion the productions of so brilliant a contributor to the particular class of literature under which the Sketches may be classed, is highly commendable, as these articles possess an inherent attraction, not to be lost by the passing away of the immediate occasion which called them forth, and many of them will be read with interest, if not with occasional admiration, when the last of those personally acquainted with the men and the times described shall have ceased to exist.

Many and brilliant were the literary talents of the accomplished writer, as indicated by these pages. The author must be regarded as a finished master of descriptive, or, we may say, of pictorial writing. He draws to the very life, with, however, a slight tendency to caricature, a failing, perhaps, from which the great masters of this art are seldom wholly exempt. His style is continually enlivened with wit and humour, though these sallies too often degenerate into what we have heard aptly termed "ponderous levities," and it must be confessed that the style is occasionally too artificial and overwrought.

Perhaps the most unpopular feature which characterizes some of the Sketches is a certain sarcastic vein running through them. The article descriptive of the farewell address to Lord Manners is certainly obnoxious to this charge. But it may be observed, in mitigation of this blemish, that the author lived amidst keen party strife, calculated to call into action a temperament prone to satire, and it is by no means his political foes only who come in for castigation—his friends, not unfrequently, bear marks of the *soutica*. The *horrible flagellum*, it is right to add, is altogether discarded.

We think that the publication of this work is

opportune by recalling the recollection of the ancient glories of the Irish Bar, and thus appealing loudly to us to emulate the fame of our predecessors, and not to permit that edifice which they reared to fall into decay.

As the work before us forms legitimately the subject of a notice in our pages, only so far as it is a record of the memorabilia of our Bar, drawn by the hand of a distinguished member of our order, it would be unsuitable to enter into a minute criticism of its varied contents, and we shall merely present one single specimen of the style, manner and matter of the author. In the "Sketch" descriptive of the calamities of the Bar Mr. Sheil thus forcibly and pathetically describes a case which we fear has too often occurred in real life, here and elsewhere,

"The life of an eminent lawyer may be thus rapidly sketched. He is called, without any other property than those talents which have not in general a descendible quality. For some years, he remains unemployed; at last gets a brief, creeps into the partialities of a solicitor, and sets up a bag and a wife together. Irish morality does not permit the introduction into the chambers of a barrister of those moveable objects of unwedded endearment, which Lord Thurlow used to recommend to the juvenile members of the profession; and marriage, that perpetual blister, is proscribed as the only effectual sanative for the turbulent passions of the Irish Bar. In the spirit of imprudence, which is often mistaken for romance, our young counsellor enters with some dowerless beauty into an indissoluble copartnership of the heart. A pretty pauper is almost sure to be a prodigal. 'Live like yourself, is soon my lady's word.' Shall Mrs. O'Bralaghna, the wife of a mere attorney, provokingly display her amorphous ankle, as she ascends the crimson steps of her carriage, with all the airs of fashionable impertinence; and is the wife of a counsellor in full practice, though she may have 'ridden double' at her aunt Deborah's, to be upprovided with that ordinary convenience of persons of condition?"

"After a faint show of resistance, the conjugal injunction is obeyed. But is it in an obscure street that the coachman is to bring his clattering horses to an instantaneous stand? Is he to draw up in an alley, and to wheel round in a *cul-de-sac*? And then there is such a bargain to be had of a house in Merriion-square. A house in Merriion-square is accordingly purchased, and a bond, with warrant of attorney for confessing judgment thereon, is passed for the fine. The lady discovers a taste in furniture, and the profits of four circuits are made oblations to *verru*. The counsellor is raised to the dignity of king's counsellor, and his lady is initiated into the splendours of the Viceregal court.

"She is now thrown into the eddies of fashionable life; and in order to afford evidence of her domestic propensities, she issues cards to half the town, with an intimation that she is 'at home.' She has all this while been prolific to the full extent of Hibernian fecundity. The counsellor's sons swagger it with the choicest spirits of Kildare-street; and the young ladies are accomplished in all the

multifarious departments of musical and literary affectation. Quadrilles and waltzes shake the illuminated chambers with a perpetual concussion. The passenger is arrested in his nocturnal progress by the crowd of brilliant vehicles before the door, while the blaze of light streaming from the windows, and the sound of the harp and the tabor, and the din of extravagance, intimate the joyance that is going on within.

"But where is the counsellor all this while? He sits in a sequestered chamber, like a hermit in the forest of Comus, and pursues his midnight labours by the light of a solitary taper, scarcely hearing the din of pleasure that rolls above his head. The wasteful splendour of the drawing-room, and the patient drudgery of the library, go on for years. The counsellor is at the top of the forensic, and his lady stands upon the summit of the fashionable, world. At length death knocks at the door. He is seized by a sudden illness. The loud knock of the judges peals upon his ear, but the double tap of the attorney is heard no more. He makes an unavailing effort to attend the courts, but is hurried back to his house, and laid in his bed. His eyes now begin to open to the realities of his condition. In the loneliness and silence of the sick man's chamber a train of reflections presents itself to his mind, which his former state of professional occupancy had tended to exclude. He takes a death-bed survey of his circumstances; looks upon the future; and by the light of that melancholy lamp that burns beside him, and throws its shadowy gleams upon his fortunes, he sees himself at the close of a most prosperous life, without a groat.

"The sense of his own folly and the anticipated destitution of his family settle at his heart. He has not adopted even the simple and cheap expedient of insuring his life, or by some miserable negligence has let the insurance drop. What is to become of his wife and his children? From the source of his best affections, and of his purest pleasures, he drinks that potion—that *aqua Tophana* of the mind, which renders all the expedients of art without avail. Despair sits ministering beside him with her poisoned chalice, and bids defiance to Colles and to Cheyne. His family gather about him. The last consolations of religion are given amidst heart-broken sobs; and he raises himself, and stretches forth his head to receive the final rite, he casts his eyes upon the wretches who surround him, and shrinks back at the sight.

"It is in the midst of a scene like this, and when the hour of agony is at hand, that the loud and heartless voice of official insolence echoes from chamber to chamber; and, after a brief interval, the dreadful certainty, of which the unhappy man had but too prescient a surmise, is announced. The sheriff's officers have got in; his Majesty's writ of *fieri facias* is in the progress of execution; the sanctuaries of death are violated by the peremptory ministers of the law, the blanket and the silk gown are seized together; and this is the conclusion of a life of opulence and of distinction, and let me add, of folly as well as fame. After having charmed his country by his eloquence, and enlightened it by his erudition, he breathes his last sigh amidst the tears

of his children, the reproaches of his creditors, and a bailiff's jest."

With respect to the editor's share in the preparation of the book, he, in his preface, claims very little for his share of the performance. His task appears to have been selection, emendation of the press, and annotation. That his selection is judicious, we entertain no doubt. That his emendations of typographical errors have been frequent, and that this edition, on the whole, is accurate, we fully believe; but blunders have, even in this edition, escaped his vigilance, amongst which we may point out one at pages 236—7, where the foundation of the Schools of the Christian Brotherhood, is attributed to one "Edmund Price," whereas Rice was the name of the philanthropist in question.

Lastly, with respect to the annotations: they are meagre in the extreme. We regret that Mr. Savage did not stamp his editorial labours more decidedly with the impress of his own literary powers, either by prefixing a sketch of the contributor of the "Sketches," or by more copiously illustrating the text. We conclude, however, that he has adopted this course for the purpose of rendering these memorials of the departed the more conspicuous, at the expense of his own individuality as an editor. At all events, the public cannot but feel obliged to him for having called these spirited papers from the dingy and dusty volumes in which they lay enshrined, and presented them in the elegant and permanent form in which they now appear.

A BILL

TO AMEND THE PRACTICE AND COURSE OF PROCEEDING IN THE HIGH COURT OF CHANCERY IN IRELAND.

(Continued from page 136.)

CXVI. After service of notice of the lodgment of the schedule, as in the next preceding section is mentioned, all parties shall be at liberty to inspect the same, and lodge objections thereto (stating briefly the grounds of objection,) at any time until within one week of the day appointed for hearing; and notice of the lodgment of such objections shall be given to all parties interested, and the same shall be taken into consideration by the judge at the hearing of said schedule, who shall make such order therein, or as to the costs thereof or occasioned thereby, as he shall think fit.

CXVII. The practice of the said court heretofore observed, of requiring the approbation of a Master to transfers of stock and investment of cash, shall be discontinued, and that when hereafter any order shall be made for such transfer or investment it shall be sufficient to produce to the accountant general of the court the quotation or calculation of a notary as to the value of such stock, who shall act thereon without such approbation.

CXVIII. In case any of the directions herein contained with respect to the practice and course of proceeding in the said Court of Chancery shall by mistake of parties fail to be followed in any suit or proceeding in the said court, it shall be lawful

for the said court, if it shall think fit, upon payment of such costs as such court shall direct, to make such order giving effect to and rectifying such proceedings as may be justified by the merits of the case.

CXIX. It shall not be lawful for the said Court of Chancery, in any cause or matter, to direct a case to be stated for the opinion of any Court of Common Law, but the said Court of Chancery shall have full power to determine any questions of law which in the judgment of the said Court of Chancery shall be necessary to be decided previously to the decision of the equitable question at issue between the parties.

CXX. In cases where, according to the present practice of the Court of Chancery, such court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law, the said court may itself determine such title or right, without requiring the parties to proceed at law to establish the same.

CXXI. The Lord Chancellor, with the advice and assistance of the Master of the Rolls and the Vice Chancellors, or any three of them, may and they are hereby required from time to time to make general rules and orders for carrying the purposes of this Act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the said court in respect of the matters to which this Act relates, so far as may be found expedient for altering the course of proceeding herein-before prescribed in respect to the matters to which this Act relates, or any of them; and such rules and orders may from time to time be rescinded or altered by the like authority, and all such rules and orders shall take effect as General Orders of the said court.

CXXII. Inasmuch as the emoluments of some of the officers of the court may be diminished by the operation of this Act, or by the rules and orders to be made thereunder, for which they may claim to have compensation made: it shall be lawful for the Commissioners of her Majesty's Treasury for the time being, and they are hereby required, within the space of six calendar months after any such claim shall arise and be made, by examination on oath or otherwise (which oath they and each of them are and is authorized hereby to administer,) to inquire whether any, and, if any, what, compensation ought to be made to any officer or person claiming such compensation, and that in all cases in which it shall appear to the said commissioners that compensation ought to be granted, it shall be lawful for the commissioners, or any three or more of them, by warrant under their hands, to order and direct that such annual or other compensation shall be made to the persons so claiming such compensation as aforesaid, or any of them, as to the said commissioners in their discretion shall seem just and reasonable; and all such compensation, whether annual or in gross, shall be payable out of such funds as may be provided by Parliament for that purpose.

CXXIII. In the construction of this Act the expression "the Lord Chancellor" shall mean the

Lord Chancellor of Ireland, and shall include the Lord Keeper and Lords Commissioners for the custody of the Great Seal in Ireland; and the expression "the court" shall mean the high Court of Chancery in Ireland; and the word "person" shall include corporation, and shall also include her Majesty's Attorney or Solicitor General in cases of charities, or of informations at the suit of her Majesty.

SCHEDULE (A.)

FORM 1.

Petition by a Legal or Equitable Mortgagee, or Person entitled to a Charge or Incumbrance affecting Property, seeking Foreclosure, and Sale or Sales.

<p>Cause Petition. P R Petitioner, R T and R S Respondents, and in the Matter of the Court of Chancery (Ireland) <i>Regulation Act, 1859.</i></p>	}	<p>To the Right Hon. the Lord high Chancellor of Ireland. The humble petition of P R [state addition and residence.]</p>
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1. Your petitioner humbly sheweth, that under and by virtue of an indenture of mortgage [or other document or security, as the case may be,] and by virtue of a judgment, which securities are designated by the letters (a) and (b) [or as the case may be] in Schedule A hereunder written, one C D was entitled, as mortgagee, to certain property in said schedule mentioned, and as judgment creditor to a charge on certain property in said schedule also mentioned.

2. That the time for payment of the sums secured thereby respectively has elapsed.

3. That the right, title, estate, and interest in the said securities are now vested in the petitioner by virtue of the documents designated by the letters (c,) (d,) and (e,) [or as the case may be] in Schedule B hereunto annexed.

4. That the equity of redemption of the mortgaged property, and the estate and interest in the property subject to the said judgment, [or as the case may be,] became and are vested in the respondents under and by virtue of the documents designated by the letters (f,) (g,) and (h,) [or as the case may be,] in Schedule C hereunto annexed.

5. That there is contained in Schedule A, column 7, a statement of the sums due to petitioner for principal and interest on foot of the securities in the said schedule set forth.

6. That the several statements in the said schedules respectively, are true in every particular, no deed or document in the said schedules mentioned is in the power, custody, or possession of petitioner, except those stated to be in his possession or in the possession of his solicitor.

7. Your petitioner prays that he may be paid the said sums, and the costs of this suit, and in default thereof that the equity of redemption in the property mortgaged may be foreclosed, and the said property may be sold, and that the property which is subject to the said judgment may also be sold, and that the produce of the sales may be applied to pay the debts affecting the properties respectively, and petitioner's costs; and for that purpose

that all proper directions may be given and accounts taken and petitioner prays general relief.

I S, Solicitor for petitioner.

[*Residence.*] *H S, Counsel.*

The respondents *R T* and *R S* are to be served with notice of the petition.

*H S, Counsel for petitioner.**

SCHEDULE (B.)

Form of notice of petition to be served under the Nineteenth of the General Orders.

*P R, Petitioner,
R T and R S, Respondents,
and in the matter of the Court
of Chancery (Ireland) Regu-
lation Act, 1850.*

Sir,
Take notice, That a
petition was filed in this
matter on the day
of 18, against

you and the respondent *R S*, which prays as follows:

Set out the prayer of the petition; and you are hereby informed, that you are at liberty, if you have any defence to the said petition, to file an affidavit by way of answer thereto, within (a) [twenty] days after the service of this notice. [And you are required within said time to answer on oath the interrogatories annexed to the petition, (or filed the day of 18, as the case may be). (a.)]

I S, Solicitor for the petitioner,

(*Residence.*)

To the respondent *R T*,

of [*Addition and Residence.*]

(a) If an order shall be made for liberty to annex or file interrogatories before the service of this notice, add the words in brackets; and instead of [twenty] days, insert the time mentioned in such order within which the interrogatories are to be answered.

No. 2.

*P R, Petitioner,
R T and R S, Respondents,
and in the Matter of the Court
of Chancery (Ireland) Regu-
lation Act, 1850.*

Sir,
Take notice, that a
petition was filed in
this matter on the
day of 18,

against you and the respondent *R T*, which prays as follows:—

[*Set out the prayer of the petition;* and you are hereby informed, that you are at liberty, if you have any defence to the said petition, to file an affidavit by way of answer thereto within (a) [] after the service of this notice. [And you are required, within said time, to answer on oath the interrogatories annexed to the petition, (or filed on the day of 18, as the case may be), (b)]; and you are herewith served with a copy of the order of the court bearing date the day of 18, giving liberty to serve you with this notice out of the jurisdiction of the court.

I S, Solicitor for Petitioner,

(*Residence.*)

To the Respondent

R S, of

[*Addition and Residence.*]

(a) The section directs that the order of

the court, giving liberty to serve a respondent out of the jurisdiction, shall limit the time after service of the notice within which the respondent is to file an affidavit by way of answer. The blank should be filled up from the said order.

(b) The words in brackets are to be added if interrogatories have been annexed to the petition or filed. If it should happen that the order giving liberty to answer the interrogatories has given a longer time to answer than the order made under the section, the blank marked (a) should be filled up with such longer period.

SCHEDULE (C.)

Directions for the preparation of affidavits filed by the respondent by way of answer.

*A B, Petitioner,
L M, Respondent,
and in the matter of the
Court of Chancery (Ireland)
Regulation Act, 1850.*

Affidavit by way of an-
swer of *L M*, of [*state ad-
dition and residence*], the
respondent in this matter.

I L M, of the respondent [*state addition and residence*], by way of answer to the petition in this matter, make oath and say—

First,

That my defence in point of law to the said petition is as follows:—(a)

(a) First.—State in ordinary language, and without repetition, and as concisely as is possible, consistent with clearness, the defence of the respondent (if any) in point of law, and without reference to any document or the evidence to sustain such defence, except so far as may be necessary to make the defence intelligible; and if the legal defence is only applicable to a portion of the petition, the portion to which it is applicable should be shortly referred to; and if the respondent insists that the petition and the documents, if any, referred to therein, do not authorise the petitioner to sue, the specific grounds of objection should be shortly stated.

Secondly (b.)

I put the petitioner upon proof of the paragraphs in his petition numbered 2, 4, 7, [*or as the case may be,*] and put the petitioner upon proof of the following documents; viz the deeds of the 2nd of February, 1842, and of the 1st of July, 1843, and the letters of the 2nd and 5th of January, 1847, and 1st March, 1848, referred to in the petition and the schedule thereto [*or as the case may be.*]

(b) Secondly.—If the respondent disputes any matter of fact or documents stated or referred to in the petition, he is to put the petitioner on proof thereof in the manner herein stated.

Thirdly (c.)

I rely on the deeds, documents, and paper writings [*or as the case may be*] in the schedule hereunder written in support of my said defence; and say, that no deed, document, or paper writing [*or as the case may be*] in the said schedule mentioned, is in my custody, power, or possession, except those stated in the said schedule to be in my possession or in the possession of my solicitor; and the said schedule is, as I believe, true in every particular.

(c) Thirdly.—The respondent is to refer to any deeds, documents, or paper writings which he relies upon in the manner or to the effect hereby directed, and without stating the contents of same.

* Schedules A, B, and C, annexed to Form 1, contain a tabular analysis of the matters referred to.

Fourthly.

I rely on the following facts in support of my said defence; and say—

1st. (d)

2nd.

3rd.

4th.

5th.

6th, &c.

(d) Fourthly.—The respondent shall state, in ordinary language, and without repetition, and as concisely as is consistent with clearness, the facts upon which he relies in support of his legal defence; and the statement shall be divided into short and separate paragraphs as conveniently as may be, which shall be numbered consecutively 1, 2, 3, &c.; and if it shall be necessary to state the contents of any records, deeds, or documents, such parts alone as shall be pertinent and material shall be set out; and the part so set out shall be abstracted and stated as concisely as possible; and the names of the several parties to the deeds and documents shall not be repeated, but the deed or document shall be referred to merely by its date as stated in the schedule to the affidavit.

Fifthly.

And in answer to the interrogatories annexed to the petition, I admit &c. [or as the case may be.]

Fifthly.—If interrogatories have been annexed to the petition, or filed before the affidavit by way of answer shall be sworn, the answers to such interrogatories shall be here inserted; and the answer to each interrogatory shall have a number prefixed corresponding with the interrogatory.

W D, counsel for the respondent.
L P, solicitor for the respondent.

[Residence.]

SCHEDULE (D.)

Form of Notice to be served under the section of this Act.

No. 1.

If the affidavit by way of answer filed by the respondent shall put the petitioner on proof of any matter of fact or document stated or referred to in the petition, and if the petitioner does not dispute any matter of fact or document stated or referred to in the said affidavit filed by way of answer, or the schedule thereto, the form of notice under the section shall be as follows, or as near thereto as circumstances will permit:—

A B, Petitioner,
L M, Respondent,
and in the Matter of the Court of Chancery (Ireland) Regulation Act, 1850.

Sir,

Take notice, that the petitioner will proceed, within the period allowed by the

from the date of the service of this notice, to prove the paragraphs in the petition, and the documents therein referred to, upon the proof of which he has been put by the affidavit by way of answer of the respondent L M, filed the day of 18, and that the petitioner will proceed to make each proof, or such part as he

shall think fit, pursuant to the thirty-fourth section.

F B, solicitor for the petitioner.

[Residence.]

No. 2.

If the affidavit by way of answer filed by the respondent shall not put the petitioner on proof of any matter of fact or document stated or referred to in the petition, and if the petitioner disputes any matter of fact or document stated or referred to in the said affidavit filed by way of answer, or the schedules thereto, the form of notice under the section shall be as follows, or as near thereto as circumstances will permit:—

A B, Petitioner,
L M, Respondent,
and in the Matter of the Court of Chancery (Ireland) Regulation Act, 1850.

Sir,

Take notice that the petitioner puts the respondent L M upon proof of the paragraphs in the statement in his affidavit filed by way of answer numbered 3, 5, 8, [or as the case may be,] and puts the said respondent upon proof of the following documents in the said affidavit and the schedule thereto set forth; viz.,

[Here set forth the dates of the documents] (and if the petitioner desires to have such proofs or any of them made viva voce, add these words: "and that the petitioner requires the respondent to prove the said matters viva voce;" or, if he only desires a portion of the said proof to be made viva voce, the following words: "And that the petitioner requires the respondent to prove the following matters; namely," &c. setting out the particular matters); and the petitioner, if so advised, will proceed to give evidence to disprove such paragraphs and documents.

F B, Solicitor for the petitioner.

[Residence.]

No. 3.

If the affidavit by way of answer filed by the respondent shall put the petitioner on proof of any matter of fact or document stated or referred to in the petition, and if the petitioner disputes any matter of fact or document stated or referred to in the said affidavit filed by way of answer, or the schedules thereto, the form of notice under the section shall be as follows, or as near thereto as the circumstances will permit:

A B, Petitioner,
L M, Respondent,
and in the Matter of the Court of Chancery (Ireland) Regulation Act, 1850.

Sir,

Take notice, that the petitioner will proceed, within the period allowed by the General Orders of the court from the date of the service of this notice, to prove the paragraphs in the petition, and the documents therein referred to, upon the proof of which has been put by the affidavit by way of answer of the respondent L M, filed the day of 18; and the

petitioner puts the said respondent upon proof of paragraphs in the statement in his said affidavit numbered 2, 6, 7, [or as the case may be]; and the petitioner also puts the respondent upon proof of

the following documents in the said affidavit and the schedule thereto set forth; viz,

[Here set forth the dates of the documents;] and the petitioner, if so advised, will proceed to give evidence to disprove such last-mentioned paragraphs and documents.

[And if the petitioner desires to make his proofs by any part thereof by affidavit, or if he shall require the respondent to make his proofs or any part thereof by affidavit, add a notice to that effect in manner pointed out by the Forms Numbers 1 and 2.]

E. B. Solicitor for the petitioner.

[Residence.]

SCHEDULE (E.)

Form of Notice to be served under the Section of this Act.

A. B. Petitioner, Sir,
I. M. Respondent, Take notice, that a
Court of Chancery (Ireland) petition was filed in this
Regulation Act, 1855 matter on the day
of 1855 [state here from the Rolls' certificate the date of the affidavits by way of answer, if any, which may have been filed, and by whom; if any order has been made by the court, state that an order has been made, and state its date, but not any part of its contents; and if a
state its date, and state the date of each important proceedings, but without setting forth any part thereof], and you are at liberty to inspect copies of the said several documents at my office; and you are further required to take notice that you will, under the section of the Act of 1855, become by the service of this notice a party to the several proceedings had in this cause as effectually as if you had been named a respondent in the petition, and will be bound by the several proceedings already had, unless within ten days after the service hereof you shall show good cause to the contrary [state the documents on which the motion is grounded].

I. S. Solicitor for the petitioner.

[Residence.]

SCHEDULE (F.)

In the matter of In Chancery.

Petitioner.

Respondent.

PARTICULARS of the Claim of a Creditor in this Matter.

[Here insert Particulars of Claim.]

A BILL

TO FACILITATE AND DIMINISH THE EXPENSE OF APPEALS FROM THE COURT OF CHANCERY IN IRELAND.

[The words printed in Italics are proposed to be inserted in Committee.]

WHEREAS the expense and inconvenience attending upon appeals in causes from the High Court of Chancery in Ireland to the House of Lords, and in lunatic matters from the decisions of the Lord Chancellor to the Queen in Council, have the effect of depriving parties of the exercise of such right in most cases adjudicated by said court; and whereas no right of appeal has hitherto existed from the decision of the Lord Chancellor of Ireland for the time being in bankruptcy and other matters, although appeals in such cases have been provided in corresponding cases in England; and whereas it is expedient to provide a cheap and expeditious mode of appeal in all causes and matters without affecting the jurisdiction of the House of Lords or of the Queen in Council as tribunals in the last resort: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. All decisions, decrees, or orders which shall be pronounced by the Lord High Chancellor of Ireland for the time being in any causes or matters, including decisions in bankrupt, lunatic, or minor matters, shall, at the election of any party or parties in such causes or matters, be subject to appeal to the court herein-after constituted and described, and which shall be styled "The Court of Chancery Appeals;" and the court so to be constituted shall have full power to make orders for affirming, reversing, or varying such decrees and orders, or to make other orders therein, in like manner as the House of Lords is now empowered upon appeals in causes from the High Court of Chancery in Ireland to affirm, reverse, or vary the decrees or orders of said court or pronounce special orders therein; and upon any party having commenced such appeal to "the Court of Chancery Appeals," no other party in the cause or matter in which the same shall be pending shall be at liberty to appeal to the House of Lords while the same shall be pending before the said "Court of Chancery Appeals," and undecided by the said court: provided, that nothing herein contained shall operate to deprive any party in a cause of the power of electing to appeal to the House of Lords against any decree or order of the High Court of Chancery as heretofore instead of bringing an appeal before such "Court of Chancery Appeals;" provided also, that nothing herein contained shall operate to deprive any party to a matter in lunacy of the option of appealing to the Queen in Council as heretofore against any order of the Lord Chancellor of Ireland in such matter instead of bringing an appeal before such "Court of Chancery Appeals."

II. Any party so bringing such appeal before the said "Court of Chancery Appeals" shall not be at liberty to bring any appeal against the decision of the said last-mentioned court, but the same shall be final and conclusive as to such party; but it shall and may be lawful for any party who may be dissatisfied with the decision of "the Court of Chancery Appeals" upon an appeal in a cause, save the party who may have brought such appeal, to appeal to the House of Lords against such decision, in like manner as appeals may now be brought from decrees or orders of the High Court of Chancery in Ireland to the House of Lords;

and it shall also be lawful for any party who may be dissatisfied with the decision of the said "Court of Chancery Appeals" in any lunatic matter, save the party who may have brought such appeal, to appeal to the Queen in Council against such decision in like manner as appeals in matters of lunacy may now be brought from any orders of the Lord Chancellor before the Queen in Council.

III. For the purposes of such appeal to "the Court of Chancery Appeals" it shall not be necessary to enrol any decree or order against which such appeal may be brought.

IV. Every such appeal brought under the provisions of this Act shall be made by way of petition, stating whether the appellant objects to the whole of the decree or order appealed from or to any particular part or parts thereof, and if only to a part or parts thereof, then further stating against what part or parts such appellant appeals; and the said "Court of Chancery Appeals" shall only entertain the consideration of the particulars so referred to in such petition, or such matters as may be necessarily involved therein or connected therewith; and it shall and may be lawful for the said Court of Appeal, in awarding the costs of such appeal, to have regard to the manner of bringing such appeal as to the statement of the matter appealed from.

V. The said "Court of Chancery Appeals" shall have full power to award the costs of any appeal brought before it, either to or against any party to such appeal as appellant or respondent, or to be paid out of any estate or fund, in like manner as the House of Lords has power to make such orders for payment of the costs of appeals brought before them; and such order for payment of costs shall have the effect of an order of the Court of Chancery in Ireland, and may be enforced in like manner as if the same had been pronounced by the said last-mentioned court.

VI. No appeal shall be heard nor shall any order be made therein by the said "Court of Chancery Appeals" unless in the presence at least of *three* members of the said court.

VII. The decision of the majority present of judges of the said "Court of Chancery Appeals" shall be deemed and taken to be the decision of the said court; and if the judges of the court be equally divided in opinion on any cause or matter brought before the court by way of appeal, the decision or order appealed from shall be deemed and taken to be affirmed by the said court.

VIII. The said "Court of Chancery Appeals" shall be deemed and taken and is hereby invested with all the powers of a Court of Record.

IX. Any person taking any oath falsely before the said "Court of Chancery Appeals" on any appeal, or before the Registrar of the said court in relation thereto, shall be deemed guilty of perjury, and subject to the same penalties as if the same had been taken before the Lord Chancellor or any officer of the court lawfully authorized to administer the same.

X. The said "Court of Chancery Appeals" shall have full power to make General Rules and Orders for the regulation of the proceedings thereof and the mode of bringing such appeals.

XI. The said "Court of Chancery Appeals" shall be composed of the Lord Chancellor of Ireland for the time being, and all or any person or persons who had heretofore or who shall have filled the office of Lord Chancellor in Ireland, the Master of the Rolls for the time being, the Lord Chief Justice of the Court of Queen's Bench in Ireland for the time being, the Lord Chief Justice of the Court of Common Pleas in Ireland for the time being, the Lord Chief Baron of the Court of Exchequer in Ireland for the time being, all or any of the puisne judges of said several courts for the time being, who has heretofore or shall have filled the office of Attorney General for Ireland, and the judge of the Court of Prerogative for the time being.

XII. If the Courts of Nisi Prius in connection with the said Courts of Common Law shall be held during the sittings of the said "Court of Chancery Appeals," puisne judges of the said courts respectively shall preside in the said Courts of Nisi Prius instead of the several chief judges of the said courts upon whom shall devolve the duty of sitting in the said Court of Appeal under the provisions of this Act, as in ordinary cases of absence of such chief judges.

XIII. The sittings of the said "Court of Chancery Appeals" shall be held in the court or place in which the Lord Chancellor of Ireland shall then hold his usual sittings; and the Registrar of the Court of Chancery in Ireland who shall be then bound to attend in the Court of the Lord Chancellor in that capacity shall act as Registrar to such Court of Appeal; and the records of such appeals, and the judgments, decrees, or orders of the said Court of Appeal, shall be kept in the Registrar's office of said Court of Chancery.

XIV. Nothing herein contained shall be deemed as referring to the powers, duties, or authorities ministerially attached to the office of Lord Chancellor, or exercised by the Lord Chancellor as Keeper of the Great Seal in relation to letters patent, grants, or writings, or the powers and authorities of the Lord Chancellor in right or on behalf of her Majesty as visitor of any charity or other foundation, or the powers of the Lord Chancellor of appointment to or removal from or otherwise in relation to offices in the said Court of Chancery or other offices, or any powers of the Lord Chancellor to make General Rules or Orders for regulating the practice, proceedings, and business of the said Court of Chancery, or the business or duties of any of the offices or officers of such court.

XV. In the construction of this Act, unless such meaning be repugnant to or inconsistent with the context, the expression "Lord Chancellor" shall mean and include the Lord High Chancellor of Ireland and the Lord Keeper or Lords Commissioners of the Great Seal of Ireland for the time being, or persons to whom authority shall be delegated to act judicially in lunatic matters.

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DUBLIN, APRIL 28, 1855.

THE Common Pleas has recently pronounced a judicial opinion relative to the construction of the 16 & 17 Vic. c. 113, s. 243. That provides, that in case that the plaintiff in any action of contract (except for breach of promise of marriage) shall *recover*, exclusive of costs, less than £20, or in any action for any wrong or injury disconnected with contract (except replevin or slander, &c.), a sum not exceeding £20, the plaintiff in any such action shall be entitled to no more than half of the ordinary costs, unless the action has been brought for the purpose of trying the right to property more extensive than the sum sued for. In the case of *Hughes v. Guinness*, (C.P. Hil. Term, 1855, not yet reported,) an action had been brought to recover a sum exceeding £20, and the defendant paid money into court, and pleaded accordingly. The action having gone to trial a verdict was found for the plaintiff under £20. The sum recovered by verdict, however, together with the sum paid into court, exceeded £20, and the question then came before the court whether the plaintiff was liable under the above section of the Act to have his costs reduced to one-half. The court, however, determined, consistently with the English case of *Crosse v. Seaman* (6 C. B. 694,) that the plaintiff was entitled to full costs. That case arose upon a somewhat

analogous provision of the English County Courts Amendment Act, (13 & 14 Vic. c. 61, s. 11,) a provision almost exactly similar to the repealed clause of the Irish Civil Bill Act, (14 & 15 Vic. c. 69, s. 40,) which section 243, now under review, has superseded. In *Crosse v. Seaman*, the facts were nearly similar to those of *Hughes v. Guinness*, with this exception, that the payment into court had been made on a plea of tender. It was strongly argued that the word *recover* related to final judgment, and the case of *Brooks v. Rigby*, (2 Add. & Ell. 21,) was relied on as an authority for that purpose. The court, however unceremoniously rejected the distinction, Maule, J., observing in his characteristic way, "The spirit of the thing is, that the plaintiff shall not lose his costs, where he has obtained by the action more than £20. He has got the money. Common sense still lingers in Westminster Hall." It must be admitted that the court there had a strong inducement to give the most liberal construction to the statute, inasmuch as the plaintiff would have been otherwise liable not only to have his costs *reduced*, but to lose them altogether; and it would indeed have been a hardship that a defendant by paying into court a sum of money so as to leave a small balance still claimed, should be enabled to drive the plaintiff to the alternative either of discontinuing his action and foregoing the residue of a just demand, or of proceeding therefor at the risk of having

to pay the entire costs of the suit, and with the certainty of losing, in the way of his own costs, a much larger sum than that sought for. The Court of Exchequer in Ireland in *Evans v. The Gt. South-ern & Western Railway Company*, (5 Ir. Jur. 329,) seem to have formed a wholly different conclusion respecting the construction of section 40 of the Civil Bill Act, a clause very similar in its tenor and effect to the English enactment of which we have been speaking. There it was held that the plaintiff, after such a lodgment, was in the same plight as regarded ulterior costs, as he would have been had the action been originally commenced for the balance, and that in case the verdict were for less than £20, and the judge had not certified, he would *lose* his costs. It is right to say that, in that case the attention of the court does not appear to have been called to *Crosse v. Seaman*, when pressed with the difficulty to which we have alluded. With respect to the hardship of the plaintiff's position, one of the judges is reported to have observed that the course for the plaintiff to adopt is to discontinue his pending action, and sue for the balance in the Inferior Court. We apprehend, however, that this *dictum* can hardly be maintained, as the acceptance of the money, so as to entitle the plaintiff to stop the action, and tax his costs, must have been full satisfaction of his demand. See 72nd Rule of 1850, and 16 & 17 Vic., cap. 113, sec. 77. However, if the question as regards section 243 were of the first impression, we conceive that a different rule of construction would be applied. While the terms respecting the event of the suit are the same as in the former Acts, the penalty is wholly different. Here the plaintiff is only liable to have his costs taxed upon a reduced scale, in cases which are met by the Act. It would appear not unreasonable to say to a plaintiff, whose demand has been cut down by a payment into court, that inasmuch as his stake has been diminished, he must be the more economical in the enforcement of his demand. However, on the other hand, it must be admitted that actions which have produced to the plaintiff more than £20, whether in the progress of the suit or by final judgment, are not within the mischief which section 243 sought to remedy, namely, the unnecessary recourse to the jurisdiction of the Superior Courts. It is probable, therefore, that the construction of section 243 will be finally and generally settled in conformity with the authorities referred to.

THE MUNSTER BAR.

At a meeting of the members of this Bar, held during the present Term, the following resolutions were adopted, in accordance with the rules in force for many years upon all the other Circuits in Ireland:—

"That in consequence of the practice which prevails on this Circuit, of postponing the giving out of briefs to counsel till a late period of the Assizes, much inconvenience to the Bar and injury to the suitors have arisen; and it is, in consequence, expedient for this Bar to fix a period for each town of the Circuit, after which no member of it shall be at liberty to accept a record brief.

"That no member of the Circuit shall accept a record brief at Ennis or Tralee after the sitting of either court on the second day of the Assizes; nor at Limerick or Cork after the sitting of either court on the third day of the Assizes.

"That the foregoing resolutions shall take effect at the ensuing Assizes, and that the General Committee of the Bar be requested to take immediate steps to give them publicity."

A BILL

TO ALTER THE LAW AND PRACTICE OF THE HIGH COURT OF CHANCERY IN IRELAND IN RELATION TO THE APPOINTMENT OF RECEIVERS AND THE MANAGEMENT OF ESTATES UNDER THE CONTROL OF THE SAID COURT.

[Note.—The words printed in *Italics* are proposed to be inserted in Committee.]

(Prepared and brought in by Mr. Whiteside, Mr. Napier, and Mr. Malins.)

WHEREAS by an Act passed in the eleventh and twelfth years of the reign of his Majesty King George the Third, intituled "An Act for rendering Securities by Mortgage more effectual," Courts of Equity in Ireland were empowered to appoint receivers for the purpose of paying arrears of interest on mortgages: And whereas heavy costs and expenses are incurred, and loss and injury to incumbered estates experienced, as well by the unnecessary appointment of receivers, as by parties in causes and matters putting persons in nomination for such appointment, and by defects in the existing practice in relation to the management of estates by receivers: And whereas it is expedient to empower the court to refuse applications for the appointment of receivers in certain cases, and to alter the practice in relation to the appointment of receivers by the high Court of Chancery in Ireland, the collection of rents, and management of estates under the control of the said court, and the duties in relation thereto heretofore performed by the Masters in ordinary of the said court, and to provide that all such duties should be performed by officers appointed for that purpose under the authority of this Act: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: (that is to say,)

I. The said recited Act of the eleventh and twelfth years of King George the Third, chapter ten, be and the same is hereby repealed: provided, that nothing herein contained shall operate to affect, invalidate, or suspend any proceeding pending under the authority of the same at the time of the passing of this Act, but such proceedings shall continue in full force as if the said recited Act had not been repealed.

II. Whenever a suit shall be pending in the said court for the sale of lands or any interest in lands, the court, without waiting for a general account of incumbrances, and in order to give adequate relief to the parties without placing the estate under a receiver, shall make an order for such sale at the earliest stage of such suit at which it shall be ascertained that such sale would be ultimately directed.

III. It shall and may be lawful for the said court in any suit for the sale of lands to refuse any application for the appointment of a receiver over the same where the applicant from the nature of the incumbrance upon which his demand may be grounded shall be entitled to obtain possession of the said premises, or to enforce payment of the rents thereof with the aid of a Court of Common Law, unless where from the peculiar circumstances of the property to be sold, or of the general incumbrances thereon, or from any other special case shown to the satisfaction of the court, it shall deem it expedient to grant such application.

IV. It shall and may be lawful for the said court in any suit for the sale of lands to refuse any application for the appointment of a receiver over the lands to be sold in the said suit, where there shall be less than *one year's* interest due to such applicant on foot of his demand, or where (there being more than *one year's* such interest so due) it shall be shown to the satisfaction of the court that from the priority of his incumbrance there is no reasonable prospect of his obtaining payment from the court of any portion of the rents to be received before a sale can be had, and the proceeds thereof distributed, unless it shall appear to the court that any waste is being committed on the lands to be sold, or that the rents thereof are in danger of being lost, or that the same are held by lease, and the interest therein is in danger of being evicted for non-payment of rent, or that the premises are an insufficient security for discharge of the incumbrances thereon, or that there exists any other special circumstance which may render such appointment expedient or necessary.

V. It shall be competent for the said court, in any cause or matter at its discretion to refuse any application for the appointment of a receiver over lands at the instance of an incumbrancer, where the rental or value of the property over which it is sought to appoint such receiver shall not exceed *two hundred pounds* per annum, or to impose such terms or conditions on granting such application as to the court shall seem fit; and it shall and may be lawful for the said court, if it shall so see fit, on such application, instead of making an order for the appointment of a receiver thereon in the ordinary way, to make an order for liberty for such applicant to enter upon the possession of the said lands or premises,

or into receipt of the rents thereof, or a competent part thereof, for the purpose of levying the amount of his demand, and to enjoy the same as if such incumbrancer were a mortgagee in possession, having the legal estate vested in him: provided nevertheless, that before such order shall be made as last aforesaid, it shall be shown to the court or judge that the same will not operate unjustly to any other incumbrancer whose incumbrance shall be duly registered, and it shall be lawful for the court or judge, on such application being made by a puisne incumbrancer to make such order for possession as aforesaid in favor of any prior incumbrancer who may intervene on such application: provided also, that such person so obtaining such order for possession shall be subject to account in the said cause or matter, on motion made on behalf of any person interested in such account, for such profits as he may, or might without wilful default, have received in like manner as if a special suit were instituted for that purpose, upon the result of which account it shall be lawful for the court to make and enforce such order as it would have jurisdiction to make in a suit so specially instituted, that upon such order for possession or entry being made, the said incumbrancer shall obtain an injunction from the court to put him into actual possession of said premises, or if the same be in possession of tenants, to issue such orders on the tenants to pay him the rents thereof, and otherwise have and be invested with such powers of enforcing payment of such rents as if he had been formally appointed receiver by the said court; provided that such incumbrancer having so obtained such possession or entered into such receipt shall not be obliged to enter into any security or account for the rents and profits, save as aforesaid, or be allowed any poundage on rents received; and provided that such incumbrancer having obtained such possession, on an application made bona fide and without fraudulent collusion with the owner of the premises, shall not be disturbed in or deprived of such possession or receipt of rents by any other incumbrancer, whether prior or otherwise, so long as he shall keep down and discharge all rent and such other outgoings as by the rules or orders of the court receivers are bound to discharge, and shall pay such annuity or annuities as may be prior to his own incumbrance, unless and until such premises shall be sold in any suit in the said court, and an order made by the court upon him to surrender possession of said premises to the purchaser, whereupon his right to such possession or receipt of rents shall wholly cease and determine.

VI. The existing junior two Masters in ordinary of the said Court of Chancery shall be and they are hereby constituted and appointed Receiver Masters of the said court, with power severally to exercise such jurisdiction and authority as herein-after provided; and it shall be lawful for her Majesty from time to time, when and as any vacancy shall occur in the office of either of the said Receiver Masters or of their respective successors for the time being by death, resignation, or removal from office, by letters patent under the great seal of Ireland to appoint a fit person, being a barrister of at least *fifteen* years standing, to supply such vacancy: pro-

vided, that it shall not be necessary for either of the said Masters in ordinary hereby constituted Receiver Masters to obtain letters patent for their said appointments to such office, but they shall be deemed capable of exercising such office as if the same were held by letters patent under the provisions of this Act; and every such Receiver Master hereby appointed and to be appointed under the authority of this Act shall hold his office during good behaviour: Provided always, that it shall be lawful for her Majesty to remove any such Receiver Master from his office upon an address from both Houses of Parliament.

VII. Every Receiver Master to be appointed in pursuance of this Act, shall previous to his executing any of the duties of his office, take the following oath, which the Lord Chancellor for the time being is hereby authorized and empowered to administer:

"I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and power execute the office of Receiver Master. So help me GOD."

VIII. The said Receiver Masters and their successors from time to time shall exercise exclusive jurisdiction in the selection and appointment of proper persons to be appointed receivers, in passing receivers' accounts, and in the control and direction of such receivers and of all matters relating to the management of property by them, as well as in their removal for neglect or misconduct and the appointment of others in the place of those so removed; and also in the application of funds in their hands according to the power heretofore vested in the Masters in ordinary of said court for that purpose by the law and practice of the said court, subject nevertheless to appeal to the Lord Chancellor.

IX. From and after the commencement of this Act all orders of reference for the appointment of receivers, or which relate to such office, or which relate to the management and letting of estates under the court, shall be made to such Receiver Masters, and the duties now performed by the Masters in ordinary in relation to receivers, and the management or letting of estates held under the court and incidental to such management and letting, (not inconsistent with this Act,) shall be performed by such Receiver Masters or under their immediate control and directions, and such Receiver Masters are hereby fully authorized and empowered to perform all such duties accordingly, subject however, to the right of appeal to the Lord Chancellor as herein-after mentioned.

X. All business of the nature and description in the foregoing section mentioned, depending in or attached to the offices of the respective Masters in ordinary, shall from and after the commencement of this Act be transferred to the office of the Receiver Masters, who shall from thenceforth pass accounts and perform all other duties in relation to such business heretofore performed by such respective Masters in ordinary, with the like powers and authorities in all respects as fully and effectually as the same are now exercised by the said Masters in ordinary, but subject to the alterations and amendments in the practice herein contained or to be contained in any general orders to be for that purpose made under the authority of this Act.

XI. Upon the occurrence of the first vacancy in the office of such Receiver Masters, the situation of such second Master shall not be filled up unless the Lord Chancellor shall certify under his hand to the Commissioners of her Majesty's Treasury that the state of business in such office requires the appointment of such second Master, in which case it shall be competent to her Majesty on a like certificate from time to time to appoint such second Master; but nothing in this Act contained shall deprive her Majesty of the power of appointing, from time to time as the office may become vacant, one Receiver Master, who shall in such case be called the Receiver Master.

XII. From and after the commencement of this Act there shall continue to be paid and payable to each of the said two Masters in ordinary of the said court hereby constituted Receiver Masters, so long as they shall respectively hold such office, and in lieu of the salary heretofore paid to them as Masters in ordinary, the full amount of the annual salary now paid to them respectively as such Masters in ordinary, and the same shall be charged and chargeable upon the same fund, and be paid and payable upon the same quarterly days of payment as the yearly salary now payable to them as Masters in ordinary is made chargeable and payable, the first payment thereof to be made on the first of the said quarterly days which shall next follow the commencement of this Act; and there shall be paid and payable to every succeeding Receiver Master for the time being so long as he shall hold such office, out of such funds as may be provided by Parliament, the annual sum of *two thousand five hundred pounds* sterling, and every such annual sum shall from time to time be payable and paid quarterly, free and clear from all taxes and deductions whatsoever (income tax excepted,) on every twenty-fifth day of March, twenty-fourth day of June, twenty-ninth day of September, and twenty-fifth day of December in every year.

XIII. Whenever any person who shall hold the office of Receiver Master shall, during the course of any quarter, resign or quit his said office, or shall die, then the person so resigning or quitting, or the executors or administrator of such person so dying, (as the case may be,) shall be entitled to such proportionate part of such salary as shall have accrued during such part of the said quarter as such person shall have exercised the said office, and every Receiver Master to be hereafter appointed shall, on the quarter day next after his appointment, be entitled to receive out of the said funds such proportion of such salary as shall have arisen from the date of the letters patent of his appointment.

XIV. It shall be lawful for her Majesty by any letters patent under the great seal of the United Kingdom to give and grant unto any person executing the office of Receiver Master in pursuance of this Act, an annuity not exceeding *two thousand pounds* sterling, to commence and take effect immediately after the period when the person to whom such annuity shall be granted shall resign the said office of Receiver Master, and to continue from thenceforth during the life of the person to whom the same shall be granted; and such annuity shall be payable out

of such funds as may be provided by Parliament, and shall be paid quarterly, free from all taxes and deductions whatsoever (save and except income tax,) on the four usual days of payment in the year; that is to say, the fifth day of January, the fifth day of April, the fifth day of July, and the tenth day of October in every year, by equal portions; and the first quarterly payment, or a proportionate part thereof to be computed from the time of the resignation of the said office, shall be made on such of the same days as shall next happen after the resignation of the said office; and the executors or administrators of the person to whom the same annuity shall be granted as aforesaid shall be paid such proportionate part of the said annuity as shall accrue from the commencement or the last quarterly payment thereof, as the case may be, to the day of his death: provided always, that it shall be lawful for her Majesty, in and by such letters patent, to limit the duration of payment of such annuity or any part thereof to such periods of time during the natural life of such person in which he shall not exercise any office of profit under her Majesty, so that such annuity, together with the salary and profits of such other office, shall together not exceed in the whole the said sum of *two thousand pounds* sterling: provided also, that no annuity granted to any person having executed the office of Receiver Master under this Act shall be valid unless such person shall have continued in the said office for the period of *fifteen* years, or shall be afflicted with some permanent infirmity disabling him from the due execution of his office, and which shall be distinctly recited in the said grant.

XV. The establishment of the said Receiver Master's office shall consist of two chief clerks and two junior clerks, who shall respectively hold their respective offices during good behaviour, and so long as they shall personally give their attendance upon their respective duties, and shall conduct themselves diligently and faithfully in the due execution of the duties of the said office, and such clerks shall not be removed except by the order of the Lord Chancellor, who is hereby empowered by order made by him to remove any such clerk for some sufficient cause to be stated in such order; and such a number of scrivenerly clerks as the service of such office shall require.

XVI. The examiners now attached to the office of the said junior two Masters hereby appointed Receiver Masters as aforesaid shall be and become and are hereby appointed chief clerks in the office of said Receiver Masters and their successors in office, and the assistant clerks now attached to the office of each of the said Masters shall be and become and are hereby appointed junior clerks in the office of the said Receiver Masters and their successors in office.

XVII. When and so often as any vacancy shall occur by the death, resignation, or otherwise of either of the chief clerks hereby appointed, or of any chief clerk hereafter to be appointed, pursuant to the provisions of this Act, such vacancy shall be filled by the appointment of one of the junior clerks in the said office who shall be next in seniority and to whom no sufficient objection to the satisfaction

of the Lord Chancellor shall be made, and in all future vacancies in the office of junior clerk the said Receiver Masters shall alternately appoint some proper person to be such junior clerk.

XVIII. Every solicitor or attorney who shall be appointed to and shall accept any office under this Act shall cease to be an attorney or solicitor, and shall forthwith procure himself to be struck off the roll of solicitors of the high Court of Chancery, and off the roll of any of her Majesty's Courts of Record in Ireland on which his name may be.

XIX. The salaries of the said chief clerks shall be the yearly sum of *eight hundred pounds* sterling each, and the salaries of such junior clerks shall be the yearly sum of *three hundred pounds* sterling each, and such salaries shall be paid out of such funds as may be provided by Parliament, and shall be paid and payable in such manner and on such and the same quarterly days, and subject to such regulations as to proportionate parts at the commencement and the termination thereof, as is herein-before provided in respect to the payment of the salaries of the Receiver Masters herein-before provided.

XX. All and every the said several clerks hereby appointed and to be from time to time appointed under the authority of this Act, who shall hereafter resign his office with the sanction and under the authority of the Lord Chancellor, or shall be removed therefrom by the Lord Chancellor in consequence of his being permanently incapable from infirmity of mind or body to discharge the duties thereof, shall be entitled to receive such superannuation allowance as the Commissioners of her Majesty's Treasury shall think proper to direct, and in ascertaining and awarding the amount of such superannuation allowance the said Commissioners shall take into consideration the whole period during which any such person shall have been permanently employed in the said office, and shall proceed according to the principle laid down by an Act passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled "An Act to alter, amend, and consolidate the laws for regulating the pensions, compensations, and allowances to be made to persons in respect of their having held civil offices in his Majesty's service," and all such sums and allowances which shall be so awarded and granted under the authority aforesaid shall be paid and payable and charged and chargeable in the same way as is herein-before provided in respect of the salaries of the said several clerks: provided always, that nothing herein contained shall prejudice the right of the examiners of the said Masters in ordinary of the said court hereby appointed Receiver Masters, and which examiners are hereby appointed chief clerks in the said Receiver Master's office, to retire from the respective offices to which they are appointed by this Act after the period of service and upon the other terms contained in an Act passed in the fifteenth year of her present Majesty's reign, intituled "An Act to regulate the proceedings in the high Court of Chancery in Ireland."

XXI. From and after the commencement of this Act it shall and may be lawful for the said several

chief clerks and junior clerks respectively, and all other persons who may be hereafter appointed chief clerks and junior clerks to the said Receiver Masters, or to any future Receiver Masters or Receiver Master, while they shall respectively continue to hold their respective offices, and they are hereby fully authorized, empowered, and directed, to administer oaths, and to take affirmations, declarations, or attestations of honour, examinations, or other matters whatever to be put in on oath in their said respective offices, or in the offices of the said respective Masters; and all persons swearing, declaring, affirming, or attesting before any of such persons so by this Act authorized to administer oaths and take declarations, affirmations, or attestations of honour, shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing, declaring, affirming, or attesting contained therein as if the same had been sworn, declared, affirmed, or attested before any person now by law authorized to administer oaths, and to take declarations and receive affirmations.

XXII. There shall be employed in the said office a sufficient number of writing clerks to make copies of all documents required from the said office, and such writing clerks shall be paid at the rate of *one penny halfpenny* per folio of seventy-two words for all copies made by them respectively.

XXIII. If it shall hereafter appear to the Lord Chancellor that the business of the said office cannot be discharged with due despatch without the assistance of an additional clerk or clerks, then and in such case it shall be lawful for the Lord Chancellor to direct that one or more additional clerk or clerks shall be appointed; and such clerk or clerks shall be appointed accordingly by the said Receiver Masters, or one of them, and shall be paid such annual salary or salaries as the Commissioners of her Majesty's Treasury shall direct, and in the manner and at the times herein-before appointed for payment of the salaries of the said clerks hereby appointed, and shall hold office for the same term and subject to the like regulations as the other clerks hereby appointed.

XXIV. The Receiver Masters shall keep or cause to be kept in the said office, in proper books, with proper and sufficient indexes thereto, in such form as shall be approved of by the Lord Chancellor, a record of the name of every cause and matter in which a receiver shall be appointed, with the date of his appointment and the respective periods of his accounting, also the address of every such receiver, and the name of the post town nearest thereto, so as to be enabled to communicate with him by letter when necessary, also the name of every defendant, respondent, or other person over whose immediate interest or estate in any lands, tenements, or premises a receiver shall be appointed in any cause or matter, also the date of the discharge of every receiver who shall be removed from off any lands, tenements, or premises over which he had been receiver; and all such books shall be open to the inspection of all parties, and their solicitors and agents, during the usual office hours.

XXV. When any order for the appointment of a receiver has been made in any cause or matter de-

pending in the said court, a copy thereof shall be lodged in the Receiver Master's office by the party having the carriage thereof, together with a statement setting forth the exact local situation of the property over which the receiver is to be appointed, the name of the person or persons in possession or receipt of the rents thereof, and over whose estate or interest the receiver is to be appointed, and the amount of the gross annual rental thereof, as nearly as can be ascertained; and thereupon, or so soon after as may be convenient, a notice shall issue for the appointment of the receiver, which shall be served upon all necessary parties, subject to the control or direction of the Receiver Master, for such time as shall be limited or directed by any general order for that purpose, to be made in pursuance of the powers herein-after contained.

XXVI. A list shall be made, under the direction of the Receiver Masters, of persons who shall be, or who may have been, acting as receivers under the said court, with the approbation of the Masters, and also of such other persons as the said Masters may deem fit and proper for the discharge of such duties, which list shall be classified by counties and districts so far as same can be done; and such list may be added to or altered by the said Masters from time to time by inserting additional names or omitting names therefrom as they shall deem right and expedient.

XXVII. When a receiver is to be appointed in any neighbourhood where there is not an existing receiver under the court, the Receiver Master before whom such appointment is to take place shall select such person as shall appear to him the most eligible, a land agent by profession to have a preference if eligible in all other respects, but no practising barrister, solicitor, or attorney shall be appointed to such office of receiver unless for some special reasons, to be set forth in the order appointing him; and where there is an existing receiver under the said court, or a person who has theretofore filled that office, in the neighbourhood of lands over which a receiver has been directed to be appointed, such receiver, provided he has conducted himself in all respects to the satisfaction of the Receiver Master, is to be entitled to a preference in such appointment, in case it shall appear upon communication made to him for that purpose from the office of the chief clerk that he shall be willing to accept of such receivership and give the requisite security; and in estimating the qualifications of any existing or previously employed receiver to a preference in any new appointment to be made as aforesaid the regularity of his accounting, and his general obedience to and compliance with the rules of the court, shall be taken into consideration, as well as his intelligence, knowledge of business, and general competency and conduct in the management of the tenants and lands over which he has been already appointed.

XXVIII. When any person shall be approved of as receiver, he shall receive directly from the Receiver Master's office an intimation by letter that he has been so approved of, and also informing him of the time within which he will be required to enter into security, and he shall also re-

ceive direct from the said office (free of expense) a copy of certain General Rules and Orders hereinafter provided for; and in case such receiver shall not enter into security within the time so intimated, or such further time as may under special circumstances be given, he shall be discharged from such receivership, and another receiver shall be appointed in his place.

XXIX. Every receiver heretofore appointed or to be hereafter appointed under the authority of this Act, so long as he shall continue receiver in any cause or matter, shall once in every year at the least, and oftener if so required, whether the cause or matter be abated or not, pass an account before one of the Receiver Masters, unless the Master before whom he should so account shall for any special reasons permit the accounts in such cause or matter to be passed at a greater interval of time.

XXX. If any receiver shall not have accounted within a year from the date of his appointment or his previous account, it shall be the duty of the Receiver Master before whom he should have so accounted, or one of the clerks before mentioned, without any intimation or request from any of the parties in the case, to call upon such receiver by letter to account for his default; and in case such receiver shall not satisfactorily account for such default, the Receiver Master shall be at liberty to disallow him his poundage or any portion of it he shall think proper, and also the costs of passing his account.

XXXI. If any receiver shall not, after having been called upon as aforesaid, pass his account within a reasonable time, the Receiver Master shall be at liberty to instruct the general solicitor of the court to proceed by attachment for contempt against such defaulting receiver, and shall also be at liberty to remove him from his receivership and appoint another receiver in his place, the costs of such proceedings to be paid by such defaulting receiver, and in case of his inability to pay the same, to be borne by the funds in the cause or matter; provided, however, that no proceedings shall be taken in any case by the general solicitor of the court where the parties or any of them are willing to carry on such proceedings.

XXXII. The balance appearing due by any receiver on passing his account shall be by such receiver paid into court or applied as the Receiver Master before whom the same shall have been passed shall certify and direct, having regard to any order made for payment of the same.

XXXIII. Any receiver who shall neglect paying or applying his balance as the Receiver Master may direct, within the time for that purpose specified, shall be liable to be removed from such receivership by order of the Receiver Master or the court, upon or without any application for that purpose, and another receiver shall be thereupon appointed in his place.

XXXIV. A diary shall be kept in the office of the Receiver Master, showing the days on which the several receivers are bound to account or to pay money, or do any other Act in pursuance of the General Orders of the court or the special orders of the said Master; and it shall be the duty

of the chief clerks of the said office to call upon the several receivers to show cause to the said Master for any neglect or omission in relation to such matters as may occur in relation to the same; and it shall be lawful for the Master to make such order upon the said receiver in relation to such matters, whether upon or without any application for such purpose, as he may deem just and expedient.

XXXV. Any tenant to any lands or premises under the jurisdiction of the said court who shall permit one whole year's rent to accrue due in respect of such lands or premises, shall be liable, without any special order or direction for the purpose, to be proceeded against by the receiver appointed over such lands or tenements, and evicted from the possession thereof; and it shall be the duty of the receiver in any cause or matter where he shall consider such course to be beneficial to the parties, (but not otherwise,) to take proceedings for such purpose.

XXXVI. No special order, direction, or permission of the court or Receiver Master, shall be necessary to authorize a receiver to distrain the goods and chattels of any tenant who shall permit any rent to be in arrear for *one month* after the gale day whereon the same became due and payable, but every receiver shall be at liberty if he shall deem it expedient so to do to proceed by distress or by action by civil bill or otherwise for recovery of such rent, any order or practice of the court to the contrary notwithstanding.

XXXVII. The Receiver Master shall have full power and authority to remit any arrear of rent or portion of such arrear which it shall appear to him, expedient, and for the benefit of the parties under special circumstances so to do, and shall also have power and authority from time to time to order and direct the application by the receiver in any cause or matter of such sum and sums of money as shall appear necessary for keeping and maintaining all fences, buildings, and improvements on any lands, tenements, or premises under the control of the court in full and perfect order and condition.

XXXVIII. The present course of letting lands for a term of seven years pending a cause or matter shall be discontinued; and in lieu thereof the Receiver Masters shall be at liberty when any lands, tenements, or premises are to be let in any cause, or cause petition, matter, or any other matter (save matters of lunacy and minority,) to determine for what term of years (not exceeding *twenty-one* years) such lands, tenements, or premises shall be let, and shall let the same and execute a lease or leases thereof for such term accordingly; and all such lettings so had shall be good and valid at law and in equity for such term, notwithstanding the termination of the cause or sale of the lands, tenements, or premises, as if such letting had been made by the person having the title or legal power to demise the same; subject nevertheless, to all remedies in force in case of non-payment of rent or nonperformance of the covenants by the lessees therein.

XXXIX. All tenants leases for lands let under the said court, and recognizances to be entered into by tenants and their sureties when the same shall be necessary, shall be prepared for execution in the

office of the Receiver Masters in the same manner as they have been heretofore prepared in the offices of the Masters in ordinary of the said court; but no fee shall be received or taken for the same, nor any charge made in respect thereof save only for the necessary stamp duty to which such leases or recognizances shall be liable.

XL. The recognizance to be entered into by every receiver and his sureties shall be in such form as the Lord Chancellor, with the advice and assistance of the said Receiver Masters, shall direct, and may be taken before the said Receiver Masters, or before a Master extraordinary of the said court, or one of the extraordinary Commissioners of the said court in Great Britain, and shall when executed be duly enrolled and registered, according to the present practice of the said Court of Chancery, and shall be duly registered in the office for registering deeds in Ireland in like manner as judgments are now by law registered therein.

XLI. The receiver so appointed shall, upon his recognizance being so executed and registered as aforesaid, lodge the certificate of registry thereof in the office of the Receiver Master, who shall thereupon make an order that the tenants of the lands over which such receiver has been appointed shall thenceforth pay all rent and arrears of rent to such receiver until the further order of the court, and the several tenants of such lands and premises shall be bound to obey such order upon being served therewith, and shall be punishable as in cases of contempt of court for noncompliance therewith.

XLII. Upon the death, removal, or discharge of any receiver, and the passing of his account and payment of any balance which may be in his hands, the Receiver Masters or one of them shall be at liberty to make an order that the recognizance entered into by any such receiver be vacated and discharged, and upon production thereof the clerk of recognizances shall enter a vacate thereon, and the registrar of judgments and registrar of deeds respectively shall enter satisfaction at the foot of the original registry thereof, and the same shall thenceforth be null and void to all intents and purposes.

XLIII. All other recognizances in the said court for the performance of decrees or orders or otherwise shall be in such form as the Lord Chancellor, with the advice and assistance aforesaid, shall by any general order direct and appoint, and the same shall be enrolled and registered in the manner herein prescribed with respect to the recognizance of a receiver, and shall be vacated or satisfied in like manner upon the order of the Master of the Rolls or one of the Vice Chancellors, or the court.

XLIV. Proceedings by scire facias in the petit bag side of the said court on foot of any recognizance entered into in the said court shall be and the same are hereby abolished; and from and after the *passing of this Act* it shall and may be lawful for the said court, or any judge thereof, to order that the persons liable upon foot of any such recognizance, or any of them, shall pay into court the sum due on foot thereof, unless good cause shall be shown to the contrary; and if no cause shall be shown, or that the cause shown shall be disallowed, then the said order shall be made absolute, and such absolute

order shall have the operation and effect of a judgment on a scire facias or a recognizance, and the court thereupon may order an attachment for disobedience of the said order, or the usual process may be issued against the body, goods, or lands of the person or persons who shall be ordered to pay such sum as aforesaid, in like manner as the same might be heretofore sued out upon such a judgment; and it shall be lawful for such judge or the court upon any motion to show cause against such order, or to make the same absolute, as well to entertain all matters which have been heretofore admissible upon a motion to put a recognizance in suit, as all matters which could be set up by way of defence on the merits to a scire facias on a recognizance, and also to make or direct any inquiry which the court or judge may deem necessary before making such order absolute: provided, that nothing herein contained shall operate to affect the jurisdiction and general control heretofore exercised over proceedings on recognizances against persons to be charged in relation to the same.

(To be continued.)

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DUBLIN, MAY 5, 1855.

We have frequently remarked with indignation at the Sittings after Term causes standing in the lists for trial, which prove, on inquiry, to be speculative, or, as they are vulgarly termed, "attorneys" actions. The class of suits to which we allude are those in which the plaintiff is in a very humble rank of life, or, at least, in extremely wretched circumstances, and is consequently "no mark" for costs in case the result of the action prove adverse to him. The facilities afforded by recent legislation, for suing in the Superior Courts, coupled with the help given by the new law of evidence to a dishonest plaintiff to bolster up his own case by what Dogberry would have termed "*flat perjury*," have given an alarming impetus to this disgraceful litigation, and the time has, in our opinion, fully come to administer a wholesome check. Far be it from us to advise the enactment of any measures which should, in the slightest degree, operate as a denial of justice to a poor man, or which would place it out of the power of the indigent to resist the aggression of a purse-proud neighbour; but we say

that it is monstrous in principle that a man, because he is poor, and can become no poorer, should be made the instrument of causing a certain loss to the unfortunate individual singled out as a defendant, by some one of those *pariahs* of the legal profession, who, as yet unstript of that robe which they disgrace, prowl about the precincts of our courts seeking whom they may devour.

The class of actions brought by paupers to which these remarks apply are chiefly those *ex delicto*; for those on foot of contracts, at least where of a probable nature, are usually of an amount recoverable in courts of inferior jurisdiction. It is not necessary for us to particularize the usual description of pauper actions; they are unhappily too notorious to require illustration or comment, as is the mischievous, though we rejoice to say, limited, class of practitioners, whose dire necessities urge them to pursue a department of business of so despicable a character.

We feel convinced that that influential and honourable body, the Law Society, must have sensibly felt the burthen of this legal nuisance, and would be most happy at seeing it abated. The

remedy which it occurs to us to propose is one which can only be had by express legislative enactment, and as we doubt not that the evil prevails in England in a very large degree, that country ought to participate in the suggested reform. We think that power might be given to the court in which the action has been brought to allow, at its discretion, a suggestion to be entered upon the record that the plaintiff's attorney do pay the defendant his costs upon the plaintiff's default, with a prohibition, from practising again till payment. This power we would give, in analogy to that already possessed by the court to make attorneys pay the costs of motions rendered necessary in the progress of a suit by their misconduct, whether moral or technical. Of course many cases would still arise in which the court would, in the exercise of its sound discretion, refuse thus to mulct the attorney of a defeated plaintiff whose conduct was *bona fide*; and it is probable that in disposing of such applications regard would be had to the previous professional character of the attorney sought to be fixed with costs. The effect of such a regulation would be, that an attorney, before commencing proceedings, would have to take another element into the account of his risks besides the mere negative one of the loss of his client's costs out of pocket. On the other hand, we do not apprehend that the poor would suffer any real loss, because, where the plaintiff has been made the victim of systematic oppression, he will at all times find men sufficiently imbued with a love of fair play to be willing to bear his attorney harmless in case he should be made personally liable. We have no doubt, that, at present, it frequently happens that many disputes between persons in an humble rank of life and their superiors would have amicably and satisfactorily terminated but for the officious intervention of the class to which we have referred. Of this we are quite certain, that there will always be found a band of honourable practitioners willing to lend their aid in righting the grievances of the poor, whose characters will afford such a guarantee against the suspicion of unworthy motives, that they need not hesitate on the score of personal risk.

As the law now stands, everyone, however inoffensive, may well tremble for himself—for first he may have to run the gauntlet with perjury; and, if he came off victorious, he will still be virtually condemned in his *own* costs of suit. This to some

may be a light matter, but others, not so wealthy, will probably be inclined to say with the Persian king: "One more such victory, and I shall be undone."

A BILL

TO ALTER THE LAW AND PRACTICE OF THE
HIGH COURT OF CHANCERY IN IRELAND IN
RELATION TO THE APPOINTMENT OF RECEI-
VERS AND THE MANAGEMENT OF ESTATES
UNDER THE CONTROL OF THE SAID COURT.

[Note.—The words printed in *Italics* are proposed to be inserted in Committee.]

(*Prepared and brought in by Mr. Whiteside,
Mr. Napier, and Mr. Malins.*)

(*Continued from page 152.*)

XLV. It shall be lawful for the Lord Chancellor, with the advice and assistance of the said Receiver Masters, and they are hereby required, forthwith to make and issue general rules and orders for regulating the times and form and mode of procedure before the said Receiver Masters respectively and their respective chief clerks, and generally the practice in respect to the matters to which this Act relates, and such rules and regulations may from time to time be rescinded, altered, varied, or added to by the like authority, and all such rules and regulations as aforesaid, shall take effect as general orders of the said court.

XLVI. If any receiver shall require the advice of the Receiver Master in relation to any peculiar exigency, he shall not file any statement of facts, but shall be at liberty to communicate by letter with the officer of the Receiver Master, upon his own responsibility as to the truth of the facts contained in such communication; whereupon it shall and may be lawful for such Receiver Master, through the chief clerk, to convey advice and direction by written answer to such receiver, if the said Master shall consider the case one calling for his special direction.

XLVII. Whereas it frequently occurs that persons who are for the first time appointed receivers under the Court of Chancery, experience considerable difficulty in the discharge of their duties from being unacquainted with the rules and regulations of the court, and their own duties, powers, and responsibilities as such receivers, and from the want of any authorised standard whereby to acquire such knowledge and regulate their conduct and proceedings: and whereas the practice of receivers filing statements of facts leads to much unnecessary delay and expense: be it therefore enacted, that the said Receiver Masters shall forthwith prepare and submit to the Lord Chancellor for his approbation a general code of rules and regulations for the guidance and instruction of receivers and the regulation of their conduct in all matters relative to their management of estates, so far as can be anticipated, relating to such duties of receiver under the Court of Chancery; and such rules, when approved of by the Lord Chancellor, shall take effect as general orders,

and shall be printed at the expense of the said Receiver Master's office, and a copy thereof shall be furnished to every receiver on his appointment as receiver for the first time, either by delivering same to him if in town, or by transmitting the same to his residence, if in the country, by post.

XLVIII. All such rules and regulations may from time to time be rescinded, altered, varied, or added to by new or amended rules, to be from time to time made in like manner and by the like authority, and all such amended or additional rules as shall from time to time be made shall, with all convenient speed, after being approved of by the Lord Chancellor, be printed and distributed, by delivering or forwarding to every receiver in manner aforesaid a copy thereof, free of expense, and such altered or amended rules shall not take effect or come into operation for a period of *one month* at least after the same shall have been so as aforesaid approved of by the Lord Chancellor.

XLIX. In framing regulations for government of and direction for receivers, they shall be rendered as conformable to the character of ordinary land agents, in the duties, discretion, and responsibilities incident to such agents in the management of estates, as may be consistent with a reasonable control to be exercised by the Receiver Master.

L. All receivers' accounts, when passed and certified, shall be retained in the office of the said receiver Masters, and shall, at such time or times as may be for that purpose specified in any general order to be made for that purpose, be bound up in one or more volumes with proper indexes, and to that end all receivers' accounts shall be written on post paper bookwise with sufficient margins.

LI. Copies of all receivers' accounts, statements, or other documents remaining of record in the Receiver Master's office shall be furnished to all parties requiring them, on payment of a fee of *fourpence* per folio of seventy-two words; and all parties requiring it shall be at liberty to take a copy of any portion or portions of such account or other document as they may require, without being compelled to take out or pay for the entire document.

LII. The mode of proceeding before the said Masters respectively shall be by notice, to be subject to the same rules and regulations as to the entry and service thereof as heretofore applicable to the entry and service of summonses, unless the same shall be altered by any general rule to be made in pursuance of the powers for that purpose in this Act contained.

LIII. The practice heretofore existing in the offices of the respective Masters of making reports to authorize the selling of lands and management of estates by receivers under the court, shall be discontinued, and no report shall be made by the said Receiver Masters except in cases where the Lord Chancellor shall specially refer any matter to the Receiver Masters or either of them to be reported upon, and in place and stead of such reports hereby directed to be discontinued the said Receiver Masters shall in all cases have power and authority to make orders, and all orders made by the Receiver Masters or either of them shall have the force and effect of orders of the Court of Chancery or any judge

thereof, and be enforced in like manner, and all persons neglecting or refusing to obey them shall be subject to the same penalties and punishments as is provided for disobedience to or neglect of orders of the said court.

LIV. All orders made by the Receiver Masters shall be drawn up in a short form, and signed by one of the chief clerks of such Masters, and shall be entered in books to be kept in the said office, with proper and sufficient indexes, and copies thereof, properly authenticated or attested, shall be issued from the said office, subject to such regulations as shall be settled and provided by any general orders to be made in pursuance of the powers in that behalf contained in this Act.

LV. The said Receiver Masters shall within the first *four* days of Michaelmas Term in each and every year transmit or cause to be transmitted to the office of the Chief Secretary of the Lord Lieutenant of Ireland, a return showing the gross number of causes, petitions, and matters of every description depending in the said Court of Chancery in which there shall be existing receiverships, and the number of causes, petitions, and matters in which receivers shall have been discharged during the *twelve* months next preceding such return, and the number of new appointments which shall have taken place during the same period; and each of the said Masters shall annex to such return a report in writing under the hand of such Master, stating the days on which he shall have attended at his office during such period in the performance of his duty, and the number of hours occupied in each of such days attendance.

LVI. In the construction of this Act the expression "*Her Majesty*" shall mean the Sovereign for the time being; the expression "*Lord Chancellor*" shall mean also and include the Lord Chancellor, Lord Keeper, and Lords Commissioners for the custody of the great seal of Ireland for the time being; and the expression "*receiver*" shall mean also and include receivers, sequestrators, and guardians of the fortunes of minors in matters of minority.

A BILL*

FOR SECURING THE TITLES OF PURCHASERS OF ESTATES SOLD UNDER THE COURT OF CHANCERY IN IRELAND.

NOTE.—The words printed in *Italics* are proposed to be inserted in Committee.

(Prepared and brought in by Mr. Whiteside,
Mr. Napier, and Mr. Malins.)

WHEREAS it is expedient to remove certain technical difficulties in suits for the sale of lands in Ireland under the Court of Chancery, and to render the

* Our readers will be aware that the result of a recent debate in Parliament has been to postpone for a time the further consideration of the series of Chancery Bills which we have been publishing. As, however, the greater portion has been already printed, and it is desirable that the contents of the whole should be well known, containing as they do matters which concern the Profession, and which will soon again be the theme of discussion, we make no apology for finishing the group.

titles of purchasers thereof secure and indefeasible: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:

I. Where any incumbrance exists upon land or an interest upon land in Ireland, which from its nature would entitle the incumbrancer to obtain a decree for a sale thereof from the Court of Chancery in Ireland, it shall and may be lawful for the owner of such estate or interest so subject to such incumbrance to institute a suit and obtain a decree for the sale thereof, or a competent part thereof, for payment of incumbrances thereon, in which suit the court shall proceed and make such a decree or order for a sale, and apply the funds, the produce of such sale, in like manner as if such suit had been instituted by such incumbrancer.

II. Where any person who, according to the existing law and practice of the Court of Chancery in Ireland, would be a necessary party to a suit for the sale of any estate or interest in land in Ireland, or to a suit for administration of the assets of a deceased person, or any other suit in which such sale would be ordered as incidental to the relief prayed, and of which suit such person ought, according to such practice, to have notice, and where it shall appear to the said court that such person is out of the jurisdiction thereof, or his or her residence cannot be discovered on reasonable inquiry made for that purpose, it shall and may be lawful for such court, having regard to the delay, expense, or difficulty attendant on the ordinary service of process or notice on such person or incident to the mode of substitution thereof, which the court has heretofore power to direct, and upon being satisfied that the petitioner is entitled to such sale in lieu of such service, to declare that the publication of such notice or process by advertisement thereof (whether with or without any further or other indirect notification) shall be a sufficient substitution for the service of such notice or process in the ordinary and formal way; and upon such declaration and such publication of such advertisement, with or without such further notification, as the case may be, such person being such party shall be bound by the said suit, and by all decrees and orders pronounced therein, and any sale had thereunder, as if such person had been within the jurisdiction of the court, and actually served with such notice or process in the ordinary way.

III. It shall not be lawful for any party to a suit pending in the said court for the sale of any estate or interest in land in Ireland, or to a suit in which such sale may be granted as incidental to the express relief therein prayed as aforesaid, to make any objection for want of parties as matter of right, but the court shall have full power and discretion to dispense with such parties to the suit, upon the plaintiff or petitioner, or person having the carriage of such proceedings, publishing such advertisements or making such other indirect notification to them of the object of such suit in such manner as to the said court may appear reasonable and expedient.

(To be continued.)

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DUBLIN, MAY 12, 1855.

IRELAND owes a deep debt of gratitude to the Incumbered Estates Court. It was indeed a bold experiment, to be tested only by success, but it has stood that test admirably. It is the best testimony to its practical value, that, although it will probably soon expire as a special tribunal, its leading features will be perpetuated. We learn by the report of a recent animated debate in the House, which terminated in the temporary postponement of a measure upon this head, already in part presented to our readers in our miscellaneous columns, that, whatever may be the differences of detail between the several proposed methods of incorporation, it is admitted upon all hands, that the time has come, to annex to our ordinary equity tribunals the peculiar functions of this court. A plan is likely soon to be brought forward for this purpose, under the auspices of Government, founded on the report of the Commission. The details of this scheme we have not yet learned, but we glean thus much from the speech of the Solicitor-General for Ireland, that not only will powers be conferred upon the Court of Chancery to sell incumbered estates with a parliamentary title, but that the novelty will be introduced of affording to the owners of property not incumbered, the privilege of disposing of their lands through the medium of the court. If this latter proposal pass into

law, a valuable benefit will be conferred upon the public. We have heard a great deal of late years about the doctrine of "free trade in land," a very convenient phrase, but one concerning which we fear that many of the well-meaning people, with whom it has become a kind of household word, form a very indefinite idea. It would really appear, to hear those persons talk, that they regarded land as a kind of abstraction, like the public funds, which ought to be made so easy of transfer, as that a man could always have it in his power to purchase a given quantity with an indefeasible title. It only requires for us to reflect upon the peculiar nature of the subject matter of the traffic, and the number of independent interests which it involves, to see the fallacy of any such comparison. Even in a newly settled country, the futility of mere paper transfers of land has, in our times, received a striking illustration by the disasters of the New Zealand Company. Again, such theorists would insist upon land being no longer treated as a subject for family settlement, or security for debts, functions for which its permanent nature so well adapts it. We believe that some who entertain very extreme views, would like to abolish even the relation of landlord and tenant. On the other hand, it cannot be denied that at present too many barriers exist in the way of transfer. It cannot but work an injury to the resources of the country, if land can, as at present, be absolutely interdicted from chang-

ing owners for a life or lives in being and a term of twenty-one years from the decease of the last survivor. Possibly, an estate might be thus locked up for a century. In the meantime, unless provision be made in the settlement for that purpose, no leases can be granted of a kind which would be any object to improving tenants, as they would necessarily be for periods which might suddenly determine. The inconvenience of the present system arises from the extreme jealousy with which the Legislature regards the interests of absent or incompetent persons. However, the vast commercial concerns of the country have of late years refused to bear these artificial trammels, and accordingly the Legislature has conceded to public undertakings the privilege of purchasing the landed interests of parties unable to deal for themselves. The new scheme, if it include the permitting the sale of estates generally to be had under the sanction of the court, with an indefeasible title, is, in our opinion, the nearest approach that can safely be made to the desired freedom of trade in land. We presume that the measure will extend to all cases of land in settlement, not to those only where a power of sale exists. There is no reason, *prima facie*, why every settlement should not contain such a power, and the implied discretion would be exercised as safely by the court as by private parties. No doubt, the process would involve more expense than that of making title to a purchaser in the ordinary way, but as has been fully shown in the working of the present tribunal, the large increase which purchasers would be willing to pay for a perfectly secure title would more than compensate for this outlay. With regard to the other points of the measure, with respect to the sale of estates charged with incumbrances, we can only say, that the time has fully come to do away with the existing anomaly, so unfair to those whose property is sold by the Court of Chancery, where the purchaser buys at his peril, without the least guarantee of title beyond his own vigilance. We make the foregoing remarks, of course, upon the faith that every precaution will be taken to protect the rights of the absent, and that the proceeds of the sales will be scrupulously secured upon the trusts affecting the property sold.

◆

To the Editor of the Irish Jurist.

SIR,

The leading article in your Jurist of the 5th instant is not only important to the profession to which I belong, and with many of whom I hold it an

honor to be associated, but to the public and the Bar—I allude to “speculative actions.” In my judgment a wholesome and simple check could be at once put to the mischief of such actions by imposing on the plaintiff the necessity of giving substantial security for costs; if then the plaintiff be unable to procure such, his attorney, who has all the beneficial interest flowing from such actions, (if successful,) would be obliged to do so, for I look on professional men thus engaged about as solvent as their clients, and no matter what control the court might in its justice endeavour to exercise, it could never have the effect of fixing a pauper attorney with the consequences, whilst the Court of Insolvent Debtors was open to his stratagema. Now turn to the class of barristers you generally see engaged in such actions; they are especially selected not from the higher ranks in the profession. No doubt a gentleman of the Inner Bar is sometimes taken in to give a colour to the scene, but he is generally, and very naturally so, in a hurry to be off after the display of a speech much against his will he has been obliged to make. How such a state of things could have been permitted so long to exist I know not, and nothing could tend more effectually to spare the feelings of those gentlemen who are obliged to advocate such cases, than by putting a period to such proceedings.

Your Jurist has made your suggestions at a time well suited for the purpose, when so much good is expected from Reform in the Law, and I confess I know no improvements that could be made more important to the public, and in that I embrace all classes of society; it would, in a word, be “for the public good.”

A SOLICITOR.



A BILL

FOR SECURING THE TITLES OF PURCHASERS OF
ESTATES SOLD UNDER THE COURT OF CHANCERY
IN IRELAND.

[Note.—The words printed in *Italics* are proposed to be inserted in Committee.]

(*Prepared and brought in by Mr. Whiteside,
Mr. Napier, and Mr. Malins.*)

(*Continued from page 156.*)

IV. When a decree or order for a sale of any estate or interest in land in Ireland shall be pronounced in any suit pending in the said Court of Chancery, and before the same shall be put up for sale, the plaintiff, petitioner, or other person having the carriage of such proceedings, shall lodge a statement of the title to such estate or interest in the office of the court of the judge before whom such suit shall have been attached, in like manner as statements of title are now lodged in the offices of the Masters of said Court of Chancery, save that every statement shall henceforth be laid before some practising barrister of at least *fifteen* years standing, being one of her Majesty's counsel, to be specially nominated in such case by the said judge, for the opinion of such counsel thereon, to be given within a limited time,

to be also specified by the said judge, to the intent that the said judge may be the better enabled to give such directions as he may deem necessary respecting such sale as herein-after mentioned; and save that such counsel, instead of the certificate now required by the practice of the court to be affixed to such statement, shall certify that he has examined such title and the proceedings in the suit, and (if such be the case) that in his opinion it would be proper and expedient to proceed with the sale forthwith; or if he shall not be of such opinion, then he shall suggest such further inquiries, notices, or advertisements as may to him appear expedient preliminary to a posting for such sale.

V. After such opinion shall be so obtained, the said judge shall investigate such statement of title and opinion, with any suggestions thereon, and by himself or his chief clerk settle a rental, and direct the necessary posting for such sale; or if he shall see fit, taking into consideration such suggestions, it shall and may be lawful for him, instead of settling such rental and ordering such posting, to make such preliminary directions as to further inquiries, notices, or advertisements as to him shall appear just and expedient: provided that nothing herein contained shall render it imperative on such judge to direct any such further inquiry, notice, or advertisement, unless he shall consider the same just and necessary.

VI. No purchaser of any estate or interest in land sold under the said court shall be at liberty to refuse to complete such sale by reason of any objection to the title thereof, or on the ground that the proper parties had not been brought before the court or properly served in the suit in which such sale was had, or for any other irregularity or informality whatever in the proceedings in the suit, save for such misdescription of the premises in the rental and statement thereof, which would, according to the existing practice of the court, entitle a purchaser to be discharged from his purchase: provided, however, that nothing herein contained shall operate to deprive the court of the power of cancelling or opening such sale, or discharging the purchaser, or allowing him compensation, if the said judge shall deem it just so to do.

VII. Where any such sale as aforesaid shall be made under the decree or order of the said court, it shall and may be lawful for the said court, when and so far as it may deem necessary for the purposes of such sale, to ascertain the tenancies of the occupying tenants, and of any lessees or under-lessees whose tenancies, leases, or under-leases affect the land, or lease, or part thereof, to be sold, and to give or cause to be given such notice, or cause such advertisements to be published, and make or cause to be made such inquiries in relation thereto, as it shall deem necessary for ascertaining and securing the rights of such tenants, lessees, or under-lessees as aforesaid; and all occupying tenants, and all persons being or claiming to be lessees or under-lessees as aforesaid, shall, at such times and places as the court may by notice require, produce all leases, under-leases, and agreements in writing under which such tenants occupy or claim to hold, if such leases, under-leases, or agreements, or counterparts thereof, be in their possession or power;

and where they occupy or claim to hold under leases, under-leases, or agreements in writing not in their possession or power, or under parol agreements or lettings, they shall deliver, at such times and places as aforesaid, particulars of the terms and conditions upon and subject to which they occupy or claim to hold; and the sale shall be made subject to the tenancies, leases, or under-leases ascertained as aforesaid, and subject to which the owner or incumbrancer applying for a sale shall be owner or incumbrancer, and such other of the tenancies, leases, and under-leases, ascertained as aforesaid, as shall appear to the court to have been granted bona fide by the owner or person in possession or in receipt of the rents and profits, and subject to which it shall appear to the court the sale should be made, save such (if any) of respective tenancies, leases, and under-leases, as, with consent as herein-after mentioned, shall be included in such sale, and, when the court shall think fit, be made subject to any leases, under-leases, or tenancies, according to any general description, or subject to any condition concerning any leases, under-leases, or tenancies, the nature of which shall not have been ascertained or shall be disputed; and where the court shall think fit, such sale may be made subject to dower or any annual charge affecting the land or lease, or part thereof sold, or to any such apportioned part of such dower or annual charge, as the court may think fit, should remain charged thereon; and where such land or lease, or part thereof, is subject to any incumbrance, under the terms of which the incumbrancer cannot be required to accept payment of the principal money before the expiration of a term of years unexpired, such sale may, if the court think fit, be made subject to such incumbrance.

VIII. It shall be lawful for the court to sell any land or lease or part thereof discharged from any crown rent or quit rent which it may be enabled, and may, with the consent of the owner, think fit to purchase, or from any charge made by virtue of an Act passed in the sixth year of her Majesty, intituled "An Act to promote the Drainage of Land and Improvement of Navigation and Water-power in connexion with such Drainage in Ireland," and the Acts amending the same, or by virtue of an Act of the tenth year of her Majesty, intituled "An Act to facilitate the Improvement of Landed Property in Ireland," or by virtue of any Act or Acts passed, or which may be passed, for amending the said Acts, which the said court may, with such consent, think fit to pay off or redeem; and in any such case the court shall, out of the money arising from such sale, and in preference to all other payments thereout, pay the consideration for the purchase of such crown rent or quit rent, or such sum as may be necessary for paying off or redeeming such charge; and it shall be lawful for the court, where it shall think fit, to pay to any person entitled to any dower or to any annual or other charge, not being an incumbrance, for payment of which the court has jurisdiction to decree a sale of land, who may consent to accept the same, a gross sum in discharge or by way of redemption thereof, or any part thereof; and where

a part only of any land or lease subject to dower or to any incumbrance or charge is sold, to charge the part not sold with such dower, incumbrance, or charge, or an apportioned part thereof, in exoneration of the money arising from the sale, and to enable or authorize persons to release the money from the part so sold from any such dower, incumbrance, or charge, or to relinquish their claim on such money in respect thereof, without impairing or affecting such incumbrance or charge as to the remaining part of the land or lease originally charged; and the court where it thinks fit may invest or provide for the investment of money to meet any claim of dower or any annual or periodical charge, or any other charge, incumbrance, or interest, where by reason of such charge, incumbrance, or interest being contingent or otherwise, it shall appear to the court proper or expedient so to do, and otherwise may make such orders and directions for applying the money arising from any sale in such manner as will secure the convenient application thereof for the benefit and according to the rights of the parties interested in the land or lease, or part thereof, from the sale of which same may have arisen.

IX. Where there shall be separate decrees of the said court for sales of any land and of any lease in the same land, or of two or more leases in the same land, or for different undivided shares of any land or lease, it shall be lawful for the said court, where it shall see fit so to do, to include, with the consent of the persons by whom such respective decrees may have been obtained, and of any other persons whose consent the court may, under the circumstances, think fit to require, in the same sale, upon such terms as it may think fit, such land and lease, or such leases, or such several undivided shares as aforesaid; and where any land or lease, or part thereof, subject to any incumbrance, is decreed or ordered to be sold, it shall be lawful for the court, upon the application of the owner of any lease or under-lease, or estate in reversion, or other estate or interest whatsoever in the same land, (and although such lease, under-lease, estate in reversion, or other estate or interest be not subject to any incumbrance, or would not, if subject to any incumbrance, be liable to be sold under any decree of said court,) or upon the application of any incumbrancer on any such lease, under-lease, estate or interest, to include the same, upon such terms as the said court may see fit, in the sale of the land or lease, or part thereof, so decreed to be sold as aforesaid; and all the powers of the said court and the provisions of this Act applicable to any land or lease subject to any incumbrance, ordered to be sold, and to any incumbrance or charge upon such land or lease, and to the purchase money arising from the sale thereof, and to the conveyance or assignment thereof, shall, so far as the circumstances may admit, extend and be applicable to every such lease, under-lease, estate in reversion, or other estate or interest to be so included in the sale; and in every such case as aforesaid the court shall apportion the purchase money and expenses as it sees fit.

X. If any land or lease to be so sold shall be subject to a lease or under-lease for years or lives

comprising other land at an entire rent, it shall be lawful for the said court to apportion the rent between the land to be so sold and the remainder of the land subject to such rent; and where it is intended to sell a part only of any lease in perpetuity or other lease, it shall be lawful for the said court where it shall think fit, and (having regard to the rights and interest of the owner of the reversion) it shall appear just so to do, to apportion the rent reserved by such lease between the land to be sold and the remainder of the land; and the said court shall direct notices of any such intended apportionment as aforesaid to be given to such persons and in such manner as they shall think fit, and shall hear such parties as shall apply to them in relation thereto; and after such apportionment, and after the sale shall be completed, the owners of the reversion in the respective lands shall have the like remedies for the apportioned rents against the land out of which the same shall be payable, and the owners and occupiers thereof respectively, as were subsisting for the entire rent before such apportionment; and all the covenants, conditions, and agreements of every lease or under-lease, except as to the amount of rent to be paid, shall, as regards the apportioned parts, remain in force in the same manner as they would have done in case no such apportionment had taken place.

XI. When any suit shall be pending in the said court for a sale of an undivided share of any land or lease, or where any such undivided share shall have been sold under a decree or order of the said court, and either before or after the conveyance thereof to the purchaser, the court, without any suit being instituted for that purpose, on the application by motion of any party interested in such undivided share, or of the purchaser, (as the case may be,) and after causing to be given such notice to the owner or owners of the other undivided share or shares of the same land or lease, as to such court may seem fit, and hearing such parties interested in the respective shares as may apply, and making or causing to be made such inquiries as may enable it to make a just partition, may, if it think fit, make an order for the partition of such land or lease, with or without of partition, as the case may be; and in such order, or in a map or plan annexed thereto, shall be shown the part allotted in severalty in respect of each of the undivided shares in such land or lease; and the said court shall have the like authority, jurisdiction, and powers in relation to such partition as if a suit had been pending for that special purpose; and the part so allotted in severalty in respect of each undivided share by such order for partition as aforesaid shall, without any conveyance or other assurance in relation thereto, go and enure to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the undivided share in respect of which the same is so allotted would have stood limited or been subject to in case such order had not been made; and the like order for a sale of the part allotted in respect of the undivided share to which the application for the sale shall relate may be made (when the order for a partition is made before sale), and the like.

proceedings had in relation to such sale, and the like conveyance or assignment may be made of the part allotted in respect of the share sold (where the order for partition is made after sale and before conveyance), and with the like consequences in the several cases aforesaid, as if the suit, decree, or order for a sale, or the sale (as the case may be) had been in respect of the part so allotted as aforesaid; and where any land or lease, or part thereof, to be sold under the court, is subject to any lease, under-lease, or tenancy under which the lessees, under-lessees, or tenants hold jointly or as tenants in common, it shall be lawful for the court, on the application of any such lessee, under-lessee, or tenant, and after giving or causing to be given such notices, and hearing such parties as it may think fit, and making such inquiries as it may deem necessary to make an order for the partition, as between such lessees, under-lessees, or tenants, of the land included in their lease, under-lease, or tenancy, and for the apportionment of the rent reserved or payable under such lease, under-lease, or tenancy; and after such order of partition the owner of the reversion in the respective parts of the land shall have the like remedies for the apportioned rents against the respective parts out of which the same shall be payable, and the lessees, under-lessees, or tenants holding such respective parts under such lease, under-lease, or tenancy, as were subsisting for the entire rent before such partition and apportionment; and all the covenants, conditions, and agreements of every such lease, under-lease, or tenancy, except as to the amount of rent to be paid, shall, as regards the respective parts allotted on such partition, and the apportioned parts of the rent, remain in force against the respective lessees, under-lessees, or tenants to whom under such partition such respective parts shall be allotted.

XII. Where a suit shall be pending for a sale of any land, or lease, or part thereof, or where the same shall have been sold, and either before or after the conveyance or assignment thereof, if application be made to the said court by any party interested in such land or lease, or by the purchaser (as the case may be) for the exchange of all or any part of such land, or of all or any part of the land comprised in such lease, for other land which the owner thereof may be willing to give in exchange, the said court may make or cause to be made such inquiries as they may think fit for ascertaining whether such exchange would be beneficial to the persons interested in the respective lands, and cause such notices to be given to parties interested in the respective lands as they may think fit; and if, after making such inquiries and hearing such parties interested in the respective lands as may apply to them, the said court shall be of opinion that such exchange would be beneficial, and that the terms thereof as proposed or as modified by it, with the consent of such owner as aforesaid, are just and reasonable, the said court may make an order for such exchange accordingly, and in such order for exchange, or in a map or plan annexed thereto, shall be shown the lands given and taken in exchange respectively under such order; and the land taken upon such exchange under such order shall, without any conveyance or other assurance in rela-

tion thereto, go and enure to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the land given on such exchange would have stood limited or been subject to in case such order has not been made; and the like order for a sale may be made in respect of the land taken in exchange for any land, or any land comprised in any lease to which the application for a sale shall relate (where the order for exchange is made before sale), and the like proceedings had in relation to such sale, and the like conveyance or assignment may be made in respect of the land taken in exchange for the land or lease, or part thereof, sold (where the order for exchange is made after sale, and before conveyance or assignment,) and with the like consequences, in the several cases aforesaid, as if the suit for a sale, or the sale (as the case may be,) had been in respect of the land so taken in exchange.

XIII. Where a sale is made by the said court of any land or lease, it shall be lawful for the said court, whenever it shall appear convenient so to do, to include in such sale all or any part of the arrears of rent, if any, which may at the time of sale be owing from any lessees or tenants, subject to whose leases or tenancies the sale is to be made, where such arrears are subject to any incumbrance in respect of which an incumbrancer shall have obtained an order for sale, or where the order for sale has been obtained by the owner, and in the conveyance or assignment of such land or lease to assign such arrears to the purchaser accordingly; and such purchaser, his heirs, executors, administrators, or assigns, shall after such assignment of the said arrears, have for the recovery and in respect of the nonpayment thereof the same rights and remedies which the person or persons who would have been entitled to such arrears would have possessed, if no such assignment thereof, nor any conveyance or assignment of such land or lease, had been made.

XIV. Where the said court shall order the sale of any lease in perpetuity, it may, if it shall think it expedient so to do, cause notice to be given to the owner or other persons interested in the reversion, or any person on behalf of such owner or other persons, may thereupon proceed to convert such lease in perpetuity into a fee farm grant, according to the principles prescribed in the Renewable Leasehold Conversion Act, but their procedure in relation thereto shall be according to the general rules and practice of the said court; and in case such conversion shall be ordered, the said court shall have power to convey the land included in such lease to the purchaser in fee, subject to the fee-farm rent ascertained as aforesaid, and to such exceptions, reversions, covenants, and clauses as shall be in conformity with the original lease, and the provisions of the Renewable Leasehold Conversion Act, and thereupon the owner for the time being shall have the same rights and remedies against the purchaser, his heirs, executors, administrators, and assigns, and against the land, by action, distress, entry, or otherwise in respect of such rent, and of any exceptions, reservations, covenants, and clauses contained in the said deed as belong by law to the owner of any fee-farm rent created under the said Acts.

XV. In every decree for a partition, made in

suits specially instituted for such purpose, or in a map or plan annexed thereto, shall be shown the part allotted in severalty in respect of each such undivided share; and the part so allotted in severalty in respect of each such undivided share by such order of partition shall, without any conveyance or other assurance in relation thereto, go and enure to and upon the same uses, and subject to the same conditions, charges, and incumbrances, as the undivided share in respect of which the same is so allotted would have stood limited or been subject to in case such order had not been made.

XVI. It shall be competent for the said court to entertain a suit for the exchange of lands in Ireland in like manner as it exercises a jurisdiction at present for partition, in which suit the court shall make or cause to be made such inquiries as it may think fit for ascertaining whether such exchange would be beneficial to the persons interested in the respective lands; and in case the court shall be of opinion, on instituting such inquiries and causing such notices to be served as it shall deem fit, that the proposed exchange would be beneficial, and that the terms thereof are just and reasonable, it shall and may be lawful for the court to make a decree or order for such exchange accordingly; and in such order for exchange, or in a map or plan annexed thereto, shall be shown the lands given and taken in exchange respectively under such decree or order; and the land taken upon such exchange shall, without any conveyance or other assurance in relation thereto, go and enure to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the land given upon such exchange would have stood limited, or been subject to in case such order had not been made.

XVII. No such decree or order for a partition in a suit expressly instituted for that purpose, and which has not been made as incidental to a sale under the court as aforesaid, shall be binding upon any person or persons save the parties thereto, and such person or persons as being interested in the lands to be partitioned, shall have intervened pro interesse suo (as they shall be at liberty to do,) upon the inquiry by the court whether such partition would be beneficial to the person interested therein, unless notices by advertisement in such newspapers as the court shall direct shall have been given of such proposed partition, and unless *three* calendar months shall have elapsed from the publication of the last of such advertisements before such inquiry shall be entered into; and no such decree for an exchange in a suit expressly instituted for that purpose, and which has not been made as incidental to a sale under the court as aforesaid, shall be binding except upon the consent of the parties to the said suit, or the persons who, being interested in such exchange, shall intervene in the same, and any person who, after the publication of the notice of proposed exchange in manner herein before provided in relation to suits for partition, shall not, within the period of *three* calendar months from the last publication of such notice, intervene in the said suit and dissent from such exchange, shall be deemed to have consented thereto; and every such decree or order for a partition or exchange as last

aforesaid shall state the fact of such advertisements having been published (if the fact be so) and the date of the last of such publications, and shall state whether the same is binding generally on all persons whomsoever, or only upon and as between the parties to the suit in which such decree or order shall have been made, or such persons as shall have intervened therein; and the court shall have full power to bind all infants, *femes covert*, idiots, or lunatics, by such decree or other proceedings in the suit in which such decree may be made.

XVIII. Where any sale of any estate or interest in land shall be had under a decree or order of the said court, the conveyance or assignment thereof shall be under the seal of the said court, and shall be signed by one of the judges thereof, and the execution by any other party of such conveyance shall be unnecessary; and such conveyance or assignment shall express or refer to the tenancies, leases, and under leases (if any) subject to which the sale is made, and may be in the form contained in the schedule to this Act, or to the like effect, with such limitation of uses and other additions or variations as, with the approval of the court, the purchaser may require.

XIX. Every such conveyance, so executed by such judge as aforesaid, shall be effectual to pass the fee simple and inheritance of, or such other estate or interest in the land, or arising out thereof, whether corporeal or incorporeal, as is by such conveyance expressed to be conveyed, subject to such tenancies, leases, and under-leases as shall be referred to therein as aforesaid, but save as aforesaid and as herein-after provided, discharged from all former and other estates, rights, titles, charges, and incumbrances whatsoever of her Majesty, her heirs and successors, and of all other persons whomsoever; and every such conveyance or assignment, executed by such judge upon the sale of a lease in perpetuity, or other lease, shall be effectual to pass the estate created or agreed to be created by such lease and then remaining unexpired, subject to the rent and covenants annexed to the reversion expectant or the determination of such leases, and to such tenancies, leases, and under-leases as shall be expressed or referred to in such conveyance or assignment, but save as aforesaid and as herein-after provided, discharged from all rights, titles, charges, and incumbrances whatsoever affecting the leasehold estate or interest; provided that where any land or lease, or part thereof, or any estate or interest in land subject to any annual or other charge, or such apportioned part thereof, such annual or other charge, or such apportioned part thereof only (as the case may be) shall remain and be charged on and payable out of such land, lease, or interest, or part thereof as in the conveyance or assignment shall be expressed.

XX. Any such conveyance or assignment as aforesaid shall not prejudice or affect any right of common, or any right of way or other easement, or any rent charge in lieu of tithes, crown rent, or quit rent, charged upon or issuing out of any land, or any charge made by virtue of the said Acts severally passed in the sixth and tenth years of her Majesty, or any Act or Acts which have been or

may be passed for amending the said Acts, save where the court shall think fit to redeem the crown rents or quit rents, or to redeem or pay off the charges under the said Acts, or any of them, under the power herein-before contained, and shall express in such conveyance or assignment that the land conveyed or assigned thereby is so conveyed or assigned is discharged of all crown rents or quit rents, or charges under said Acts, or either of them (as the case may be), and in such case such land shall be so discharged accordingly.

XXI. Every conveyance and assignment respectively executed as required by this Act, and every decree or order for partition or for exchange, shall for all purposes be conclusive evidence that every application, proceeding, consent, and act whatsoever which ought to have been made, given, and done previously to the execution of such conveyance or assignment, or the making of such decree or order respectively, has been made, given, and done by the persons authorized to make, give, and do the same; and no such conveyance, assignment, or order shall be impeached by reason of any informality therein.

XXII. Where any conveyance or assignment has been made before the passing of this Act, or shall hereafter be made by the said court or any judge thereof, subject to any lease, under-lease, or tenancy, such conveyance or assignment shall be deemed to afford conclusive proof that the estate or interest purporting to be conveyed or assigned thereby is the reversion expectant upon such lease, under-lease, or tenancy; and it shall not be necessary in any action arising out of or connected with such lease, under-lease, or tenancy, or in any pleadings in such action, to allege or prove the title of such reversion prior to the said conveyance or assignment, and the person to whom such conveyance or assignment is made, his heirs, executors, administrators, and assigns, and every of them, shall and may have and enjoy the like advantages against the lessees, under-lessees, and tenants, their heirs, executors, administrators, assigns, and under-tenants, and against all other persons in possession or occupation of the land comprised in such conveyance or assignment, by distress or by entry, for nonpayment of rent, or for doing of waste, or other forfeiture, and also shall and may have and enjoy the like advantages and remedies by action for not performing other conditions, covenants, and agreements contained in such lease or under-lease, or in the parol agreement for such tenancy, against the said lessees, under-lessees, and tenants, their heirs, executors, administrators, and assigns, as the person granting such lease or under-lease, or as the landlord entering into the agreement for such tenancy, or his heirs, executors, administrators, or assigns, ought to have had and enjoyed at any time or times, in like manner and form as if the reversion in such land expectant on such lease, under-lease, and tenancy had remained or continued in such person granting such lease or under-lease, or as landlord entering into such agreement.

XXIII. Whenever an order shall be made under this Act by the Court of Chancery in Ireland, it shall and may be lawful for the party obtaining

or having the carriage of the same to apply by petition to the Court of Chancery in England, that the said last-mentioned court, without requiring such exemplification or enrolment as herein-after mentioned, may cause like process to issue to enforce such order as upon an order for payment or accounting for money made by the high Court of Chancery in Ireland, whereof a copy has been exemplified and certified to and enrolled in the high Court of Chancery in England, under an Act passed in the forty-first year of King George the Third, intituled "An Act for the more speedy and effectual Recovery of Debts due to his Majesty, his heirs and successors, in the Right of the Crown of the United Kingdom of Great Britain and Ireland, and for the better Administration of Justice within the same:" which process the said Court of Chancery in England shall issue accordingly, and have the same effect as if such order had been enrolled; and the said petition shall be grounded on a copy of the said order, attested by the proper officer of the Court of Chancery in Ireland, but without such exemplification or enrolment.

XXIV. In the construction of this Act (except where the context or other provisions of the Act require a different construction) the word "court" shall mean either the Lord Chancellor of Ireland, or any of the judges of the Court of Chancery in Ireland, who according to the practice of the same are competent to make decrees or orders in suits; and the word "land" shall extend to manors, advowsons, rectories, messuages, lands, tenements, rents, and hereditaments of any tenure, whether subject to any fee-farm or other perpetual rent, with or without condition of re-entry for securing the same or otherwise, and whether corporeal or incorporeal, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law; and to an equity of redemption, and to the benefit of any covenant or contract for or right of renewal; and the word "lease" shall include an agreement for a lease, and the estate or interest created, or agreed to be created by such lease or agreement in the whole or any part of the land therein comprised.

XXV. This Act shall, except so far as the special provisions of the same otherwise require, extend only to Ireland.

A BILL

TO AMEND AN ACT OF THE FOURTH YEAR OF THE REIGN OF KING GEORGE THE FOURTH, FOR GRANTING ADDITIONAL STAMP DUTIES ON CERTAIN PROCEEDINGS IN THE COURT OF CHANCERY AND IN THE EQUITY SIDE OF THE COURT OF EXCHEQUER IN IRELAND.

NOTE.—The words printed in *Italics* are proposed to be inserted in Committee.

(*Prepared and brought in by Mr. Whiteside,
Mr. Napier, and Mr. Malins.*)

WHEREAS by an Act passed in the fourth year of the reign of his late Majesty King George the Fourth, intituled "An Act to grant additional

Stamp Duties on certain Proceedings in the Court of Chancery and in the Equity Side of the Court of Exchequer in Ireland," certain duties of stamps were granted and directed to be raised and levied in Ireland, for and in respect of the proceedings, matters, and things enumerated and described in the schedule to said Act annexed: And whereas under and by virtue of certain Acts of the present session of Parliament for the better administration of justice in the Court of Chancery in Ireland, the practice and course of proceeding in the said Court of Chancery will be materially altered, and certain of the instruments, matters, and things mentioned in the schedule to the said Act are abolished, and other instruments, matters, and things are substituted in lieu thereof; and it is expedient that the schedule to the said recited Act should be altered and amended to provide for the new course of practice: *And whereas it is expedient that Stamp Duties of a similar Amount to those granted and levied on Proceedings in the Court of Chancery in Ireland should also be granted and levied on similar Proceedings in the Court of the Commissioners for the Sale of Incumbered Estates in Ireland, and that the Provisions of the said recited Act should be extended to Proceedings in the said Court:* Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the commencement of this Act the several duties of stamps enumerated and set forth in the schedule to the said recited Act shall be and the same are hereby repealed; and in lieu and stead thereof there shall be granted, raised, levied, collected, and paid in Ireland unto her Majesty, her heirs and successors, for and in respect of the several instruments and proceedings in the high Court of Chancery in Ireland, and in the Court of the Commissioners for the Sale of Incumbered Estates in Ireland, set forth in the schedule to this Act annexed, the several sums of money or duties respectively inserted and set forth in the said schedule, over and above and in addition to any stamp duties or other duties payable by law for or upon the said several instruments, matters, and things, or any of them; and all and singular the several provisions of the said recited Act (so far as the same shall be consistent with and shall not be superseded by the provisions of this Act) shall be extended to the several instruments, proceedings, matters, and things in the said Court of the Commissioners for the Sale of Incumbered Estates in Ireland, so far as the same or any of them are set forth in the Schedule to this Act.

(To be continued.)

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DUBLIN, MAY 19, 1855.

It is to be hoped that the New Rules of Common Law Practice already issued by the judges under the authority of section 233 of the Common Law Procedure Act, are not to be regarded as a final measure, but that they were formed only provisionally in the first instance, until that which the statute left wanting should become fully apparent. Every day's experience points out that this very comprehensive measure supplies but a rude outline of that which it remains for the judges to complete, by virtue of the plenary powers confided to them. We called attention some few weeks since to what appeared to us to be a remarkable defect in the new practice in replevin. A very recent case, which will be found reported at page 273 of our legal columns—*Crofton and others v. Sholdice*, now affords a striking illustration of the incompleteness of the ejectment clauses of the Procedure Act. That was an ejectment for nonpayment of rent; the summons and plaint was in the form referred to in section 195, and the defence was pleaded in the terms suggested by section 198. That section provides, that "every defence to an ejectment for nonpayment of rent shall set forth the substantial ground of the defence, as, for ex-

ample, whether the title of the plaintiff as landlord is disputed, or the fact of the rent being due, if in dispute." Now the section does not actually say that these are the *only* pleas which the defendant is to plead, but this enumeration seems to imply that one or other of these pleas will exhaust every matter of defence which can be alleged. The provision in section 202 for allowing an abstract of issues in ejectment to be made up at once, *ex parte*, would also clearly show that the framers of the Act contemplated no such thing as special pleading in ejectment. The case in question proves that the above abstracted provision in section 198 (which, by the way, is an echo of the form of writ referred to in section 195) is to the last degree dangerous and illusory, inasmuch as defences may exist which would be excluded under issues strictly pursuing the terms of the defences framed thereunder. In *Crofton v. Sholdice*, for example, there was no question but that the defendant held under a lease, as described in the summons and plaint. Therefore the first issue must necessarily have been found against him. Again, the rent was due, and he should therefore fail upon the second issue. But he alleged at the trial a *tertium quid*, which, if true in fact, was doubtless a defence, but which it was equally clear that the defence, as pleaded, and the issues, as settled, did not admit of being relied

on. The defendant in effect said that by reason of the non-completion of the lease until within a year antecedent to the bringing of the action, although he, in point of fact, held thereunder at the time of action brought, he had not held long enough to satisfy the requisites of the ejectment codes. It is true that the fact alleged by the defendant was not perfectly clear, and, at all events, the ground was inequitable, but, be that as it may, the form of pleading precluded him from the benefit of moot-ing the question. Many other cases will suggest themselves to our readers in which it would be equally impossible to raise under such issues, matters of defence, which have been already established to be valid answers to this form of action, such, for example, as arose in *Delap v. Leonard*, (6 I. L. R. 478.) Now the fountain of all this difficulty is the form of summons and plaint in ejectment for nonpayment of rent, (No. 15, Schedule B,) which alleges "that the defendant holds the lands of Blackacre, &c., as tenant to the plaintiffs, under a lease, at the yearly rent of, &c.; a form which plainly ignores the fact that although a tenancy between the plaintiff and some one or more of the defendants is the basis of the action, it does not therefore follow that every defendant answering to the description of "a tenant in possession" should be a tenant, in the vulgar acceptation of the term, to the plaintiff. An under-lessee of the immediate tenant, to whom the writ might be directed, would not be tenant under the lease sought to be evicted. Then the 198th section seizes on this allegation, as being the gist of the action, and suggests the putting in issue—not the title of the plaintiff to enter—but the title of the plaintiff as landlord. It is singular to observe how this section conflicts with section 202 respecting the abstract of issues. That appears to assume that the only additional fact to be ascertained by the jury, in ejectment for nonpayment of rent, is as to the amount of the rent, and that *quoad* the title of the plaintiff to possession, both classes of ejectment may proceed on common ground. That is the rational way to view the subject. Then why not frame both the summons and plaint and the defence, in ejectment for nonpayment of rent, in harmony with this? Why not adopt, as in the form given in the 18th Vic. c. 18, the same precedent for both forms of summons and plaint, merely adding to that, for nonpayment of rent, a statement that such is the special object of the action, with the proper indorsement? The present form, strange to say, does not allege the day upon

which the right of entry accrued; whether upon the day the year's rent became due or the twenty-first day afterwards. Then why not, in the defence, simply dispute the plaintiff's title to enter and the amount of rent, instead of pleading a plea, which, if strictly pursued, excludes several important subjects for inquiry. It is singular enough that in a reported case, *Murphy v. Fouhy*, (6 Ir. Jur. 239,) where a defence had been pleaded exactly in the terms of the summons and plaint disputing the tenancy of the defendants, the court ruled that they were not entitled to have the issue settled specifically to match the plea, but were properly sent to trial upon the following issue, namely, "whether the plaintiff was entitled to the possession of the said dwelling-house, in said summons and plaint mentioned, or any part thereof, on that day," (namely, the day from which the abstract of pleadings alleged that the plaintiff claimed title.) When that case was finally brought before the full court, the issues having been settled on circuit, Crampton, J. observed that he would have set aside the defence, as pleaded by the defendants, had an application been made to him for that purpose. It may be said that the 198th section may be followed for the purposes of pleading, but that the issues, as ultimately settled, should be in the extended form. But we cannot imagine anything more preposterous than to contend that a defendant may plead irrespective of the issue to be knit upon his plea. Surely if these issues were intended to have no intimate relation with the previous pleadings, it would be an unnecessary burthen to cast upon the parties, to force them to plead before coming to issue. It is true that the court may recommend to parties, in order to save the delay of a repleader, to agree upon an issue not warranted by the previous pleadings, but, in strictness, the issues are to be regarded as the condensation of that which was formerly supplied by the last issuable pleading and the *similiter*. Seeing, therefore, that the sections of the Act, regarding pleadings in ejectment, have already led to embarrassment, and will probably do so again, we hope that the judges will see meet to frame some directions as to the mode of framing these pleadings, which will operate as a safe guide to the practitioner.

Encumbered Estates Commission. FURTHER PRACTICAL DIRECTIONS.

May 9, 1855.

MONEY ORDERS.

1. That all orders for payment of money shall

be drawn on the day immediately following the receipt by the Accountant of the fiat for the same, and on or before the following morning shall be sent to the Examiner's office in order that the Commissioner's signature may be procured on his arrival.

2. That all orders for payment by means of transfer of stock shall be drawn on the day next after the quotation for the same shall have been received by the Secretary, and shall, on or before the following morning, be sent to the Examiner's office for signature by the Commissioner on his arrival.

3. That when any person desires to have money paid, or stock transferred, under Power of Attorney, he shall produce the same to the Secretary, who shall, on its being verified and proved to be correct, sign his name thereon, and transmit it to the Examiner who shall enter it in his book and send it back to the Secretary.

4. In cases of payments under Powers of Attorney, the order to pay Attorney shall be presented for signature on the morning of the day next after the day of the production of the Power to the Secretary.

RENTALS.

5. That on the settling of any rental before the Master, the Solicitor, or some sufficient person acting for him, shall depose on oath that he has personally examined each of the several leases and contracts under which the tenants stated on the draft rental are represented to hold, so far as such leases or contracts are forthcoming, or within the power or control of such solicitor; and that the same are truly and correctly stated on such draft rental, and such affidavit, as well as the leases or contracts, are to be brought before the Master upon the settling of such rental.

SURVEYS.

6. When any party applies for a survey or valuation he shall state, on affidavit, all necessary facts, so as to enable the Master to judge whether such survey or valuation ought to be granted, having regard to the expense thereof and to the value of the land and the utility of such survey or valuation.

ABSTRACTS.

7. The Commissioners noticing the insufficient manner in which Abstracts of Title are sometimes prepared and brought before them, and the great delay and expense consequent thereon, deem it right to order that no costs shall be allowed against the funds, of any Abstract which shall be declared by a Commissioner to be insufficient, unless it shall appear to him that the Solicitor had not in his power, and could not by reasonable diligence have procured, sufficient materials to enable him to prepare a more perfect abstract. And this Rule is to be considered as extending to all cases where deeds or other documents are erroneously or imperfectly abstracted, and where the execution or non-execution of such instruments by the several parties thereto, or the registration or non-registration

thereof, with proper dates, are omitted to be stated, and to all cases where there is an omission to state whether a will is proved or not, and in what court, and by whom, and when and how executed; and to all cases where the date of the testator's death is not stated; and wherever Counsel's opinion is obtained upon an Abstract which shall afterwards be condemned, or deemed insufficient by the Commissioners, the expense of so obtaining Counsel's opinion is not to be allowed against the funds; and this Rule is to be enforced whether Counsel has given a favorable opinion or not on such an Abstract.

8. Whenever Counsel gives an opinion on an Abstract favorable to the Title, but dependent on the assumption of matters of fact not stated on the Abstract, or not sufficiently vouched, or where Counsel requires any matter to be done in order to complete the Title, it shall be the duty of the Solicitor, on laying such Abstract, with Counsel's opinion, before the Commissioner, to show how far he has established the matters assumed by Counsel, or is in a condition to do so, and how far he has complied, or is unable to comply, with the requirements of Counsel; and unless this direction be attended to the Solicitor is not to be allowed, against the funds, the expense of taking Counsel's opinion on the Abstract, neither can such an abstract be considered as sufficient by the Commissioners.

TAXATION OF COSTS.

9. It is ordered,—That in Taxing the Costs incident to the preparation of the Draft Final Schedule, the Taxing Officer is not to allow the Costs of any "Explanatory Statement" or Schedule of Acts and Judgments appearing in Searches, or of any affidavits in relation to Searches, or of any Extracts of Memorials of Deeds, unless such Statement, Schedule, Affidavit, or Extracts have been marked or allowed by the Commissioner or his Examiner: and the Taxing Officer is not to allow more than one attendance upon the Commissioner's Examiner for the purpose of explaining the Searches and preparing the Draft Schedule, unless the Examiner certify that two or more attendances were necessary.

CONVERSION ORDERS.

10. In all cases of Conversion under the Renewable Leasehold Conversion Act, and 16th & 17th Victoria, cap. 64, It shall be the duty of the Solicitor to lay before the Registrar on his preparing the Conditional Order for Conversion, the Original Lease sought to be Converted and the last Renewal, and the Registrar shall not without the special direction of a Commissioner, make out or pass such Conditional Order without seeing such Original Lease and last Renewal.

J. RICHARDS.
M. LONGFIELD.
C. J. HARGREAVE.

May 9, 1855.

A BILL

TO AMEND AN ACT OF THE FOURTH YEAR OF THE REIGN OF KING GEORGE THE FOURTH, FOR GRANTING ADDITIONAL STAMP DUTIES ON CERTAIN PROCEEDINGS IN THE COURT OF CHANCERY AND IN THE EQUITY SIDE OF THE COURT OF EXCHEQUER IN IRELAND.

NOTE.—The words printed in *Italics* are proposed to be inserted in Committee.

(Prepared and brought in by Mr. Whiteside,
Mr. Napier, and Mr. Malins.)

(Continued from page 164.)

II. Separate and particular types, marks, and stamps shall be kept and used for denoting and marking on vellum, parchment, or paper the several and respective duties in the schedule to this Act mentioned, as applicable to the several proceedings therein set forth in the Court of Chancery, and in the Court of the Commissioners for the Sale of Incumbered Estates in Ireland respectively.

III. The said first herein-recited Act, and all and every the clauses, regulations, matters, and things therein, and the powers and authorities thereby given, for charging, raising, levying, paying, accounting for, and securing the several duties in the schedule to said recited Act mentioned, and for preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, or otherwise, shall be continued and remain in full force and effect in all respects, and shall be and they are hereby extended and applied to the several duties in the schedule to this Act annexed; and the said schedule to this Act annexed, and every clause, regulation, matter, and thing therein respectively contained, shall be deemed, taken, and considered as part of this Act.

IV. This Act and the several provisions herein shall commence and take effect from the

SCHEDULE

Of the DUTIES of STAMPS which are to be paid and payable for and in respect of the first sheet or piece of vellum, parchment, or paper upon which the several instruments, matters and things herein mentioned, relating to the business of the Court of Chancery, or relating to the business of the Court of the Commissioners for the Sale of Incumbered Estates in Ireland, shall respectively be written or printed, and which duties shall be payable over and above any other duties payable by law on the like proceedings.

Affidavit, affirmation, declaration, or deposition taken in any cause, cause petition, matter, or other matter in court,	£	s.	d.
Not to apply to depositions taken on a viva voce examination before the court or any of the judges thereof.	0	2	6

Certificates.—On every certificate, except certificates at the foot of bills of costs,	0	6	6
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On every certificate at the foot of any bill of costs, where the amount as furnished or claimed by such bill shall not exceed the sum of fifty pounds sterling,	0	10	6
Where such amount shall exceed the sum of fifty pounds sterling, for every sum of ten pounds sterling, above fifty pounds sterling, an additional sum of	0	3	0
Leases.—Any lease, and any counterpart thereof,	0	15	0
Notices.—Any notice, advertisement, or posting to sell or to let, pursuant to any decree or order,	1	1	0
Any other notice,	0	1	0
Petitions.—Any petition, except petitions in matters of minority or lunacy,	0	10	0
Any petition in a matter of minority or lunacy,	0	6	6
Recognizances.—Every recognizance,	0	10	0
Summonses.—Any summons requiring the attendance of any person to be examined as a witness,	0	1	0

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MAY 26, 1855.

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DUBLIN, MAY 26, 1855.

ONE of the most remedial changes in legal procedure, effected in our time, appears to us to be that accomplished by the 17 & 18 Vic. cap. 125, s. 28, whereby documents imperfectly stamped or wholly wanting in that respect, are permitted to be conditionally read in evidence. Our readers will recollect that the recent Act provides "that upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court, whose duty it is, to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped or not sufficiently stamped, shall not be received in evidence until the whole (or as the case may be) the defi-

ciency of the stamp duty and the penalty required by statute, together with the additional penalty of £1, shall have been paid." The following sec. (29) points out what shall be the duties of the officer on the receipt of the duty and penalty, and it contains this proviso, "that the aforesaid enactment shall not extend to any document which cannot now be stamped after the execution thereof on payment of the duty and a penalty." The class of documents referred to by that proviso are—bills of exchange, promissory notes, bills of lading, letters of attorney, proxies, and policies of sea assurance, absolutely, and likewise charter parties, articles of clerkship, apprenticeship indentures and receipts, after a certain period has elapsed—(See Tilsley on Stamps.) So long as the principle of indirect taxation continues to be acted on, the impo-

sition of stamp duties appears to be an obvious and unobjectionable mode of raising revenue, and it is clear that the laws for that purpose should be supported by an adequate sanction. Accordingly, not only were positive penalties ordered to be enforced for the evasion of the stamp laws, but the more cogent negative remedy was provided that no instrument which ought to bear a particular stamp, and which was wanting in that respect, should be receivable in evidence. This stringent rule was, no doubt, very efficacious in inducing parties to obey the stamp regulations, who would otherwise have fearlessly braved the penalties of evasion, knowing the unpopularity which attended their enforcement. But great hardship was also the frequent and inevitable result, and it is to be feared that a stimulus was too often afforded to dishonesty. Had the sufferers been only those, who wilfully and designedly neglected to affix the proper stamp in the first instance, trusting to the chapter of accidents to indemnify them against their own wilful *laches*, the law, as it existed previous to the late Act, would have been sufficiently just. But there was a wholly different class of sufferers, upon whom fell the brunt of the interdict. Many an honest man prepared, upon plain paper, an agreement or other instrument, which in strictness of law required a stamp, and was not apprised, possibly until the trial, of the fatal omission of which he had been guilty. Sometimes this case of peculiar hardship occurred—that a person in the interest of the opposite side had in his possession the instrument upon which the issue of the cause depended, and refused to produce it, unless under subpœna, at the trial, and the document, when ultimately produced, was found to be inadmissible for want of a stamp. Every lawyer will remember with what a host of cases our legal reports abound, in which the questions debated have been, whether the instruments required a stamp at all, or whether they ought to have borne stamps of a higher amount or a different denomination. Surely in cases where the practised intellects of astute lawyers were sorely tried, as not unfrequently they were, with the most subtle distinctions, involved in the construction of inartificial documents, it was too much to make a poor layman pay by his purse or person the penalty of his ignorance.

Again; there is another point of view in which the benefit likely to result from this change in the law is far from inconsiderable. How often did it happen that parties were induced to resist a just demand in the hope that the plaintiff's case would

fail upon a stamp objection? Surely nothing could be more calculated than this to foster dishonesty. Happily all this is now at an end, and justice will take its due course freed from these trammels. However, it must be confessed that this relaxation of the law, by allowing the duty and penalty to be paid at the trial, might tend to the loss of revenue, arising from parties speculating that an occasion for stamping might never arise, and hence the Act has properly provided that in addition to the usual penalty for poststamping, the extra sum of £1 shall be paid into court. The inconvenience which parties will subject themselves to, by neglecting to pay their stamp duty till the trial, will be great; for, not only will they have to pay the additional fine, but the penalty proper to the particular case will be rigidly enforced, the court having no discretion as to its remission.

In order to discountenance captious objections, and to affirm the principle that whatever impediments are thrown in the way of unstamped documents is for the sake of the revenue, and not to give an unfair advantage to the other side, it is further provided, that, in the event of the judge at the trial admitting the document without requiring the payment of the duty, &c., no exception can be taken to his decision. Approving as we do of the general features of this admirable measure of reform, we think that, in one respect, it is susceptible of a slight improvement. Supposing the judge to be of opinion that the document produced ought to have been stamped and to rule accordingly, the party seeking to rely on it must, as the law now stands, elect, whether he will refuse to pay the duty and penalty and except to the refusal of the document or pay unconditionally. If he prefer the former course, he will run a certain risk; if he choose the latter, the money paid is gone for ever. We think that a power should be reserved to him, in the event of his paying the money, of taking the opinion of the Court of Exchequer, on motion, as to the correctness of the decision of the judge. The controversy would, of course, lie not, between himself and the opposite party, but between himself and the revenue. Not only would this course obviate the hardship to which an ill advised decision at *Nisi Prius* might subject him, but the solemn judgment of a competent tribunal would afford a safe guide for the solution of similar questions subsequently occurring.

A BILL

TO FACILITATE THE MORE SPEEDY ARREST OF
ABSCONDING DEBTORS IN IRELAND.*(Prepared and brought in by Mr. Cairns and Mr. Napier.)**[Note.—The words printed in Italics are proposed to be inserted in Committee.]*

WHEREAS the laws now in force for the arrest of debtors absconding from Ireland are insufficient and inadequate for that purpose, by reason of the delay which is occasioned in obtaining the necessary process: and whereas frauds are perpetrated upon creditors residing at a distance from Dublin by debtors embarking for distant countries from various towns and seaports in Ireland: and whereas it is expedient to provide a more expeditious and efficacious mode of obtaining process for the arrest of debtors about to quit Ireland in all cases where such debtors are now liable by law to be arrested: be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the *passing of this Act* it shall be lawful for the Assistant Barrister of any county in Ireland, or for any Commissioner of Bankruptcy, or for the Mayor or Recorder of any corporate town, (the said person and persons being hereafter referred to as the commissioners,) on application by or on behalf of any creditor, upon due proof by affidavit, intitled in her Majesty's Superior Courts of Common Law, of the creditor applying, or of some other person, or by solemn affirmation in cases in which solemn affirmation is allowed by law, to the satisfaction of such commissioner or commissioners, that a debt of *twenty pounds* or upwards is owing to such creditor, and is then payable from the person or persons against whom such application shall be made, and that there is probable cause for believing that such debtor or debtors, unless he or they be forthwith apprehended, is or are about to quit Ireland with intent to avoid or delay the said creditor, or with intent to remain out of the jurisdiction of the courts of law in Ireland so long that thereby the said creditor will or may be delayed in the recovery of the said debt, to grant a warrant, such warrant being in the form and endorsed in the manner specified in the Schedule A. to this Act annexed, or to the like effect, to such person as the said creditor shall name, and the said commissioner or commissioners shall approve, as his bailiff, and at his peril, whereby the said bailiff and his assistants shall have authority, at any time within *seven* days after the date of the said warrant, including the day of such date, to arrest the person or persons named in such warrant, and him or them safely keep until he or they shall have given bail to such bailiff, or made deposit with him, according to the practice observed in the Superior Courts of Law, or until he shall have paid the debt and costs endorsed on the said warrant, or be otherwise discharged from arrest under such warrant by due course of law, and such warrant shall bear date the

day of the issuing thereof, and may be executed in any part of Ireland, and a copy of such warrant or warrants shall at the time of the arrest be served upon the party attested: provided always, that every creditor who shall cause such warrant to issue shall, within *seven* days thereafter, cause to be issued a writ of *capias*, and also, in cases where no action shall be pending, a writ of summons and plaint out of some one of the Superior Courts of Law in Dublin, against such debtor or debtors, and shall cause such debtor or debtors, if in custody, to be served with such writ of *capias* within *seven* days from the issuing of such warrant, and if not in custody then within *three* days after he shall have been arrested and in custody on such warrant; and thereupon such debtor or debtors shall be considered and deemed to have been arrested by virtue of the said writ of *capias*, and all proceedings shall be had upon such writ of *capias* as if the same had been issued prior to the issuing of such warrant, and as if the arrest had been made on such writ of *capias*, and according to the practice now observed in the said Superior Courts of Law.

II. The affidavit or affirmation required by this Act may be sworn or made before such commissioners, or before any person having authority to administer oaths in any of the courts of law aforesaid.

III. The warrant or warrants which shall be issued by virtue of this Act shall be auxiliary only to the processes now in use, and shall be wholly void and of none effect whatsoever as a protection to the person on whose behalf such warrant shall have issued, unless such writ of *capias* shall be issued and served in manner aforesaid.

IV. The person to whom the warrant hereby authorized to be directed shall, immediately on the same being executed, endorse a certificate thereupon of the time and place where the debtor was arrested; and the production of such warrant and certificate to the sheriff of the county where such warrants shall have issued, or to the keeper of the gaol of such county, shall be a sufficient authority to such sheriff or keeper to detain such debtor or debtors until he or they shall be discharged by due course of law.

V. It shall be lawful for any person arrested upon any such warrant forthwith before the issuing of the said writ of *capias* to pay the debt and costs which shall be endorsed on such warrant to the said bailiff as aforesaid, or to enter into a bail bond to such bailiff, with two sufficient sureties, for the amount which shall be endorsed on such warrant, conditioned to put in special bail as required by the said warrant, or to make deposit of the sum endorsed on such warrant, together with *ten pounds* for costs, and thereupon he shall be entitled to be discharged from custody, and such bailiff is hereby authorized and required to discharge such person accordingly.

VI. As soon as the person so arrested as aforesaid has been taken into custody or detained under the writ of *capias* herein-before mentioned, the said person shall be held and detained in custody under or by virtue of the said writ of *capias* in like manner as if the said person had been first arrested un-

der and by virtue of the same, or in case the person so arrested shall have made deposit with the said bailiff as aforesaid, or entered into such bail bond as aforesaid, then, upon delivery to the bailiff by whom such person was arrested of a copy of the warrant granted by the sheriff upon such writ of *capias* as aforesaid, the said bailiff shall pay over to such sheriff as aforesaid the said deposit, or assign to the sheriff such bail bond as aforesaid, and the said sheriff shall then hold the said deposit or bail bond, and shall be entitled to enforce the said bail bond in his own name, or to assign the same, in the same manner as if the said person had been first arrested on the said writ of *capias*, and the said deposit had been made or bail bond entered into with the said sheriff: provided always, that the said sheriff shall not be in any manner liable or answerable for any default, misbehaviour, or miscarriage of the person to whom such warrant was addressed, or of the person or persons making the arrest under and by virtue of the said warrant; provided also, that if no writ of *capias* be issued and served within seven days from the issuing of the said warrant, the person arrested under such warrant shall be entitled to be discharged from custody, or in case the deposit has been made with or bail bond given to the said bailiff, then the said deposit shall be returned, and the said bail bond given up to be cancelled.

VII. Such warrant shall be endorsed with the amount of debt and costs claimed by the plaintiff in such manner as writs of *capias* are now directed to be endorsed, and on payment of the amount so endorsed all proceedings shall be stayed, and the person so arrested be discharged from custody, and he shall be at liberty afterwards to tax the costs so endorsed as if he had been arrested under a writ of *capias*.

VIII. It shall be lawful for any person for whose arrest a warrant shall have been granted to make application, either before or after arrest shall have been made by virtue of the said warrant, and before a writ of *capias* shall have been issued as aforesaid, to any judge of the said Superior Courts, for a summons or rule calling upon the creditor who shall have obtained such warrant to show cause why the warrant should not be set aside and vacated, if such application shall be made before arrest, or why the debtor should not be discharged out of custody, if the application should be made after arrest, and that it shall be lawful for such judge or court to make absolute or discharge such summons or rule, and direct the costs of the application to be paid by either party, or to make such other order therein as to such judge or court shall seem fit; provided that any such order made by a judge may be discharged or varied by the court in which an action may be then pending for the said debt, or if no such action be pending, by any of the said Superior Courts, on application made thereto by either party dissatisfied with such order.

IX. The officer or person to whom such warrant shall be directed or addressed as aforesaid shall be subject to the jurisdiction of the court in which the action shall be brought; or, in case no action shall be brought, to any judge thereof, and shall be re-

sponsible to such court or judge, and to the person at whose suit such warrant shall issue, for the due execution of the said warrant, in the same manner, so far as the circumstances of the case will admit, as sheriffs are now responsible for the due execution of all writs of *capias* directed or addressed to them, and shall be entitled to the same protection as sheriffs now are entitled to on executing such writs.

X. The costs of and attending the warrant hereby authorized to be issued, and the arrest thereon, shall be deemed to be costs in the cause: provided always, that no such costs shall be allowed to a plaintiff unless the court or the proper officer thereof is satisfied, by affidavit or otherwise, that the plaintiff had good reason to believe that he would probably have failed in causing the defendant to be arrested if he had proceeded in the first instance by application to a judge of one of the Superior Courts for a writ of *capias*, without first applying to commissioners under the provisions of this Act.

(To be continued.)

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DUBLIN, JUNE 2, 1855.

We have much pleasure in presenting to our readers the valuable Report of the Incumbered Estates Commission, (received by us on the 6th inst.,) the perusal of which will be both interesting and instructive to every member of the Legal Profession. We have already, in our number of the 12th May, adverted to this subject, having gleaned our information from the Parliamentary speech of the Solicitor General enumerating the heads of the sundry recommendations, to which the Commissioners had agreed. We presume that no time will be lost in the production of a measure founded upon these recommendations. It would be premature for us now to enter into the details of this report, and shall not further specially advert to it beyond saying that we cordially concur with the reasons which have been stated for recommending the discontinuance of the court as a separate tribunal. Nothing can be more destructive to justice than the removal of suits from one court to another for the mere purpose of obtaining more extended remedies, and the policy of the Legislature in our time appears to have set in the direction of rendering every tribunal competent, *per se*, to carry out its own decrees and fully adjust the rights and equities of its suitors.

As an instance of this we may take the English Common Law Procedure Act of last session, (17 & 18 Vic. c. 126.) We are pleased to learn, in connection with this report, that Lord Chancellor Cranworth is reported to have stated in his place in Parliament, in allusion to the beneficial working of the Incumbered Estates Court system and the advantage of perpetuating it by amalgamation with Chancery, that there was no reason why a similar system should not hereafter be extended to England. The time has certainly gone by for making Irish Legislation exceptional. The grand discoveries and inventions of the age, steamboats, railways and electric telegraphs are slowly, but surely, consolidating the peoples of the United Kingdom, and we hope that this great social revolution will hereafter be crowned by a thorough assimilation of all, save fiscal, laws. We contemplate that the lucid report of this commission will be followed by a measure as lucid, and that the precedent afforded by the appointment of this commission will henceforward be followed, whenever an organic change is required in our laws. If so, a vast amount of the confusion, imperfection and inconsistency, which have accompanied some of our recent attempts at legislative reform, will be avoided.

in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: and whereas it is expedient that foreign ships should be liable to detention in respect of claims upon bills of lading or contracts relating to the freight or hire of such vessels: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows: -

I. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have all rights of suit and otherwise in respect of such goods as if the contract for the carriage thereof had been made with himself.

II. Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

III. Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

IV. Whenever any person shall have any claim for debt or damages against any foreign ship or the owners thereof, arising upon or out of any bill of lading of goods, or any charter or contract for or relating to the freight or hire of any such ship, to be performed wholly or in part within the United Kingdom, if such ship shall be found in any port or river of the United Kingdom, or within three miles of the coast thereof, it shall be lawful for the judge of any Court of Record in the United Kingdom, or in Scotland the Court of Session, or the sheriff of the county within whose jurisdiction such ship may be, upon the existence of such claim being shown by any person applying summarily, to issue an order directed to any officer of customs or other officer named by such judge requiring him to detain such ship until such time as the owner, master, or consignee thereof has made satisfaction in respect of such claim, or has given security, to be approved by the judge, to abide the event of any

action, suit, or other legal proceeding that may be instituted in respect of such claim, and to pay all costs and damages that may be awarded thereon, and any officer of customs or other officer to whom such order is directed shall detain such ship accordingly.

V. In any case where it may appear that before any application can be made under the foregoing section such foreign ship will have departed beyond the limits therein mentioned, it shall be lawful for any British officer of customs to detain such ship until such time as will allow such application to be made and the result thereof communicated to him, and no such officer shall be liable for any costs or damages in respect of such detention unless the same shall be proved to have been made by him without reasonable grounds.

VI. It shall be lawful for any owner, master, or consignee of a ship detained under either of the two preceding sections in the meantime, until such security as aforesaid can be given, at any time within two days from such detention, to deposit with the collector or chief officer of customs of the port, at or near to which the ship shall be, a sum equal to the amount of the claim for which the ship shall be detained, with *twenty pounds* for costs; and thereupon the ship shall forthwith be discharged from such detention, and the officer detaining the same is hereby required to discharge such ship accordingly.

VII. The money so deposited shall be subject to the order of the judge to whom application shall be made for an order of detention, or, if such action, suit, or other proceeding as aforesaid shall have been instituted in any court, shall be subject to the order of such court, or of a judge thereof; if an order for detention shall be finally refused, or shall be rescinded, or if such security as aforesaid shall be given, the said money shall thereupon be refunded to the person depositing the same; otherwise such money shall be security for all damages and costs that may be awarded in any such action, suit, or proceeding.

VIII. In any action, suit, or other proceeding in relation to such claim, the person so giving security, or (if such security shall not be given) the person making such deposit as aforesaid, shall be made defendant or defender, and shall be stated to be the owner of such ship, and the production of the order of the judge made in relation to such security or deposit shall be conclusive evidence of the liability of such defendant or defender to such action, suit, or other proceeding in respect of any damages and costs that may be awarded.

IX. Any person applying for an order of detention shall give security to the satisfaction of the judge for the costs and expenses of and attending the detention and release of the ship, and also on or before the commencement of any such action, suit, or other proceeding for the costs of the defendant or defender therein, and if the plaintiff or pursuer shall fail to recover therein he shall bear and pay all such costs and expenses; and if any such plaintiff or pursuer shall not recover the full amount of his claim it shall be in the discretion of the court or judge before whom the case shall be tried to de-

prive the plaintiff or pursuer of costs, by a certificate that there was not reasonable or probable cause for the claim.

X. Words and expressions in this Act shall have the same meaning and import as the like terms used in "The Merchant Shipping Act, 1854."

INCUMBERED ESTATES INQUIRY COMMISSION. REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

Your Majesty having been pleased to appoint us Commissioners to inquire into the state of the business of the Incumbered Estates Court in Ireland, and to consider and report whether it would be desirable that the court should be continued either permanently or for a limited period, and whether with any additions to, or alterations or modifications in, its powers, constitution, or procedure; or whether it should be annexed to, or its powers transferred to, the Court of Chancery in Ireland; we humbly beg to submit to your Majesty the following Report of the proceedings which we adopted in order to carry out the objects of the Commission, and our opinion upon the several matters referred to us for consideration.

At the commencement of our proceedings we decided on conducting the inquiry by calling for returns from the Incumbered Estates Court to show the state of the business there and the amount remaining undisposed of; and with a view to the second branch of our inquiry, viz. the expediency of continuing that court or transferring its powers to the Court of Chancery, we determined to submit written questions to such persons as we deemed competent to assist us by their information and opinion. We reserved to ourselves the power of calling witnesses before us for *vide voce* examination, if any necessity for so doing should arise during the progress of our proceedings, but we have not found it necessary to exercise that power. The questions which we issued, and the answers which we received, are all given in the Appendix to this Report.

We have received from the Commissioners and all the officers of the Incumbered Estates Court the most prompt and satisfactory information upon every subject on which we required it; and they have afforded us the utmost facility in the course of our proceedings.

We have also received from the judicial and other officers of the Court of Chancery, the members of the Bar, and the Law Society, valuable assistance and advice in their answers to the questions which were addressed to them in this behalf.

We have also referred to the returns which we have received from the Incumbered Estates Court, and which give in chronological order the obduracy of each case still remaining undisposed of, with the dates of the most important steps taken in the proceedings, affording the fullest information not only with respect to the present state, but also the past history of the business of that court.

We also beg leave to refer to a return which we have obtained from the Taxing Office of that

court, showing the amount of petitioners' costs as taxed, and distinguishing therein the amount allowed for surveys, valuations, and advertisements.

These returns will be found in the Appendix to this Report.

Besides obtaining this information as to the state and progress of its business, we considered it expedient to inquire minutely into the practice and course of procedure adopted in the court from the commencement to the close of each case, and to invite suggestions as to the expediency of the practice so adopted, and the possibility of altering and improving it. The course of practice will be found fully detailed in the answers of the Commissioners and officers of the court. Some changes in the practice have been suggested by members of the Bar, whose opinions we have obtained; we shall have occasion hereafter to advert to the practice and to the alterations which have been suggested.

We now proceed to state the conclusions at which we have unanimously arrived, and the recommendations which we are prepared to make to your Majesty, in order to carry into effect the views which we entertain upon the several important matters referred to us for inquiry.

At the commencement of our proceedings, it became apparent that the most important of the questions which it would be our duty to consider, was that of the propriety of giving to the purchasers of land in Ireland a PARLIAMENTARY OR INDEFEASIBLE TITLE, and that our views upon the other matters referred to us would depend mainly upon the conclusion to which we might arrive as to the expediency of giving such title to a purchaser under a judicial sale. If the result of our investigation were to establish that it was inexpedient, we felt that we could not then consistently recommend the making permanent an institution of which the power to give such title was the distinguishing characteristic; and if, on the other hand, we came to a conclusion in favour of the principle of giving such title, the only question then remaining would be, by what tribunal and under what regulations that object could be most effectually attained.

Hitherto a Court of Equity had not power to secure to a purchaser under its order or decree an indefeasible title. An expensive investigation of title indeed, always took place before the Master, who was supposed to have ascertained before the sale that the title was a good one; but the result of this investigation was not binding, and the opinion of the Master afforded no protection to the purchaser, who was consequently obliged at his own expense to employ a solicitor and counsel not only to repeat in a more rigid manner the very same investigation, but also to examine all the proceedings in the cause, in order to see that it had been regularly and formally conducted, and a valid and binding decree made as against all parties having interest in the lands decreed to be sold. The title to the purchased land was consequently purchased at a considerable expense and delay, without assurance of a higher title being acquired by the purchaser than he had acquired.

For the first time the Act of the 11th & 12th Vic. c. 48 introduced the principle of giving to a conveyance by the Court of Chancery the effect of vesting

absolutely in the purchaser, discharged of all claims, the title of the land which it purported to convey to him—the 27th section of that Act having enacted that “In case the assurance so executed shall be a conveyance upon a sale of land under this Act, the same shall be effectual to pass the land thereby expressed to be conveyed, and the fee-simple and inheritance thereof, to the uses, and in manner therein limited and expressed, discharged from all former and other estates, rights, titles, charges, and incumbrances whatsoever of her Majesty, her heirs and successors, and of all other persons whatsoever, save and except such charges and incumbrances, if any, as shall be thereby excepted or expressed to be or to remain charged upon such land, and except also as hereinafter provided for.”

This Act is generally known as the “First Incumbered Estates Act.” In consequence, however, of the limited nature and character of its provisions, it was not found to work well in practice, and very few proceedings were taken under it. It only empowered the owner having contracted to sell, the first incumbrancer, or an incumbrancer who had the title deeds, to apply for a sale, and it did not extend to cases where suits for sale were already pending, unless the consent of the parties to such suits could be obtained. For these and other reasons which it is unnecessary to enumerate, this Act has had a very limited operation; it is still in force, but suspended by the Act 12 & 13 Vic. cap. 77, now generally known as “The Incumbered Estates Act,” which not only gave enlarged powers to owners and incumbrancers, but constituted a new tribunal for the purposes of the Act. The 27th section contained a provision similar to that contained in the former Act, giving to a conveyance executed by the Commissioners the effect of vesting the estate absolutely in the purchaser, discharged of all estates and titles whatsoever, in case the estate sold was held in fee; and in case of the sale of a lease making the conveyance effectual to pass the estate created, or agreed to be created, by the lease; it is by virtue of this clause, fortified by the 49th section, which makes the conveyance conclusive proof of the regularity of the proceedings, that the conveyance of the Incumbered Estates Court has been treated as giving to the purchaser a parliamentary or indefeasible title. It has been suggested that some question may exist upon this point; we see, however, no reason for doubting that the true construction of the Act is that which the Commissioners have put upon it, and which it has generally received, namely, that the conveyance from the Commissioners gives to the purchaser an indefeasible title. Such was the intention of the Legislature in passing the Act, and it appears to have been fully carried out by the words which they have used.

It has been our anxious desire to ascertain how this experiment, which has been now tried for a period of five years, has worked. It would be but reasonable to expect that, if the giving of parliamentary title were calculated to produce injury and injustice to individuals, or detriment to the public, some of those results would, already, have become apparent, and that instances would not be few in

which such consequences could be pointed out. We were careful, therefore, to invite opinion, and to ask for information on this subject; and, in the papers which we issued, we pointed attention to this question of parliamentary title, and our inquiries were directed not less to its practical results than to the abstract question of its fitness and expediency. The evidence exhibits a very general and cordial concurrence of testimony in its favour; with two exceptions, all the witnesses unite in recommending its continuance, and bear testimony to the benefits it has conferred. Only one case has been adduced to us, in which a mistake was made as to a plot of ground; that is the case of *Robinson's estate*. We have ascertained that it merely related to one of those part-and-parcel questions which so often arise, in which the mistake is not as to the title, but as to the precise boundary of the estate, and the plot was of such little value as not to be worth the expense of ascertaining whether the adverse claim was in reality well founded;* but no instance has been brought before us in which “one man's estate has been sold to pay the debt of another,” which is the principal danger apprehended by those who are opposed to the principle of giving parliamentary title. The numerous advantages of the system appear to us to be satisfactorily stated by the Law Society, and several of the witnesses, whose evidences will be found in the Appendix.

Having then considered the propriety of giving parliamentary title, as well in the abstract, as with reference to the practical results of the working of the Incumbered Estates Court in Ireland, we fully approve of the principle, and recommend that it should be perpetuated. We think it highly desirable, as well for the benefit of owners of land as of the public, that the sale and transfer of land should be facilitated. One of the most effectual modes of accomplishing this is by giving to purchasers a parliamentary title. We think that the danger of mistake, and consequent injury to the interests of individuals, will be very small, under a system requiring and insuring a judicial investigation of the title, and a due publicity of the proceedings; while the advantages flowing from it are so great as very much to outweigh the consideration of any supposed danger as to the rights of individuals; we may also remark, that the system of registration in Ireland affords peculiar facilities for perpetuating and extending the principle of giving parliamentary title, which will be greatly increased when the Act of the 13 & 14 Vic. cap. 72, for the better Registration of Assurances, shall have been brought into operation.

Having arrived at a conclusion in favour of continuing parliamentary title, the next question which presented itself was, whether the application of the principle should be limited, as at present, or whether it should be extended to other cases. Its present limits are, first, the estate must be incumbered. Secondly, it cannot be sold without the consent of the owner unless it be incumbered to one-half its

* Mr. Robinson gave up the point to avoid the expense of contesting it, and the claimant accepted £25 in full for costs and compensation.

amount, or be under a receiver; thirdly, the jurisdiction is confined to estates in fee, leases in perpetuity, and leases of which sixty years are unexpired.

As regards the first, it appears obviously unjust that a benefit should be conferred by the Legislature upon the owner of an incumbered estate which is not extended to an unincumbered proprietor; it is conceded that the power of selling with a parliamentary title enhances the market value of an estate; and it seems anomalous that a person who has been improvident enough to incumber his estate, should thereby obtain an advantage which is denied to the prudent unincumbered proprietor. We have framed questions to elicit opinion and information on this point, and the result of the evidence is, that almost all the witnesses concur in thinking that an unembarrassed proprietor is entitled at least to as favourable a position in this respect as an embarrassed one.

If, however, there were any doubts as to the propriety of conferring the same privilege on the owner of an unincumbered estate as the law at present affords to an incumbered proprietor, one consideration ought, in our judgment, to be decisive. It appears from the evidence of several witnesses, and is, indeed, we believe, matter of public notoriety, that charges, to a certain extent fictitious, are now constantly created upon estates, for the purpose of enabling the proprietor to sell them through the instrumentality of the Incumbered Estates Court, and thus give a parliamentary title.

We think, therefore, that the owner of an unincumbered estate should be enabled to do directly what he now can do indirectly; that he should be entitled to present a petition, praying for the sale of his estate, and that, if the title be found satisfactory on a judicial examination of it, a sale should take place, as now in the case of an incumbered estate. We also think, that in any case where an owner has contracted out of court to sell his estate, he ought to have power to make such contract subject to the condition of giving a parliamentary title; and if, on a similar investigation of the title, it be found satisfactory, we think that a parliamentary title ought to be given to the purchaser. The first Incumbered Estates Act contained in its 2nd section a provision of this nature, but limited to the case of land subject to an incumbrance.

With respect to the second limit, namely, that which restricts the right of an incumbrancer to force a sale unless the property be incumbered to half its value, or be under a receiver, we recommend that such restriction should be altogether removed, its continuance being incompatible with the recommendations herein-after contained.

With respect to the third limit, which makes the right of sale depend upon the tenure of the lands, we think that it also should be removed, and that the jurisdiction should be extended to all lands, whatever may be the extent of the interest or tenure by which they are held.

The effect of giving a parliamentary title to any class of lands exclusively is twofold: first, to enhance the value of the estates to which it is attached; and, secondly, to depreciate the value of those

from which it is withheld. Since the passing of the "Incumbered Estates Act" in Ireland, the incumbrancers on those lands held for interests exempt from its jurisdiction, could only enforce a sale through the medium of the Court of Chancery, which must have diminished the value of them. We see no valid reason for excluding any estate in lands from the benefit which a parliamentary title confers, and we therefore recommend that the jurisdiction to confer such title be extended to all estates unincumbered as well as incumbered.

With regard to leasehold interests, the Incumbered Estates Commissioners only convey to a purchaser the interest in the lease, not warranting its validity, as against the landlord. We do not think it necessary to enlarge this power—to enable the court to give a warranty of title as against the landlord upon the sale of a tenant's interest might lead to injustice.

The practice of the Commissioners has been to investigate minutely all titles brought before them for sale, and to refuse a sale when the title appeared to be defective, as, for instance, when the estate is liable to be defeated on the happening of some contingency: this has prevented the sale of estates by the Incumbered Estates Court, in many instances where the party seeking it had a clear right to enforce one, according to the practice of Courts of Equity in Ireland; in such cases we think that the tribunal intrusted with this jurisdiction, in cases where an absolute parliamentary title cannot be given, should be empowered to sell the land with such qualified title as the case may demand, such qualification to be expressed in the conveyance.

We have not considered it within our province to inquire into the present state of the laws which regulate landed property, or to suggest any change in them with a view to facilitate its sale and transfer; but whether those laws shall remain unchanged, or undergo revision, we consider the giving of parliamentary title upon sales a most important step in the right direction, and greatly calculated to increase the value, and secure the enjoyment, of real estate. We are aware that another Royal Commission has been issued for the purpose of inquiring "into the registration of title with reference to the sale and transfer of land;" and it has been suggested to us that it might be better to continue the powers of the Incumbered Estates Court until the Report of those Commissioners shall have been made. We think, however, that our recommendations cannot clash with or be affected by the result of that inquiry. A considerable time must elapse before any extensive changes in the law of real property, if such should be recommended by those Commissioners, can be brought into actual operation; and, we think that estates in Ireland should not, in the meantime, be deprived of the advantage of sale with parliamentary title, which has now been enjoyed for more than five years. If the result of that Commission shall be such a simplification of the law as to enable the owner of an incumbered or unincumbered estate to confer an indefeasible title by private sale, the consequence will be that the court which has the jurisdiction of sell-

ing with parliamentary title, will have a much easier duty to discharge than it has under the present state of the law of real property; but the power to give an indefeasible title, in cases of adverse sale, must still be vested in the court, otherwise the public will not reap the full benefit of the reform. We may also observe, that in proportion to the number of estates possessing a parliamentary title, will be the facility for carrying into effect any plan for the registration of title to land; and we therefore conceive that the adoption of our recommendations may assist, and cannot impede, the attainment of a result which all must admit to be most desirable, namely, the simplification of titles, and the cheap and ready transfer of land.

Having come to the conclusion that a tribunal invested with the powers we have described should be made permanent in Ireland, the next question which presents itself is, whether the Incumbered Estates Court should be continued and made permanent, or whether its powers should be transferred to the Court of Chancery, and upon this point we recommend that the Incumbered Estates Court should not be continued, but that its powers should be transferred to the Court of Chancery, subject, however, to the introduction into that court of the alterations which we shall suggest.

In order to explain our reasons for arriving at this conclusion, it will be necessary to advert to the circumstances connected with the establishment of the Incumbered Estates Court, and the present state of its business.

The Court was established to supply an urgent want, and to relieve the great distress occasioned by successive years of famine, which had then almost overwhelmed the landed interest in Ireland. It is now generally admitted that it was a necessary measure at that time, and the results of the experiment demonstrate the wisdom and sagacity of those with whom it originated. At that period there was great difficulty in effecting sales in the Court of Chancery: and this, as well as the general distress, in a great measure stayed the further prosecution of creditors' suits, and placed a vast amount of property under the control of the Receivers of that Court. In the meantime, nominal proprietors were unable to discharge the duties incident to the position of the owner of an estate, and creditors were suffering from the withholding both of principal and interest. It was manifestly essential to the public welfare that the mass of incumbered estates should be taken out of the hands of proprietors who had little interest in their proper management, and of Receivers who had none, and that, whether the produce of the estate were sufficient or insufficient to pay the charges upon it, it should be sold, discharged of all the incumbrances. A review of the proceedings of the Court will show, that it has fulfilled the object for which it was created; under its process a great number of the heavily incumbered estates have passed into the hands of other proprietors, and the number of insolvent estates now brought into the Court is very small.

It appears that the number of petitions presented since the institution of the Court, to the last day of December, 1854, has been 3405; that in 1448 of these

sales have taken place, and that the gross amount produced by those sales has been £14,133,105 19s. 10d.

The number of petitions presented in each year was as follows:—

In 1850,	.	.	1,200
1851,	.	.	627
1852,	.	.	488
1853,	.	.	453
1854,	.	.	372

These figures show, that at the commencement there was a very great pressure of business in the court, arising no doubt from the peculiar circumstances of the country to which we have adverted, and the following table will show the change which has taken place in the character of the business:—

The number of owners presenting petitions in the first 100 petitions filed in the court, was,	6
The number of owners presenting petitions in the last 100 petitions filed in court,	51
Number of matters in which the owners were bankrupt or insolvent in the first 100 petitions filed,	13
Number of matters in which the owners were bankrupt or insolvent in the last 100 petitions filed,	3

We may infer from these figures, that the more recent petitions have been in general presented by those desiring to sell their estates to more advantage by obtaining the benefit of a parliamentary title, rather than by persons driven into court by the pressure of creditors.

It may be reasonably expected that proceedings of this character will be likely to continue and to be permanent, and that as long as the advantages of a quick sale and parliamentary title exist, the public will avail themselves largely of them in the sale and transfer of landed property. In fact, as appears from the statements of some of the witnesses, the public at present evince a disinclination either to lend or purchase except upon the security of such a title; and this feeling, which may be expected to become more general, will probably cause all sales and loans of any magnitude, where such a title has not yet been given to the estate, to be ultimately effected through the machinery of a tribunal empowered to confer it.

The pressing necessity which called the Incumbered Estates Court into existence having now comparatively ceased, there seems no adequate reason for the continuance of an extraordinary tribunal to dispose of business which we think can be as well transacted by the ordinary tribunals. In making this recommendation we are not in any respect departing from the principle on which the Incumbered Estates Court was established; it was created only for a limited period, and its arrangements were of a temporary nature; the Chief Commissioner of the court was called away at intervals from his place in the Court of Exchequer to preside over the new tribunal; the staff of the court was only employed as its business increased, and rendered additional assistance necessary; and no fixed place was provided, at first for the sittings of the court. The inconvenient situation in which it is

placed has given rise to many well-founded complaints; and it is to be regretted that a court transacting business of such importance has been obliged to hold its sittings in a place remote from the other courts, and inconvenient to the legal profession. The court thus constituted was, under the circumstances, necessarily continued by successive Acts of Parliament; but we are of opinion, that the principle of prolonging the existence of any court from time to time, by Acts of Parliament, is one not to be approved of; neither do we think that the public interest would be promoted by suffering a court to continue merely for the purpose of discharging its arrear of business. There seems, therefore, no alternative but either to establish the Incumbered Estates Court as a permanent tribunal, or to transfer its powers and business to the Court of Chancery, as soon as the legislation and consequent arrangements requisite for that purpose can take place.

We have already assigned some reasons for not continuing the Incumbered Estates Court as a permanent tribunal; others may be stated.

In the course of a proceeding for the sale of an estate and the distribution of the purchase money, questions may and do arise which grow out of equities between the parties, and which it is the peculiar province of a Court of Equity to decide: most of these the Commissioners have been necessarily compelled to determine, but in some they have left the parties to assert their rights in the Court of Chancery. It is most important that the judge who has the conduct of the case should be able to decide every question which may arise in it, with the ordinary right of appeal; and, by transferring the powers of the Incumbered Estates Court to the Court of Chancery, the latter tribunal will generally be able satisfactorily to decide all the questions which can arise in the progress of the cause.

The amount and state of the business in the Incumbered Estates Court demonstrate that it would be necessary, if that court were continued, to make considerable alterations. In the first place, it should be removed from its present situation; and the quantity of business remaining undisposed of is such, that, in order to carry it on with safety and with reasonable dispatch, it would be absolutely necessary to provide an additional staff, probably judicial, certainly ministerial.

The amount of the business was originally so great, and the staff employed so inadequate, as to cause the existing arrear; the number of cases not yet wound up is 1,633, being nearly one-half of the entire number brought into the court. In 307 only of these 1,633 cases, sales have taken place, and the settling of the final schedule, which is the most important stage, in only 216; so that, irrespective of the accruing business, there remains 1,300 cases in which sales are yet to take place, and 1,400 cases in which final schedules have not yet been settled, leaving about one-third of the business undisposed of. The effect of this pressure in retarding the dispatch of business may be estimated from the fact shown by the returns, that the average period which now elapses between the presenting of a pe-

tition and the settlement of the final schedule, is about three years.

For the reasons we have mentioned, we are of opinion that the Incumbered Estates Court ought not to be continued; and we recommend that all its powers shall cease on some certain and early day, and that thereupon its jurisdiction shall be transferred to the Court of Chancery in Ireland, together with the cases then remaining undisposed of.

We feel, however, that we should very imperfectly discharge the duty entrusted to us, if we merely recommended this transfer without regarding the terms and conditions upon which it can be safely made, so as to insure, as far as possible, the same facility for the dispatch of business in the Court of Chancery which exists in the Incumbered Estates Court, and to adapt it to the efficient performance of the new functions with which we propose that it shall be entrusted.

(To be continued.)

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NAMES OF THE CASES REPORTED IN THIS NUMBER.

COURT OF CHANCERY.

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DUBLIN, JUNE 9, 1855.

It is now pretty well settled that the recent Procedure Act has not altered the fundamental rule of pleading, that upon demurrer the court were bound to give judgment, not only upon the last pleading demurred to, but upon the entire record. For example, the plaintiff who demurred to the plea of the defendant might be called upon to support the validity of his own declaration, upon the defects of which the defendant, who possibly might be unable to sustain the legality of his plea, might "fall back."

In the case of *The Ecclesiastical Commissioners v. Holmes* (not reported) the defence having been demurred to, the defendant proposed to show that the answer and plea was bad. But the Court of Queen's Bench refused to allow this matter to be discussed, being of opinion, at the time, that section 66 of the Common Law Procedure Act had, in effect, changed the pre-existing law upon this subject. In the case of *Thompson v. Balfour* (not reported) the Court of Exchequer expressed a contrary opinion, and in the very late case of *O'Brien v. Gault* (Q.B. 1855, not reported) the Queen's Bench was reconsidered the latter conclusion which they had previously arrived at, and actually overruled a

demurrer taken to the plaintiff's replication, upon the ground that the defence did not disclose a valid answer to the action. The view which the court now appear to adopt of the bearing of the 80th and 81st sections upon this question is, that so far they leave the previous law unaltered; that to repeal so beneficial a principle of law, and one so founded on justice, would require very express legislation, which certainly does not exist in the clauses referred to, and that the words of the 81st section, "wherever issue shall be joined on any demurrer, the court shall proceed and give judgment according to the very right of the cause," afford positive evidence in favour of the continuance of the right of the court to examine the whole record. Whilst, however, we think that it may now be taken for granted that such is the law, it cannot be denied that an unfair advantage might be taken by a party being permitted, as it were, to demur *ore tenus*, without having apprized his opponent of the defect complained of. It is only right that if the party formally demurring to the last pleading should be bound, as he is by statute, to state the reasons of demurrer, his adversary, in case he intends to challenge the soundness of the previous pleading, should likewise give due notice. Hence it has been held by the Court of Exchequer, that in cases where a party should demur *ore tenus* to the pre-

vious pleading, without having noted points of objection, the argument ought to be adjourned at his expense. This rule would be an excellent one in practice, and would entirely obviate any hardship which might otherwise be expected to result.

INCUMBERED ESTATES INQUIRY COMMISSION. REPORT.

(Continued from page 180.)

The course of practice and procedure adopted in the Incumbered Estates Court has worked well, and given general satisfaction. So far as relates to the sale of estates and the proceedings incident thereto, we cannot suggest any improvement in it. Of the proceedings for the distribution of the purchase money, it has been suggested, and, we think, with reason, that a more formal record ought to be kept, a fuller opportunity allowed for making written objections, and a more careful supervision exercised with respect to unopposed claims. We recommend, therefore, that the same general course of practice and procedure be adopted in the Court of Chancery with respect to all sales in that court, and that in the framing of General Rules for the regulation of the Court of Chancery the existing practice in the Incumbered Estates Court be substantially adopted, with the alterations suggested in this Report.

In addition to the conferring parliamentary title, the peculiarities in the mode of procedure which chiefly recommend the practice of the Incumbered Estates Court are:

1. That the same judge has the entire conduct of the case in all its stages, subject to a cheap and ready appeal from his decision.

There is, indeed, a Master in the Incumbered Estates Court, but the power of making references to him has been very sparingly exercised by the Commissioners; and both they and the Master concur in opinion that such references ought not to be made, but that all inquiries and accounts connected with each case should be disposed of by the judge himself, assisted by a clerk under his immediate superintendence, and acting according to his directions; thus dispensing, as far as possible, with the necessity of communicating through the medium of written orders and reports. The Commissioner himself reads the abstract, directs the searches, and satisfies himself that no act appears upon them which invalidates the title, his clerk or examiner compares and verifies the deeds, but the Commissioner himself pronounces his judicial opinion as to the validity of the title, and upon his responsibility the sale takes place: the consequence is, that he is familiar with the case in all its subsequent stages; and when objections are made by a purchaser, or the rights and priorities of parties interested are discussed upon the distribution of the funds, it is not necessary to state the case to him again in detail, as it would be to a judge who had been previously unacquainted with the cause: thus the business is dispatched with greater promptness,

and without those technical difficulties which are incident to a system proceeding by references and reports.

2. There is an immediate sale, with a simple form of conveyance, upon the execution of which possession is forthwith given to the purchaser.

3. The proceedings are exempt from fees and stamps, and the forms are simple and unincumbered by technicalities.

By whatever tribunal the jurisdiction to sell and give parliamentary title may be exercised, we think that it is absolutely necessary that these advantages should be preserved, and consequently that before the transfer of the jurisdiction of the Incumbered Estates Court to the Court of Chancery, the constitution and practice of the latter court must be remodelled; and for that purpose we recommend the following alterations:—

That the office of Master of the Court of Chancery be abolished. This has been done in England under the 15 & 16 Vic., c. 60—and we recommend that the change in this country should be carried out in an analogous manner; that vacancies in the office of Master should not be filled up; that no references should, for the future, be made; but that the Masters should wind up the business at present in their offices, and be released from the performance of their duties as soon as that business is completed, or at such times as the Lord Chancellor may direct.

The system of receiverships in Ireland is peculiar, and an officer will still be required to control and regulate the conduct of receivers, and to audit their accounts, as well as to superintend the management of the estates of lunatics and minors. We recommend that one of the present Masters be retained for that purpose.

In the place of the Masters, whose office we thus propose to abolish, we recommend that two Vice-Chancellors be created, and that the Lord Chancellor, the Master of the Rolls, and the two Vice-Chancellors, should be the judges of the Court of Chancery.

In order to carry out the principle to which we have adverted, of entrusting each case throughout to a single judge, being that now adopted in the Court of Chancery in England, the Master of the Rolls and the Vice-Chancellors should each have the entire conduct and responsibility of every cause or matter in their respective courts, from its commencement to its termination, subject to the right of appeal; and should discharge the duties at present performed by the Incumbered Estates Commissioners, save that the actual sales by auction should take place before an officer to be appointed for that purpose.

In order to assist the Master of the Rolls and the Vice-Chancellors in the discharge of their duties, we are of opinion that each should have attached to his court two chief clerks and two junior clerks—who should be appointed by the judge, as he is the person responsible for the due performance of their duties, and should hold the office until removed—they should perform such duties as may be enjoined by the judge, and should be under his control. Each judge should have the power;

of removing any of the clerks in his own court, for cause to be expressed in the order to be made for that purpose, and such clerks should be removable, without assigning any cause, by the three judges, or by any two of them, of whom one should be the judge to whose court he is attached.

The clerks being under the immediate control and superintendence of the judge, should submit to him all matters of difficulty, and communicate personally with him, without the necessity of making reports or orders. If this be not carefully attended to, the office of clerk may, in course of time, become like that of Master, a result to be guarded against; this will be most effectually done by taking care that as far as possible, the business shall be treated as having been performed by the judge himself, although the details have been carried out by clerks.

The appeal from the Commissioners of Incumbered Estates Court to the Privy Council has hitherto given very general satisfaction, and all the witnesses concur in pointing out the value of such an appellate tribunal; there is only one matter connected with it of which we cannot approve, namely, the power vested in the Commissioners of allowing or refusing an appeal, which should be given to the suitor as a matter of right. In recommending the transfer of the jurisdiction to the Court of Chancery, it becomes necessary to consider whether the same appellate tribunal ought to be continued, and, if not, what other can be substituted; as it would be very inexpedient to deprive the suitor of the right of appeal to a tribunal in Ireland, and leave him only an appeal to the House of Lords. We are, however, of opinion that the Privy Council ought not to be the permanent Court of Appeal: it is a fluctuating body, there is no obligation upon its members to attend, and if, as is probable, the appeals should become numerous, it is to be feared that it could not at all times be relied upon as constituting an adequate appellate tribunal. We are convinced that the establishment of a Court of Appeal, affording facility to the suitor of having his case promptly reconsidered, is absolutely essential to the proper working of a tribunal giving parliamentary title. In a very great majority of cases an appeal to the House of Lords is, from its expensive character, quite beyond the reach of parties, especially where the property is small. We have, however, no intention of recommending any interference with the right of appeal to the House of Lords; but, considering the powers proposed to be conferred upon the Court of Chancery, we think that an appellate tribunal is also necessary. We have very much considered how this appellate tribunal should be constituted. At present the appeal in Chancery is from the Master to the Master of the Rolls or the Lord Chancellor, from the Master of the Rolls to the Lord Chancellor, and from him to the House of Lords. In our opinion an appeal from one judge to another judge sitting alone is not satisfactory. We were at first disposed to recommend that the Court of Appeal should consist of three of the judges of the court, but we are satisfied that to withdraw from the discharge of the duties of their own court either the Master of the Rolls or the

Vice-Chancellors, for the purpose of hearing appeals, would inconveniently impede the business of their courts. We have arrived at the conclusion that the Court of Appeal should consist of the Lord Chancellor and an additional judge, and that the suitor should have a right of appeal to that tribunal from every decision of the Master of the Rolls and the Vice-Chancellors. A Court of Appeal, consisting of two judges, has this advantage—that in every case there will be at least two opinions in support of the decision; if the Court of Appeal be divided in opinion, the order of the judge below will stand unreversed. We recommend that the second judge of the Court of Appeal should be nominated by her Majesty, and should be selected, in the first instance, from the ex-Chancellors of Ireland; or, if there be no ex-Chancellor eligible or willing to accept the office, that such additional judge should be selected from amongst the Common Law Judges for the time being; or in case it should be considered necessary to have a permanent judge for this purpose alone, that a Lord Justice be specially appointed by her Majesty. In case an ex-Chancellor or a Common Law Judge be appointed to the office, we contemplate that there should be such an increase of salary and rank as will induce him to accept it. In recommending the nomination of a Common Law Judge, we have assumed that he will be able to discharge the duties thus thrown upon him in addition to his own, but if the number of appeals shall prove to be such as to render that impracticable, then it would be expedient to appoint a Lord Justice. This will provide an appellate tribunal in Ireland for all cases, save those originally heard and decided by the Chancellor sitting alone; after the most anxious consideration we find ourselves unable to suggest any fitting tribunal for the rehearing of such cases in Ireland; and we are therefore of opinion that they must continue to be brought, as heretofore, before the House of Lords.

The alterations in the constitution of the Court of Chancery, as well as the transfer of the jurisdiction, can only be carried out by an Act of Parliament; but the details of the procedure must be regulated by General Rules. The rules should be framed by the four judges of the court, or, in case they differ, by any three of them, of whom the Chancellor should be one. Such rules should, as nearly as possible, follow the present practice of the Incumbered Estates Court, with respect to proceedings for sale; and in the regulation of the general practice of the court they should conform to the practice in the English Court of Chancery. We think it for the interest of the public and the profession, that the English and Irish Courts of Chancery should be assimilated in their practice as closely as circumstances will permit, so that the decisions of each may be applicable to both, and thus tend to establish a uniform system in the two countries.

With respect to the present system of taking evidence in the Court of Chancery, which is almost exclusively by affidavit, we recommend that it be altered, and the English practice introduced. We think that the system of making proof by affidavit

is a very convenient one, and the least expensive; but, in order to effectuate justice, it should be subject to some check and control. We propose, therefore, in addition to the now existing power of *visa voce* examination before the court, that wherever a witness refuses to make an affidavit it shall be in the power of the party requiring his evidence to summon and examine him before one of the Examiners of the court, or a special Examiner appointed for that purpose; and that, when a witness has made an affidavit it shall be in the power of any other party in the cause or matter to compel him to attend for the purpose of *visa voce* cross-examination, upon giving notice for that purpose. The adoption of this practice in England has been found to afford a salutary check against the making of improper and uncandid affidavits.

A main cause, in the opinion of all the witnesses, of the successful operation of the Incumbered Estates Court is—the exemption of its proceedings from fees and stamps. To tax the suitor for the maintenance of courts of justice is unsound in principle, and in its practical operation extremely injurious. This opinion is in exact conformity with the view of the English Common Law Commissioners, as stated in their Report of the Session of 1851, in which they recommend the abolition of all fees by the suitor, a recommendation, the propriety of which is, we believe, acquiesced in by all those who have considered the subject, although considerations of finance have been hitherto allowed to interfere with its universal adoption. When, however, it is proposed that a parliamentary title should be given, it becomes peculiarly necessary that the proceedings which are to produce that result should be exempt from fees and stamps. The best safeguard against the danger of overlooking or defeating the rights of absent parties, a danger necessarily incident more or less to the proposed system, will be provided by giving the utmost possible publicity to all the proceedings, and by affording to every person complete facility of access to the documents, and of procuring information without incurring any expense, and without the necessity of resorting to professional assistance. This has been fully accomplished by the practice of the Incumbered Estates Court. The petition, the schedule, and other important documents which show the rights of all parties, and the manner they are dealt with, are kept in a public office, to which all persons have access, and in which those documents can be inspected without charge. Of this power the public have largely availed themselves, and the result has been in many cases as well to apprise parties of their rights and enable them to put them forward, as to save them from incurring useless expense, by satisfying themselves that their supposed claims were not sustainable. The case is different in Chancery: payment must be made for the inspection of documents; copies can only be obtained at great expense; and, from the technical character of the proceedings, it is practically impossible for any non-professional person to acquire accurate information as to the state of a cause or matter, and the allegations put forward in it, without employing a solicitor, and incurring considerable cost;

this frequently deters persons from making inquiries unless they have a very confident opinion that the result will be the establishment of their rights. We cannot, therefore, recommend the entrusting to any court the power of giving parliamentary title, unless its proceedings shall be exempted from charges which impede inquiry and prevent publicity; and we are convinced that the consequences of imposing such charges would be dangerous in the extreme. In addition to other causes, the existence of fees and stamps on proceedings in Chancery has been, we believe, a main cause of the delays which existed in that court; clients and solicitors were reluctant, and often unable, to incur the heavy expenditure required at every step; and if the opposing party were an obstinate and experienced litigant, he had it in his power so to conduct the proceedings as to lead to considerable expense and vexation. The costs in Chancery have been very considerably reduced, and the delays of the proceedings diminished, by the operation of the Chancery Regulation Act; but the stamps and fees form still a large item of expense.

It would obviously be inexpedient to make any distinction in respect of charge between different modes of proceeding in the same court, and we therefore recommend that, concurrently with the proposed change, the fees and stamps upon all proceedings in Chancery be abolished, or reduced to such an amount as not to interfere with the due dispatch of business, or prevent the full publicity of the proceedings.

With respect to the comparative amount of expense in Chancery and in the Incumbered Estates Court, we are of opinion that if the former court be remodelled and altered, as we have suggested, the necessary costs of proceedings there ought not to be greater than they have been in the latter court. It appears from the return, which will be found in the Appendix, that in the Incumbered Estates Court the taxed costs of petitioners, or parties having the carriage of proceedings up to the present time, amount to £254,707 1s. 6d.—which includes a sum of £28,960 16s. 1d. allowed for surveys and valuations. Many of the witnesses say that the expenditure under this latter head has been too great, and we think that it may be considerably curtailed in future without detriment to the sale of the estates.

We think it right to add that the Taxing Department of the Incumbered Estates Court has been conducted with great efficiency; but it will appear from the returns of the corresponding department in Chancery, that there is a considerable arrear there, and that some assistance ought to be provided and some new arrangements made to insure the more prompt taxation of costs.

In order further to insure publicity and due expedition in the discharge of business, we recommend that a careful record be kept of the progress of business in the Court, and that each Judge and officer should annually make returns of the state and dispatch of business before him to the Lord Chancellor. We are further of opinion, that it should be considered to be the duty of each judge, when the proceedings in any cause or matter are

not conducted with due dispatch, to investigate the cause of the delay, and, where necessary or expedient, to oblige the parties to proceed with diligence and expedition.

The changes which we have recommended will, if carried out, impose many new and onerous duties both on the judges and the officers of the court; and as much of the business at present discharged by the officers will become unnecessary under the new arrangements, we recommend, in order to the effectual working of the court, and the due apportionment of the business, that the Lord Chancellor should be invested with the power to direct any officer of the court, save the clerks attached to the courts of the Master of the Rolls and Vice-Chancellors, to discharge such new duties as he may think expedient. In addition to the staff at present employed in Chancery, officers will be required to carry on the new business which will devolve on the court; and we recommend the transfer of the powers and business of the Incumbered Estates Court to the Court of Chancery, in the reasonable expectation that those officers of the Incumbered Estates Court, who have efficiently discharged their duties there, and from experience have become familiar with the practice and the details of business, will, so far as may be practicable and necessary, be transferred to, and made officers of, the Court of Chancery.

It will be indispensable to erect suitable buildings, contiguous to the Four Courts, for the accommodation of the new judges and officers; and the title deeds and documents at present deposited in the Incumbered Estates Court ought to be transferred to the Court of Chancery, and kept there with the records of that court, with power to persons interested to inspect them, on obtaining permission for that purpose.

The following is a summary of the recommendations which we respectfully submit to your Majesty:—

1. That a parliamentary title should be given to purchasers upon the transfer of land in Ireland under judicial sales.

2. That the jurisdiction to give parliamentary title should be extended to all estates, as well unincumbered as incumbered, by whatever tenure they may be held, provided the title be submitted to judicial investigation, and found satisfactory.

3. That in case the tribunal empowered to confer such title shall be of opinion that a complete parliamentary title ought not to be conveyed, it should have power to convey a qualified parliamentary title, such qualification being expressed in the deed of conveyance.

4. That this jurisdiction should be vested in the Court of Chancery in Ireland, and that thereupon the Incumbered Estates Court should cease to exist, and all its powers be vested in, and its business transferred to, the Court of Chancery.

5. That the office of Master of the Court of Chancery be abolished, in a manner analogous to that provided by the 15th and 16th of the Queen, chap. 60; subject, however, to the continuance of an officer for the purpose of controlling and regulating the management of estates by receivers, and

for passing receivers', guardians', and committees' accounts.

6. That the Court of Chancery should consist of the Chancellor, the Master of the Rolls, and two Vice-Chancellors, who are to be the judges of that court.

7. That a Court of Appeal should be constituted, consisting of the Lord Chancellor and an additional judge; such judge to be selected from the ex-Chancellors, or, if there be none eligible to that office, or willing to accept it, from amongst the Common Law Judges for the time being, to be nominated for that purpose by your Majesty, or in case it shall be thought necessary, such additional judge to be specially appointed by your Majesty, and to be the Lord Justice of the Court of Appeal.

8. That the Master of the Rolls and the two Vice-Chancellors should each have the entire conduct and responsibility of each cause or matter in their respective courts, from its commencement to its termination, subject to the ordinary right of appeal.

9. That the Master of the Rolls and the two Vice-Chancellors should each have attached to their respective courts two chief clerks and two junior clerks; that such clerks should be appointed by the judge of the court, and should hold their office until removed; that it should be in the power of each judge to remove any of the clerks in his own court, for cause to be expressed in the order to be made for that purpose; and that such clerks should be removable by the three judges, or by any two of them, of whom one should be the judge to whose court he is attached, without assigning any cause.

10. That the practice of the Court of Chancery as to the sale of estates should be regulated by General Rules, and be assimilated, as far as possible, to the present practice and procedure of the Incumbered Estates Court.

11. That such General Rules should be made by the Lord Chancellor, the Master of the Rolls, and the two Vice-Chancellors, or any three of them, of whom the Chancellor should be one; and that the same be required to be laid before both Houses of Parliament.

12. That in all causes and matters, where a witness refuses to make an affidavit, or where a witness has made an affidavit, it should be in the power of any party to such cause or matter to examine or cross-examine such witness *viva voce* before one of the Examiners of the Court of Chancery, or before an Examiner to be specially appointed for that purpose; and that the practice, as at present established in the Court of Chancery in England for this purpose, should be extended to the Court of Chancery in Ireland.

13. That each judge and officer of the Court of Chancery should annually make returns of the state and dispatch of business before him to the Lord Chancellor.

14. That it should be the duty of the judge, when the proceedings in any cause or matter are not conducted with due dispatch, to call upon the parties to explain the cause of the delay; and that

the judge should be invested with compulsory powers to expedite the cause or matter.

15. That stamps and fees upon all proceedings in Chancery should be abolished, or reduced so much as not to interfere with the dispatch of business or the publicity of the proceedings.

The recommendations which we have submitted involve important changes, and will, if adopted, require to be carried into effect with great care. They are not, however, without precedent or authority; and we believe, that if worked out in their true spirit, they will not only facilitate the sale and transfer of land, but also tend to the better administration of justice.

All which we humbly submit for your Majesty's gracious consideration.

Witness our hands and seals this twenty-first day of May, 1855,

MAZIERE BRADY, C.	(Seal.)
JOHN ROMILLY.	(Seal.)
JAMES HENRY MONAHAN.	(Seal.)
FRANCIS BLACKBURNE.	(Seal.)
ABRAHAM BREWSTER.	(Seal.)
RICHARD BETHELL.	(Seal.)
MOUNTIFORT LONGFIELD.	(Seal.)
J. D. FITZGERALD.	(Seal.)
H. M. CAIRNS.	(Seal.)

JAMES ANTHONY LAWSON, *Secretary.*

PAPER No. 1.—QUESTIONS ADDRESSED TO THE COMMISSIONERS OF THE INCUMBERED ESTATES COURT.

1. Give a short outline of the course of practice adopted in your court in the case of a petition for sale, and the several steps taken from the presenting of the petition to the payment out of the monies realized by the sale.

2. Does any defect or imperfection in that course of practice occur to you? and if so, state the same, and any remedy which you can suggest.

3. Can you suggest any modification or alterations in the constitution of the court, or in its practice or forms of procedure, which, in your opinion, would be calculated to make the system more perfect?

4. What are the peculiar circumstances in the constitution of the court, or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

5. What, according to your experience, have been the practical results of giving a Parliamentary title?

6. In your opinion, ought the privilege of obtaining Parliamentary title to be continued and made permanent, and should such privilege be confined to incumbered estates, or limited to lands of any particular tenure?

7. Can you estimate the time within which the business of the court can be completed, supposing the period now limited for receiving petitions is not extended?

8. Is the present staff of officers and clerks suffi-

cient for the effectual discharge of the business of the court?

ANSWERS OF THE COMMISSIONERS OF THE INCUMBERED ESTATES COURT TO QUESTIONS IN PAPER No. 1.

1. Give a short outline of the course of practice adopted in your court in the case of a petition for sale, and the several steps taken from the presenting of the petition to the payment out of the monies realized by the sale.

The petitions for sale presented during each month are transmitted according to a system of rotation to the chambers of the respective Commissioners, each of whom makes a fiat or conditional order for sale on the petitions sent to him, if a sufficient *prima facie* case be shown for a sale; and in doing so he directs on whom the conditional order is to be served.

By the general practice of the court, the whole of the proceedings in the matter are considered as referred to the Commissioner issuing the fiat; and all original motions and applications in the matter, (except motions to make the order for sale absolute, and motions to vary or rescind it,) are heard and disposed of by such Commissioner; all orders and directions made and given by him being subject to the revision of the full court, at the instance of any person aggrieved.

If no cause be shown against the conditional order within the time prescribed, it is made absolute in the office; and in case cause be shown by any person, the motion to make the order absolute is heard by the full court.

The conduct of the sale and all the proceedings in the matter is ordinarily left with the solicitor of the petitioner, who obtains the directions of the Commissioner upon all matters arising in the course of the proceedings which appear to require such directions; but in some few cases of a special character, where the owner's solicitor has the conduct of the sale, a solicitor for the general body of creditors, or for any other party whose interests seem to require special protection, is authorized to attend to their interests upon all important motions and proceedings.

On the order being made absolute, the proceedings preliminary to the settlement of the rental, and the proceedings to make out or complete the title to the estate go on simultaneously.

With a view to the former, notices are served upon the tenants and occupiers, calling upon them to state the particulars of their holdings; and subsequently, all leases and tenants are served with a final notice, under the 13th General Rule, stating as accurately as can be done the nature and particulars of the leases and tenancies, to which any lessee or tenant is at liberty to object; and in such case his objections are heard by the Master.

At this stage directions are given by the Master as to the obtaining of renewals of leases, the apportionment of annual charges, the redemption of quit rent, the ascertainment of the amount of tithe rent charge, and of charges under the Land Im-

provement and Drainage Acts, and other matters of a similar character.

The Master also gives an order for the survey and valuation of the estate on the application of petitioner's solicitor, where reasonable necessity for it exists and no sufficient objection is shown by any of the parties interested.

All directions of the Master are subject to the revision of the Commissioner in chamber, and ultimately of the full court.

With a view to the latter object (making out title), all persons having deeds or documents relating to the estate are called upon to lodge them; and from the deeds, with the aid of searches, and abstracts or statements of title previously existing, the abstract of title to the estate is prepared and lodged; and in most cases the opinion of counsel is taken as to its sufficiency, and as to the searches that are likely to be required.

The Master is then authorized to proceed with the settlement of the rental; and when this is completed and laid before the Commissioner, he peruses the abstract of title, if he has not done so at an earlier stage.

He is thus able to see that the interest to be sold is properly described, and sold under proper and necessary conditions, and subject to all such rents, annuities, and other outgoings, as may appear in each case to affect the premises. He also, with the aid of counsel's opinion when obtained, directs the necessary searches in the office for the registration of deeds and judgments, so as to ascertain what charges exist, and in whom they are vested.

The sale takes place either before the Commissioner, or, (in case of sales in the country,) before an auctioneer appointed for the purpose, who returns the biddings to the Commissioner for his approval; and in some cases lots are sold by private contract on notice to the parties, if the Commissioner should think it beneficial that a private offer should be accepted.

The purchaser is at liberty to lodge the money and take out his conveyance as soon as he pleases; and, if, having claims on the estate, he desires to avail himself of the power given by the 26th section of the Act to apply his demand towards the liquidation of his purchase money, before his rights have been judicially ascertained, he applies to the Commissioner for a provisional credit as against his demand, which is granted, if the Commissioner is of opinion that it may be done with safety; and though in such cases his conveyance is retained by the Commissioner until his rights are finally declared, he is enabled to obtain immediate possession of his purchase.

Pending the foregoing proceedings, all parties who have or claim any interest in the estate or in its produce are at liberty to file their claims; or, if they deem it advisable, to enter appearances, for the purpose of receiving notice of the various steps in the matter; and with a view to enable all interested parties to attend to their rights, the order for sale is advertised in the public papers soon after it is issued; and, if any person interested conceive that the matter is not progressing in a satisfactory manner, it is open to him to call for explanations, or to apply to have the conduct of the matter transferred to him.

nations, or to apply to have the conduct of the matter transferred to him.

The Commissioners, also, when they perceive that there is any undue delay, take steps to require the petitioner to proceed with expedition.

Upon the searches being obtained, it is the duty of the solicitor conducting the proceedings to prepare a schedule of incumbrances according to their priorities, and to attend upon the Commissioner or Examiner for the purpose of accounting for all the acts and judgments which the searches may have disclosed, and of enabling the Commissioner to see that the schedule is prepared in a regular and formal shape.

Notice of the lodging of this schedule is given to all persons who have appeared, or filed claims, or have lodged documents subject to any claim of lien, or who may appear by the searches to have charges which might possibly affect the premises; and in order that the proceedings may not escape the attention of the last-mentioned class of persons, or of any parties who may have dormant or latent claims, or who may conceive themselves injured by the operation of the Commissioner's conveyance, a notice of the schedule is advertised in the Dublin and local papers, and occasionally in the English papers; and all persons whose rights may not be considered as properly stated on the draft schedule are at liberty to file objections, which are heard and disposed of, or placed in a course of adjudication on the day fixed for the hearing of the schedule.

The funds are shortly afterwards allocated by the Commissioner, and paid out according to the schedule, sufficient funds being appropriated, when necessary, to meet claims not yet finally decided upon; or to provide for the accruing annuities or other periodical payments when not commuted.

In a large number of cases the Commissioners are able to avail themselves of the power conferred by the 30th General Rule to pay out well-known and ascertained demands, before the time for the settlement of the schedule has arrived. This course is generally practicable, when the first or an early demand is vested in a mortgagee who has taken the precaution at the time of his loan to have the title fully made out, and prior claims put out of the way, or when previous proceedings in Chancery have resulted in a report finding the priorities of the incumbrances; or when the searches show that the payment may be made with safety; or when the owner of an estate having a clear surplus requests that such payments may be made.

The above is an outline of the course of practice to which the Commissioners ordinarily desire to adhere; but deviations from it have not unfrequently occurred at times when the pressure of business has been excessive, or when a strict adherence to it might have caused delay and hardship to the parties concerned.

2. Does any defect or imperfection in that course of practice occur to you? and if so, state the same, and any remedy which you can suggest.

The course of practice above detailed is considered as applicable to all ordinary cases, and not to be departed from without adequate cause. The Com-

missioners, however, do not regard these rules as inflexible or of universal application; and they therefore mould and adapt them to the exigencies of individual cases. Thus, *e.g.*, if the creditors upon an estate desire to have their rights definitely ascertained before the sale, so as to enable them at the sale to purchase with safety by means of their demands, the schedule of incumbrances may be settled in the first instance. Having regard to the qualification implied in this remark, it does not occur to the Commissioners that there is any defect or imperfection in the course of practice above detailed. It may be observed, however, that, with reference to the minute details of practice and of routine in the offices, the Commissioners are in the habit, from time to time, of applying a remedy whenever any practice of an inconvenient character appears to exist.

3. Can you suggest any modification or alterations in the constitution of the court, or in its practice or forms of procedure, which, in your opinion, would be calculated to make the system more perfect?

After much consideration, we think it desirable that that portion of the business of the Commission which has hitherto been transacted by the Master in a separate office should be performed by or under the immediate control of the Commissioner who has the charge of the matter; and that, for that purpose, an addition should be made to the staff of the respective Commissioners. The business of the Master consists mainly of the three following departments.—1. The settling of the rentals including the disposal of all objections filed by tenants and lessees, and of all questions arising as to the mode of sale, the division into lots, &c. 2. The settling of all conveyances, and orders for partition and exchange. 3. The taking of accounts, and making inquiries into facts under references for that purpose made by the court, or by the respective Commissioners in Chamber. As to the first class of business, it is found in practice that when a rental is referred for settlement, the Commissioner loses all immediate control over the progress of the matter; and having no means of knowing when the rental will be returned, he is unable to adapt the progress of the other parts of the case to that of the settlement of the rental and the period of sale, and the general business of his office is deranged from the circumstance of the rentals being returned in great numbers at particular periods of the year, whilst at other times comparatively few are brought in. As to the second class of business, it is obviously expedient that it should be performed by the person who has previously settled the rental. And as to the third class of business, our experience has led us to the decided conviction that all formal references, and reports consequent thereon, (however efficiently made,) lead to a circuitry of procedure not consistent with the rapid transaction of business. We are disposed to think that the details of accounts, and inquiries into minute facts, form a very small portion of the ordinary course of business; and that when they arise in such a form as not to admit conveniently of an immediate decision by the Commissioner, they might be submitted at

once to a Chief Clerk or Examiner, who would deal with them under the immediate directions of the Commissioner who has to act upon his certificate or report. At present the conduct of a reference, even of the simplest character, has a tendency to expand itself into a distinct branch of litigation; the extent and expense of which are often quite disproportionate to the result, and which the Master, (acting in part ministerially,) has not sufficient authority to check and control. We think that the Commissioner, with two Chief Clerks or Examiners, each of them having the aid of a clerk, would be able to dispose of the whole of the business arising out of the cases in his office. One of these officers could act as Registrar to the Commissioner; which would be indispensable, if the Commission should be made permanent.

(To be continued.)

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DUBLIN, JUNE 16, 1855.

It is high time for the Legislature to interpose and terminate, by a well-digested enactment, the interminable disputes which have been waged ever since the *Marshaleen case* respecting the limits of protection enjoyed by the officers of courts in respect of acts sanctioned by their tribunals. It is not the absence of general principles which creates the embarrassment, but the want of any certain criterion for the application of those principles. To endeavour to classify the centuries of cases, involving this question, would be perfectly hopeless. It is certain that a broad distinction prevails between acts ministerial and judicial; between acts done by judges of inferior courts and those of superior jurisdiction; between the degree of protection afforded by the officers of superior and inferior courts in the execution of process; between the degree of protection afforded in respect of the execution of irregular process, to officers and to the party suing out that process or his attorney; finally, between erroneous or voidable and irregular or void proceedings of Courts, superior or inferior. These distinctions are more or less recognized and established. But in almost every case a question will arise, the solution of which does not lie on the surface. Perhaps the two which cause the greatest

amount of perplexity are, as to whether the act complained of was ministerial or judicial; or whether, at all events, it was done within the limits of his jurisdiction. In the present vagueness of the law, the first is very often very hard to be solved; but the second is infinitely more so. There are no questions which come before our courts so evenly balanced, and upon either side of which so much may be plausibly said, as those relating to the competence of jurisdiction. The fact is, that the term "want of jurisdiction" is susceptible of more meanings than one. In one sense, in every proceeding defective in the smallest particular, there is a want of jurisdiction; but in the larger acceptance of the term it will only apply to cases where the law has been substantially departed from, and the error is not referable to mere form. It will be found upon examination that the difficulty of applying the principles to which we have adverted has given rise to most arbitrary distinctions, and to a mass of inconsistencies. If the results of this "glorious uncertainty of the law" were as imaginary as the system itself is speculative, its evils would be comparatively trivial, but unfortunately the innocent suffer for what they are not justly responsible. Laying out of consideration, for the present, the absolute importance of investing the upright Judge with an assurance that errors of judgment and involuntary misprisions shall not involve him in litigation with

the suitors of his own court, we cannot see upon what principle a like measure of protection should be denied to the honest suitor, or his agent, against the consequences of mistakes for which they are not justly responsible.

Doubtless there are certain extraordinary expedients, which it is and always will be the policy of the law that if the creditor resort to against his debtor, he must do so at his peril, as for example when he levies his demand by the summary process of distress. But when, on the other hand, he acts *bona fide* and without malice, under the sanction of a court claiming to have jurisdiction, it does seem most unjust that the protection which he is to enjoy should depend upon the question of the authority of that court to issue the particular mandate. Is it fair that the honest creditor, in consequence of such a misprision of the tribunal to which he had had recourse for justice, should, his debt unsatisfied, change places with his *quondam* debtor, and himself be "delivered to the tormentors?" It may be, and sometimes has occurred, that the creditor has acted heartlessly in the first instance, and that the jury have thought fit to avail themselves of the error in the proceedings to mulct him for his want of forbearance. But such cases are the exception, and while we doubt the propriety of punishing a man for one offence, because he may have committed another, how deplorable is it that an honest, worthy man, who has merely endeavoured to recover a just debt should, perhaps by a mere slip of the pen, be subjected to the vexation of an action, besides the loss of his debt. What renders the case still harder is, that for such an inquiry a jury is rarely well adapted. There is in the world too large an amount of morbid sympathy, with persons circumstanced like such a plaintiff, to render it likely that the defendant will meet with due consideration, and it is not improbable that some one or other of the jurymen may labour under still more sinister influences. If the defendant had put the law successfully in motion, few perhaps would have blamed him, but he failed in his efforts to do so, and his attempt to incarcerate or sell the goods of his debtor is by some tortured into a crime against humanity. As the law now stands, how can any individual feel that he is assured safe? Whether he is called upon to act in the capacity of judge, officer, suitor or agent, he stands in jeopardy.

Let us, therefore, earnestly hope that the Legislature will take this most important subject into their consideration, as nearly allied to the law of

procedure itself, and that effectual means will be adopted to put this branch of jurisprudence on a definite and satisfactory basis.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 188.)

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure, which in your opinion have mainly contributed to its successful operations?

The constitution of the court, and its mode of procedure are so closely connected with and dependent upon each other, that it is difficult to classify the circumstances referred to in this question under the two separate heads. The following, however, are the points which appear to us most deserving of consideration.

First.—The circumstance that each case is conducted throughout under the immediate supervision and control of a single person, who is responsible for the correctness of the proceedings, and for that purpose is armed with the entire powers conferred by the Act upon the Commissioners. It is found that the adoption of this system greatly increases the working power of the Commission by rendering it quite unnecessary to bring before the full court any merely formal matters, or matters of course, or indeed any questions whatever except such as involve matters of law or are proper subjects for careful judicial consideration.

Secondly.—The circumstance that all the general practice and forms of procedure can by proper modifications be made to subserve and adapt themselves to the exigencies of each particular case.

Thirdly.—The power which the Commissioners possess to bind the right of all parties having any interest in the subject-matter of the sale. The Commissioners being thus able to judge for themselves whether particular rights are properly represented, and if not, how they should be represented, are not embarrassed with nice questions as to the construction of the suit, or its adaptation to bind particular rights, or as to the jurisdiction of the Commissioner to dispose of them.

Fourthly.—The facilities with which applications may be made to the Commissioners and information obtained without expense from them or their Examiners as to what has been done or is likely to be done in each case. This enables any claimant on the estate to intervene at the exact period when his rights ought to be brought forward, and from time to time to see that the proceedings are conducted in a satisfactory manner. The publicity and comparative rapidity of the proceedings tend to the same end. We consider that the power of obtaining a parliamentary title can hardly be exercised with safety except through a system which gives to every person ready means for learning, without expense and without the possession of special professional experience, the nature of the proceedings in each case.

Fifthly.—The practice adopted by the Commis-

sioners under the sanction of the rules approved of by the Privy Council of settling one general schedule of incumbrances in the presence of all the parties interested, instead of calling upon each creditor to prove separately, and proceeding in each case by charge and discharge. This course is greatly facilitated by the circumstance, that ordinarily the fund is realized prior to the settlement of the schedule, so that all parties can ascertain their exact position, and the Commissioners are relieved from the necessity of hearing questions of priority when the state of the funds is such as to render them unimportant. It also enables the Commissioners to confine the delay of litigation to the parties affected by it, as they are able to set apart the fund in dispute, and distribute the residue.

Sixthly.—In relation to sales, we would direct particular attention to the 15th and 16th General Rules, by which the Commissioners are prohibited from adjourning sales by auction except in cases of palpable insufficiency in the biddings, and from ever permitting any sale actually made to be opened on the ground of an advance in the price offered. A steady adherence to these rules has been found to inspire great confidence in the good faith of the Commissioners towards the public: who appear to be always willing to attend when there is a reasonable confidence that they are brought together for the purpose of a *bona fide* sale, and not for the mere purpose of putting a price upon the land to aid the vendors in future speculation. The adjournment of sales without sufficient cause appeared to us to operate unfairly towards the first or early mortgagees who may be considered as having lent their money not at random but upon the security of the estate. Such an adjournment is generally a speculation for the benefit of the puisne incumbrancers at the risk of those whose rights ought to be paramount.

Seventhly.—The Commissioners have laid it down as a general canon for their guidance in the discharge of their duties, that it is incumbent upon them to take care that any party who uses moderate diligence in the pursuit of justice shall not be frustrated by a point of form; and that the neglect of any mere practice shall not be met by a disproportionate penalty.

5. What, according to your experience, have been the practical results of giving a parliamentary title?

The following appear to be the most important results of giving a parliamentary title.

First.—The absolute and final settlement and ascertainment of the rights of all parties interested in the land, including those of leasees and tenants, thus closing many sources of petty litigation. This to some extent implies that dormant claims may be prematurely extinguished, but we have no reason to suppose that this has occurred to any material extent.

Secondly.—A great inducement to monied men to invest in the purchase of land, by giving them possession of the estate purchased, free from all fear of being involved in litigation, and with an exact binding statement of all interests affecting land, and with a title so simple that their deed of

conveyance is almost as good as ready money, and admits of being disposed of again without material expense. It is a further inducement, that they are able, beforehand, to estimate the legal expenses incident to the purchase, and to calculate tolerably accurately when they may expect possession.

Thirdly.—Practical facilities for the sale of large estates in numerous lots, which under the former system was often impracticable, and always attended with great expense.

Fourthly.—An increased disposition on the part of incumbered proprietors to sell a sufficient portion of their estates to pay off charges, arising mainly from the removal of artificial impediments to the transfer of land.

Fifthly.—The gradual abolition of receiverships over land for the purpose of paying off debts.

6. In your opinion ought the privilege of obtaining parliamentary title to be continued and made permanent, and should such privilege be confined to incumbered estates, or limited to lands of any particular tenure?

We are of opinion that the privilege of obtaining parliamentary title ought to be made permanent, and that it should extend to all estates sold under judicial process adapted for the purpose, whether incumbered or not; and that it should apply to the sale of all land, whether held in fee-simple, fee-farm, or under leases.

Whether the privilege ought to be conferred upon the occasion of the transfer of partial interests in land, such as estates for life, and remainders, and future and contingent rights, is a question deserving of consideration, upon which we are not prepared to offer a decided opinion. With the view of diminishing the acknowledged evil of placing landed estates under the charge of court receivers, it would, probably, be desirable to facilitate the transfer of life estates in possession by conferring the advantage of a parliamentary title.

Any law confining such a privilege to incumbered estates can always be evaded with great facility.

7. Can you estimate the time within which the business of the court can be completed, supposing the period now limited for receiving petitions is not extended?

Assuming that there will be no extraordinary influx of petitions between the present time and the last day for receiving petitions, we think that the period prescribed by the Act of Parliament (*viz.*: two years and the duration of the then ensuing session of Parliament,) will be sufficient for the completion of the business of the court, so far as its completion rests with the court; but there will probably then remain considerable funds to be disposed of under the 35th section of the Act; and there may be some cases not concluded, owing to the amount of litigation involved in them.

8. Is the present staff of officers and clerks sufficient for the effectual discharge of the business of the court?

In answer to the third question, we have suggested some alterations of practice which, if carried into effect, would cause changes in the staff of officers and clerks.

There is also wanted a General Clerk at the

head of the General Office, the time of the gentleman now filling that office being fully occupied in the performance of his duties as Taxing Master.

The addition of a clerk in the taxing office, and of a clerk in the auction office, and of an additional clerk in the notice office, are under the consideration of the Commissioners.

The Act of Parliament (4th section) contemplates the appointment of a Secretary, and the General Rules attribute certain duties to him by that name; but in fact the office is merely nominal, and its duties are performed by the gentleman who fills the office of Registrar. Upon a re-constitution of the court, the office of Secretary might be dispensed with.

If the office of Master should be continued, it will be necessary that he should have a clerk or examiner.

The Commissioners think it right to add, that the transaction of business is very much impeded, and the profession as well as the Commissioners subjected to great inconvenience, from the locality of the court being so remote from that of the other courts.

JOHN RICHARDS.

MOUNTFORT LONGFIELD.

CHARLES JAMES HARGREAVE.

PAPER No. 3.—QUESTIONS ADDRESSED TO THE OFFICERS OF THE INCUMBERED ESTATES COURT.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?
2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.
3. Give a detail of the general course of practice and mode of procedure adopted in your office.

ANSWERS OF S. W. FLANAGAN, ESQ., TO QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Master, and have held it since December, 1850.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

As to their nature, my duties are partly ministerial, partly judicial. Their particulars are as follows:—*Ministerial*—settlement of all rentals, conveyances, partition and exchange orders. *Judicial*—adjudicating on all tenant's objections; references made to me by the Commissioners; adjudicating on all applications for orders for deeds on behalf of purchasers, surveys, valuations; adjudicating on all applications for orders on persons to lodge deeds; adjudicating on all applications for certificates for taxation of costs in Chancery, and transferring deeds from Court of Chancery to Incumbered Estates Court. Those matters which I have classed under the head "*Ministerial*" are all subject to the approval and revision of the Com-

missioners; those under the head "*Judicial*" to *appeal* to the Commissioners. As to the time occupied in the discharge of my duties—this has varied considerably. In the year 1851–2, and in the year 1852–3, the office attendance was habitually from 10, A.M., till 5, P.M., for *weeks* till 6, P.M., and on many occasions till 7, P.M. In the year 1853–4 the *average* office attendance did exceed from 10, A.M., till 5, P.M. In the present year, *i.e.*, from October, 1854, to the present time, I have never been detained later than 4, P.M., and my business has often been finished before that hour. In addition to the office attendance, the time occupied at home has been in all years (save the present), on an *average*, from *two to three* hours daily; in the present year, about *two* hours.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

As to the general course of practice: matters of course, *i. e.*, *ex parte*, from 10 till 11 o'clock, then motions on notice, then settlement of conveyances. As to mode of procedure; in matters classed under head "*Ministerial*"—1st, as to rentals—when an order has been obtained from Commissioners for settlement of a rental, notice of settling the rental before me is served on all persons who have entered appearances in the matter, and, in all cases where practicable, on the owner, whether he has appeared or not. Draft rental as prepared by solicitor having carriage is then compared by me with notices served on tenants; affidavits of service on tenants are examined; tenants heard, and all deeds referred to in rental examined; *lots* are arranged; conditions of sale, if any required, settled.

As to conveyances: Draft prepared by solicitor for purchaser, with approval endorsed of solicitor having carriage of sale, is lodged with me, with auction clerk's certificate of sale, and a copy of rental. This draft I read at home, compare with rental and conditions; and on the following day, if the solicitor for purchaser attends, and the form be correct, I examine the deeds (if any) referred to in conveyance. Having finally approved of it; I then transmit it to the Commissioner in the matter, for his final perusal and approbation.

Partition and exchange orders: These are in the nature of conveyances. In all cases I read the abstract of title, and prepare the order accordingly. Of the former there have been very many, of the latter very few. These orders, when finally settled by me, are passed on notice to all parties interested, and, as in case of conveyances, transmitted to the Commissioner for his final approval.

As to matters classed under head *judicial*: tenants' objections are decided on notice; where objection filed by solicitor, to solicitor; where not filed by solicitor, to tenant. Where the tenant is in such a condition of life that notice through office would be sure to reach him, on notice transmitted accordingly; where not, notice must be served personally, and affidavit of service produced to me; and notice must be for some *fixed* day, not earlier than one week from date of service.

Tenants' objections are very numerous, and sometimes very trifling; their character at others rais-

ing very serious questions—of fact and of law. Where a pure question of law is raised, I proceed on the affidavit filed and the documents referred to. Where evidence becomes necessary, as it generally does, I proceed according to the nature of the case—either on affidavit or *viva voce* testimony. The latter I prefer, and have always found more satisfactory. Where the testimony is very conflicting, and the case is sufficiently important to justify it, I direct (subject to the approval of the Commissioners) an issue of fact to be tried. Where, on the other hand, a serious legal question is raised, I leave the parties impeaching the lease to proceed at law or in equity as they may be advised. Very often—all parties so desiring—I decide myself on all questions raised.

As to references made by the Commissioners: Where a reference is made I require a notice to be served on all persons interested to attend to take my directions under the order of reference. I then give such directions as I may conceive necessary according to the nature of the reference. Where a question of fact, and an issue sufficiently raised on the documents already before me, by directing the parties to go into evidence on a day named, either by affidavit or *viva voce*, as already explained under head of tenants' objections; where issue not sufficiently raised, by directing a charge and discharge to be filed, and then proceeding thereon; where a mixed question of law and fact, I adopt similar course as above, but generally directing a charge and discharge to be filed. I have found this latter course (save in the most simple cases) to be the better course, and ultimately the less expensive. As to references, they are necessarily very various in character.

As to orders for surveys, valuations, and all other matters enumerated above: they are, according to circumstances, disposed of, either *ex parte* or on notice—*ex parte* when no appearances entered; on notice when appearances entered; and in both cases on affidavits and documents, showing the necessity for the order sought.

S. W. FLANAGAN.

ANSWER OF S. W. FLANAGAN, ESQ., TO A FURTHER QUESTION SUBMITTED TO HIM.

4. Does any defect or imperfection in the course of practice in your office occur to you? If so, state the same, and any remedy which you can suggest.

As already explained in my former answers, my duties are twofold, wholly different in character, what I called ministerial, and judicial in contradistinction from the former.

The former would be more advantageously discharged by a clerk, in the office, and under the immediate supervision, of the Commissioner. Such a mode of procedure would be more expeditious, less expensive, and save an immensity of labour.

As regards what I have designated my ministerial duties, I would also submit, that, in my opinion, they would be more satisfactorily, expeditiously, and less expensively discharged by the Commissioner in the matter. All references necessarily

entail expenses, which would be avoided if the matter were decided as I have suggested.

S. W. FLANAGAN.

ANSWERS OF HENRY CAREY, ESQ., SECRETARY, &c., TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

Secretary, Registrar, and Examiner. I was appointed to the office of Examiner in the opening of the Commission, in October, 1849. I immediately afterwards assumed the duties of Assistant-Secretary and Registrar; and on the promotion of Mr. Flanagan to the office of Master, on the 10th December, 1850, I was appointed Secretary, in conjunction with the offices I had theretofore held.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

As Secretary:—Signing all orders for payment of money and transfer of stock, and for investment and sale of stock, and for receiving funds from Chancery; perusing and signing all certificates which pass the seal of the Commissioners, *i.e.*, for discharge of Chancery Receivers, obtaining deeds from Chancery of absolute orders for sale, to discontinue proceedings in Chancery; perusing and keeping powers of attorney, comparing parcels, purchasers' names, and certificates of payment of purchase money in all conveyances, and signing same as certifying such comparison; perusing, settling, and signing notices to tenants, under the 13th General Rule, signing notices to claimants and incumbrancers; superintending the preparation of returns ordered by Parliament and the Government; keeping the accounts of the incidental expenses of the Commission, and disbursing same; conducting the correspondence of the Commission, and the general superintendence of the official department of the Commission. As Registrar:—Perusing and signing all orders which pass the seal of the Commission; reading petitions for sale, partition, and exchange, with schedules thereto, and drafting the orders thereon; drafting special orders made by the Commissioners and Master, in chamber; inspecting affidavits of service where any special matter is stated; reading statements of facts and leases, and settling conditional and absolute orders for the conversion of renewable leases into fee-farm grants; attending the Commissioners, sitting in full court, and taking down and drafting all orders made therein. As Examiner:—Attending the Commissioners in their chambers, and taking down the *viva voce* examination of witnesses; and when not engaged in any of the foregoing duties, assisting in the discharge of the more general business of the office.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The foregoing details will necessarily suggest the general mode of procedure in this office. There is a general registry kept of every step and proceeding in each particular matter, which shows at one glance the progress made in each—the intervals of time, and orders made. There is also a registry of

all conveyances executed by the Commissioners, specifying the matter, grantees' names, parcels and amount of purchase money and date. Indexed entries are also made of notices to claimants and incumbrancers, to tenants under 13th General Rule; of objections by tenants, and requisitions to the Paymaster of Civil Services and Board of Works with respect to Government charges, and of the certificates from these departments thereon. With respect to the payment of money the procedure is as follows:—the fiats for payment are transmitted from each Commissioner to the Accountant's office, and on being entered by him, are sent to the Secretary's office, on which the cheque or order on the bank is drawn up, and afterwards signed by the Secretary. It is then sent to the Commissioners' Examiner, who compares it with his block fiat, and initials it as thus examined. It is then signed by two Commissioners, and returned to the Secretary's office, where it is retained until applied for. The party applying (if in person) produces an affidavit that he is the person entitled thereto, and that the sum is due; he then signs a receipt-book kept for that purpose, and (if necessary) is identified. Where the payment is made under power of attorney, the power is examined by the Secretary, or in his absence, by the Assistant-Secretary, and the same process is observed as in personal payments. The cheque is then sent to the Accountant's office to be entered as a payment in the ledger; and when entered, is returned to the Secretary's office, and delivered out.

The late Act, which gives the Commissioners jurisdiction to convert renewable leaseholds into fee-farm grants, has caused a considerable accession to the business of the office. The Registrar is obliged to closely inspect the leases, to ascertain the covenants to be commuted or to remain outstanding, and specify them in the order, and to see that the calculations as to the amount for which the fines are proposed to be commuted are correct, and to examine the affidavits of the service of the conditional orders and statements of facts. The inspection of the notices to tenants under the 13th General Rule requires an accurate perusal of the description of each tenancy. The amount of general business arising from the preparation and issue of documents so numerous and multifarious must be obvious, and a considerable portion of the Secretary's time is thus occupied, as well as in advising as to practice, &c. The usual time devoted to the discharge of the duties is from ten until four o'clock daily, while the Commissioners are sitting, which, with the exception of short intervals at Christmas and Easter and the summer recess, continues throughout the year; at which latter periods the attendance is from twelve to three o'clock. The Secretary is generally allowed about six weeks' leave of absence during the summer recess. When there is a more than ordinary pressure of business the attendance of the Secretary is not confined to the above hours.

HENRY CAREY.

ANSWERS OF ROBERT K. PIERS, ESQ., TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I have held the office of Notice Clerk since the opening of the Commission, in October, 1849, in addition to which I have performed the duties of General Clerk, since the early part of the year 1851, from which period the services of Mr. Fitzgerald (General Clerk originally appointed) have been exclusively devoted to the taxation of costs.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

The particular duties of this office, which are performed conjointly by myself and Mr. Frizell, my assistant, are: 1st. To receive all notices or orders lodged for transmission, and compare each copy with the originals which are filed in the office. 2nd. To enter the said documents in a book kept for that purpose under proper headings, with the title of matter, nature of document, name of attorney or party lodging same for service, and name and address of the attorney or party on whom service is required, and to stamp with office seal each notice. 3rd. To post such notices enclosed in envelopes, properly directed and sealed, in the general post office, before six o'clock on the day when same are lodged for transmission; and afterwards to enter in the above-mentioned book a memorandum or minute of having so posted same. 4th. To enter in a book kept for that purpose, under a proper index, a memorandum of all notices of cause being shown against making absolute a conditional order for sale; and in case no cause shown, to ascertain if time allowed for showing cause has expired, afterwards to fill up and deliver to party requiring the certificate of no cause. 5th. To enter in a book kept for such purpose all motions to be heard before the Master of this Court. 6th. To arrange and classify all notices of court and chamber motions to be heard before the Commissioners. 7th. To examine and sign certificates of all parties who have entered appearances and lodged claims as creditors, that they have all been served with notice of draft schedule having been lodged in the General Clerk's office. 8th. To sign and seal notices for publication in various newspapers of draft schedule having been lodged in General Clerk's office. 9th. To enter in a book kept for such purpose all letters from Commissioners' Examiners, and from the Keeper of the Deeds, relating to property ordered to be sold.

In addition to the foregoing duties as Notice Clerk, those performed by me as General Clerk, before referred to, are as follow: 1st. To receive affidavits verifying petitions, and to examine the petitions and abstracts of title, with a view to ascertain if they comply with the general rules and rules prescribed by the Commissioners. 2nd. To receive affidavits as to any amendments subsequently required to petitions. 3rd. To enter the petitions as they are lodged in two books with proper index, kept for such purpose, under proper headings, with the title of matter, name of petitioner, name of so-

licitor lodging same, and date of filing, and number of petition; also, to endorse the date of filing and number to correspond with books. 4th. To receive affidavits verifying abstracts of title lodged subsequent to petition, and preliminary abstracts. 5th. To receive claims by incumbrancers. 6th. To receive affidavits to objections to draft schedule of incumbrances, and as to lodgment of deeds in record office, and affidavits verifying abstracts of title lodged subsequent to petition, and preliminary abstracts of title; also, as to searches directed by Commissioners in registry office, and various other affidavits. 7th. To sign attested copies of documents taken out by solicitors and other parties. 8th. To examine and sign certificates of objections and claims. 9th. To search for and exhibit to solicitors and the public all the various documents above referred to, and replace them in their proper repositories. 10th. To attend generally to the public, answer all questions relating to practice as to business done in offices under my charge.

I am fully occupied from ten to four o'clock each day, and later if business of the offices require it; and on other occasions, when Commissioners are not sitting, from twelve to three o'clock each day.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The details given respecting question No. 2 fully suggest the mode of procedure adopted in my office.

ROBERT K. PIERS.

ANSWERS OF THOMSON SEED, ESQ., TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Accountant, and my appointment bears date, April 1st, 1850.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

Since the commencement of my appointment, in April, 1850, until the month of January, 1853, I had the entire duties of this office to perform, having for part of the time only had the assistance of a writing clerk for the purpose of copying accounts and other documents; and I continued to have the custody and keeping of the estates ledgers until the month of October 1853; but in consequence of the increasing magnitude of the business the accounts were getting into arrear, and the Commissioners deemed it necessary to augment the staff and apportion the duties of each officer and clerk.

For the first three years my time was completely occupied from 10 o'clock in the morning, until 5 o'clock, P.M., and I was unable to take advantage of the annual vacations. The time occupied at present is from 10 o'clock until a quarter or half-past 4, P.M., and my present duties are annexed.

1. The general superintendence of the office. 2. Arranging and settling the Commissioners' flats for payment in the order directed, part being ordered to be paid in cash, part by sale of stock, part by quotations in stock, and part by investment in the funds previous to payment, and part by abso-

lute credits. 3. Examining and initialing the Commissioners' drafts on the bank for cash, consols, and stock, in payment to claimants, &c. 4. Granting certificates of funds. 5. Granting certificates of non-lodgments by purchasers. 6. Granting certificates of absolute credits. 7. Granting certificates of dividends on stock. 8. Granting certificates of special lodgments. 9. Granting certificates of sums retained or impounded. 10. Examining and certifying copies of accounts. 11. Answering queries relating to the general business of the department. 12. Granting and signing receipts for certificates of lodgments in bank. 13. Certifying investments and sales of stock, under order of Commissioners. 14. Ordering quotations of stock for payments and dividends. 15. Examining, certifying, and assisting in striking the annual general balances with the bank. 16. Custody and posting of the Government stock ledger.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

1. On receipt of a certificate of lodgment from the bank of Ireland, which certificate exhibits the title of the estate, the name of the purchaser, and the amount, an account is opened in the general ledger in accordance with the bank. 2. The purchase-money, as it thus comes into the credit of each estate, is frequently invested in the Government funds under a Commissioner's order and at the request of the solicitor having carriage of the matter, thus changing the general feature of the account. 3. When payments are ordered to be made out of the funds brought in, the Commissioner (in whose chamber the matter may be) issues a fiat containing the names of the different parties who are to be paid, and the several sums they are to receive, which fiat is sent to the Accountant's office. 4. On receipt of the fiat, it is entered in the fiat book, and after having had endorsed thereon any or such sum or sums which may previously have been ordered to be retained or impounded, or that may have remained uncalled for, it is handed to the Accountant for arrangement in the way ordered by the Commissioner; and when so settled it is sent to the Secretary, whose duty it is to draw the cheque for payment. 5. When the cheque is prepared for issue and called for, it is sent to the Accountant's office to be entered as paid in the fiat book; and when examined and initialed by the Accountant, it is sent back to the Secretary for issue. 6. The cheques are also recorded in a diary and afterwards entered in a journal kept by Mr. Doyle, the Junior Clerk, who also puts the proper folio to each account, for the purpose of the amount being finally entered in the general ledger. 7. The books of this department are read over and examined by the Accountant and First Assistant every week, for the purpose of being at all times prepared for certificates of funds.

There are three distinct "sets of books" kept in this office, viz.:—

1. The general estates ledgers, five in number, under the management of the First Assistant Accountant. 2. The Commissioners' "flat ledgers," four in number, under the management of the Second Assistant Accountant. 3. The bank cash,

and Government stock ledgers, two in number, the former kept also by the Second Assistant, and the latter by myself. Besides a daily journal kept by the Junior Clerk, Mr. Doyle, whose time is fully occupied with this book, a minor bank book, filling bank receipts for lodgments, and copying accounts, &c.

THOMSON SEED.

ANSWERS OF RICHARD A. FITZGERALD, ESQ., TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

Taxing Officer and General Clerk; since the 24th day of October, 1849.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

In respect to my primary duty as Taxing Officer, the taxation of all costs incurred in this court—this I have done without any assistant; and all costs lodged for taxation up to the 23rd day of December last, have been taxed by me, and no arrear exists.

The amount as taxed and certified up to this date is as follows—

	£	s.	d.
Amount as lodged,	434,294	12	3
Deductions thereout,	100,713	12	7

Nett amount as certified by me, £333,580 19 8

In addition to this sum, costs have been taxed up to this date, but have not been yet certified, amounting to £31,837. As far as I can judge, the deductions in the latter sum would appear to be in the same proportion; thus making a total taxed by me of £466,131 12s. 3d.

As to the time occupied by me: from 10 o'clock, A.M., till 5 o'clock, P.M., daily, in my office; except from first week in August to first week in October, when I attend only once in each week. In addition to which I read all costs at my own house, previous to the public taxation, and make my deductions and notes thereon, which enable the parties to come prepared with the various necessary requirements and objections.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

As regards costs: at the time of each bill being lodged I appoint the day for taxation; and only give summonses for so much business as I can with due exertion transact during each day; any party taking a summons, and not attending (without sufficient excuse) on the day named, I put at the foot of the list. The result is, I scarcely ever have a party absent; as the profession find their own time is saved by being punctual in attendance.

The duty of the General Clerk's office is performed by three assistants. In this office the petitions, affidavits, objections, final schedules, and draft conveyances, are kept, and appearances entered, and copies of those various documents bespoken and issued, and certificates of lis pendens given when required. The office is open from 10 till 4 o'clock daily during the sitting of the Commissioners, and from 12 o'clock till 3 o'clock at other periods. I do not attend personally in this

office, more than each day to see that the assistants are in attendance, and the duties performed by them.

RICHARD A. FITZGERALD.

(To be continued.)

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DUBLIN, JUNE 23, 1855.

A LEADING object of the Common Law Procedure Act was to provide for the uniformity of the practice of the Superior Courts. When our present system is compared with the several concurrent systems which, even in our days, used to embarrass both judges and practitioners, it cannot be denied that this most desirable object has been already largely attained. There are no longer General Rules applicable to each individual court, and hence a written law for each separately. Something has, however, to be done before entire uniformity of practice will be attained. Several minor points of practice have been ruled in the different courts in different ways, and the judges of each evince a resolution to adhere to the views already adopted. Amongst the questions left somewhat at large by the Procedure Act, and the New Rules, which have received these various solutions, we may particularize the controversies as to what constitutes a satisfactory affidavit of merits, and also as to the degree to which a defendant seeking to plead double should verify his proposed defences. Other points might possibly be enumerated, in the determination of which each court looks only to its own precedents, and refuses the assistance of others, and more of these discrepancies will probably yet arise. Perhaps

there is no occasion upon which the inconvenience and we might almost say absurdity, of these various readings of the Act strikes the observer, more than in the Consolidated Practice Chamber, (held under section 238,) where a judge, before he rules a particular point, has occasionally to inquire out of what court the motion proceeds, so as to give to the litigants the benefit of the *law of that court*. We submit, therefore, that it is the duty of the judges, under section 233, to reconcile these deviations from uniformity of practice, whenever they have occurred, as in many cases they have already done, and to promulgate from time to time such General Rules upon these subjects as will carry out the spirit of the Procedure Act.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 196.)

ANSWERS OF JAMES M'DONNELL, ESQ., TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Examiner to Commissioner Longfield. I have held this office for four years and ten months.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

The nature of my duties is to assist the Commissioner in the minor details of his office. The par-

ticular duties performed in my office are:—1. To take charge of and arrange the books and documents kept in Commissioner's chamber. 2. To keep his list of chamber motions and sales. 3. To read and note his titles. 4. To examine the title deeds as detailed in my answer to the third question. 5. To make copies of the Commissioner's directions for searches and rulings. 6. To compare the conveyances to purchasers with the drafts. 7. To settle the draft final schedules of incumbrances. 8. To compare the fair copies of the draft final schedule with the original draft. 9. To see that the proper parties are served with notice of the draft final schedule of incumbrances, and that the advertisements of same are duly published. 10. To keep, in the manner detailed in my answer to the third question, an account of the money disbursed. 11. To give general information to the public on matters of practice, connected with the Commissioner's office, and to show to them such of the books and documents in my custody as they are permitted to inspect. 12. To make from time to time list of cases in delay, and, if necessary, send notices to the solicitor having the carriage of the proceedings, calling upon him to account to the Commissioners for such delay. I have the assistance of a clerk, Mr. Richd. H. V. Archer, in the discharge of my duties; he usually performs those numbered 2, 5, 6, 8, and 9; I myself those numbered 3, 4, 7, 10, and 12. Those numbered 1 and 11 are performed in common by us both. My office is open to the public from 10 until 2 o'clock. From 2 until 4 o'clock I and my assistant are engaged in entering up accounts; comparing original deeds with the abstract of title, entering up the indices, making copies of the Commissioner's rulings, arranging the papers used during the day, &c. Titles and draft final schedules I have, for the most part, to note and settle after office hours, partly because I am otherwise fully employed from 10 until 4, and partly because this part of my business requires more undivided attention than I can give to it in an office where I am necessarily liable to frequent interruptions.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The following is the detail of the course of practice and procedure adopted in my office:—I follow, as the most convenient mode of answering the question, the course of a single petition through my office. When a petition is sent to Commissioner Longfield's office, I lay it before him. When filed, the original petition and the documents accompanying it are sent to the Registrar, the counterpart filed in my office, and its number on the file entered in the column No. 3 of an alphabetical index, kept in the following form:—

Name of Owner. 1.	Name of Petitioner. 2.	Petition. 3.	Petition Book. 4.	Abstract Book. 5.	Search. 6.
Sale Book. 7.	Rental. 8.	Schedule. 9.	Schedule Book. 10.	Account Book. 11.	

And in column No. 4 the page of the Commissioner's petition book, in which the Commissioner himself enters the particulars of the cause, the fiat,

and all rulings in chamber thereon, up to the hearing of the schedule. I may hear remark that the above form of index has been adopted as showing at a glance the state of the proceedings in any cause, besides answering the usual purposes of an index. When any notice of motion in chamber is brought in for service, I read it, to see that it is in proper form, sufficiently explicit, and such as the Commissioner will hear in chamber. It is then entered in the Commissioner's list of motions (as many motions as it is likely the Commissioner can dispose of, and no more, being entered for each day,) and initialed, to satisfy the notice clerk that it has been entered in my office. When the Commissioner makes his ruling on a motion, any person wishing to have a copy of it, applies to my clerk. If only one copy is required he usually makes it out himself, and hands it to the party asking for it. If more than one copy is wanted, or likely to be wanted, he sends a copy of the ruling to the scrivener's office where a copy is made out for each person requiring one. As soon as the abstract of title and deeds are lodged in court, the solicitor having the carriage of the proceedings (hereinafter called the solicitor,) ought to notify this to me; whereupon I send to the General Clerk's office for the title, and place it in the Commissioner's list of titles for reading. I have no column in my index for titles, but keep a separate list of them, as it is material to have them arranged in the order in which they are lodged for reading, and also because they do not remain permanently in my office. At this period, if the solicitor requires it, and the title seems of sufficient importance, I direct that it shall be laid before counsel for his opinion thereon; but in this case I do not enter the title in the Commissioner's list for reading until it is returned to me with counsel's opinion. I then read and note the title. It is my duty to see that the parcels comprised in the absolute order for sale are mentioned in the deeds abstracted, and that the title is drawn in conformity with the Commissioner's directions. If the title is not properly drawn or defective in any way I have it amended, and the defect if possible removed before it is submitted to the Commissioner for his perusal; the page of the book at which I note it is entered in column No. 5 of the index. I also see that it is verified by affidavit and that the deeds mentioned in it are lodged in court, or their absence satisfactorily accounted for, and secondary evidence given of their contents. I compare the principal deeds with the abstract, so far as to enable me to see that the most material points (*e. g.*, the parties, parcels, granting part, limitations, and execution) are truly abstracted. When the Commissioner has read the title, the original direction for searches (on which also the Commissioner notes any observations or directions in relation to the title, and the conditions of sale if he thinks any necessary) is filed, and its number on the file entered in column No. 6 of the index. A copy of these directions is given to the solicitor. I next make out on the back of the original order for sale (to enable the solicitor to go before the Master to settle the rental) a certificate stating that the Commissioner has approved of the title, and setting

forth any condition of sale or observations of the Commissioner which the Master should have before him on settling the rental. I lay before the Commissioner, for his approval, the draft rental sent from the Master; and when the day of sale is fixed, it is entered in the sale book, which is kept in the form of a diary, and the page of the sale book is entered in column No. 7 of the index. When the sale has taken place the rental is filed, and its number thereon entered in column No. 8 of the index. When the draft conveyances are sent in by the Master, I submit them to the Commissioner; and when approved of by him, forward them to the General Clerk's office. When the deed is engrossed, my clerk compares it with the draft settled by the Commissioner, and I compare the map with that on the rental, and then forward it to the Registrar. As soon as the draft of the final schedule of incumbrances (hereinafter called the schedule only) is prepared, the solicitor brings it to me with the searches which have been made in pursuance of the Commissioner's directions, and a certificate from the Paymaster of Civil Services in Ireland, stating what sums, if any, are due out of the estate for drainage loans. It is my duty to see that the searches follow the Commissioner's directions, that they disclose no act which would vitiate the title, and that all subsisting charges appearing on them, the abstract of title, and Paymaster's certificate, are set down in their apparently proper priority in the schedule. When the schedule has been thus made out, two fair copies of it are prepared by the solicitor, and compared with it by my clerk: one of these is submitted to the Commissioner, and when approved of and signed by him, is given to the solicitor to file in the General Clerk's office; the other is filed in my office, and its number on the file entered in column No. 9 of the index. At this period the solicitor prepares and serves his notice of the filing of the schedule, which is passed through my office in the same manner as other notices. Before the schedule is heard by the Commissioner the solicitor has to produce the documents necessary to show that all persons whom the rules require to have notice of the settling of the schedule have been served, and that the notice has been published in such papers as the Commissioner has directed. If any service or publication has been omitted, the omission is stated on the back of the schedule. When the schedule comes on for hearing, the Commissioner enters his rulings thereon, in a book called his schedule book;—column No. 10 of the index shows the page of this book in which the rulings are made. The Commissioner makes his money flats in a cheque book; I copy them into an account book kept for the purpose, entering the page of the account in column No. 11 of the index; and my clerk copies the money flats into the counterfoil of the cheque book. He then takes them to the Accountant and gets his receipt for them on the counterfoil. When the drafts on the bank are made out in pursuance of the Commissioner's money flats, I compare each with the entry in my account book previous to its receiving the Commissioner's signature, and mark it off therein, to prevent a duplicate draft from issuing. When the Com-

missioner has made money flats for all the funds in the cause, it is marked off in my index as wound up. It is my duty in all cases of doubt or difficulty arising in my office, to lay the case before the Commissioner, and take his directions in relation thereto; such cases are of very frequent occurrence, especially with respect to the practice of the office in novel cases, and on the settling of the draft of the schedule. I have also frequently to apply to him about the title deeds, which are often difficult to get.

JAMES M'DONNELL.

ANSWERS OF R. D. URLING, ESQ., TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

The office of Examiner to the third Commissioner, which I have held since its institution. I was appointed on the first day of May, 1850.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

My duties are to assist the third Commissioner of the Incumbered Estates Court in transacting his business. Those duties may with more particularity be described as follows:—1. To arrange the business of the Commissioner, and keep all the books, papers, and documents used in performing that business. 2. To keep a "diary," in which all appointments are entered by me, and a book in which all sales of estates in his office are entered; all "notices of motion" before the Commissioner are brought to me in the first instance, that it may be ascertained that they are formally correct and properly entitled; if so, they are initialed by me, and entered in the "diary" prior to transmission through the notice office. 3. To communicate with all persons who may come to the office of the third Commissioner to give information or to make inquiries relative to cases in the office, and to give directions as to the course of practice generally. 4. To receive petitions which may come to the third Commissioner to be fiat, to lay them before him for fiat, and to enter them in a book denominated "index of cases," with a reference to the book and page in which a copy of the fiat is entered; to send down fiat petitions to the Registrar's office, and to receive the duplicate copy petitions which is filed in my office, and thereafter kept for reference. 5. To receive abstracts of title, ascertain that they are prepared in accordance with the rules of the court, and are properly verified and entitled; to enter them in the "Examiner's list," that they may be taken up and read in their due priority. 6. To direct that counsel's opinion shall be obtained on the abstract where it is long or complicated, and to give orders of reference to the Master of the court to "settle the rental" when the case is in a fit state to proceed to a sale. 7. To read through every abstract of title lodged in the office, (whether counsel's opinion has been obtained thereon or not,) and to make notes of the contents and purport of every deed and document referred to in the title. [The number of abstracts read and noted as above

amounts to between 120 and 130 per annum, and the notes already made by me are collected and bound into seven quarto volumes.] 8. To lay the abstract of title together with my notes thereon (and counsel's opinion, if taken) before the Commissioner, and to give a copy of his observations and directions on the title to the solicitor having carriage of proceedings. 9. To receive draft conveyances from the Master of the court, lay them before the Commissioner for approval, enter them in a book called the "conveyance book," transmit them to the General Clerk's office that attested copies may be made, and compare the engrossments of such conveyances with the original drafts. 10. To examine the maps on deeds of conveyance, to ascertain that the property conveyed is correctly delineated, to see that such deeds are formally correct and are stamped, and signed by all persons whose signatures as assenting parties or otherwise are required; to initial all erasures or interlineations on such deeds, and finally, to transmit them to the Registrar's office to be sealed prior to execution. 11. To examine all searches made in the "office for registering deeds"—to ascertain that they are made against the parties and for the periods required, and that all deeds "excepted" and "returned" on such searches are satisfactorily accounted for, or shown not to affect the lands sold; and for this purpose to direct affidavits or declarations to be made, and copies of "memorials" to be procured, and to examine such affidavits, &c. when made. To examine in like manner all "searches for judgments" against the present or former owners of the estate, and call for such evidence as may be necessary with regard to them. Any points on which I am not satisfied with regard to any of the above are reserved for the Commissioner's directions, and it is my duty to see that all his directions with regard to them are carried into effect. 12. To settle (provisionally) all draft "schedules of incumbrances," having regard to the notes of title and directions thereon, and to the searches; to ascertain that schedules are prepared in conformity with the rules of the court, and contain a full statement of all charges and incumbrances affecting the estate, arranged in their proper priority. 13. The schedule having been provisionally settled, and any points thereon reserved by me for the Commissioner's consideration having been disposed of, to see that a compared copy of such schedule is lodged in the General Clerk's office for public inspection. 14. To settle a "final notice to claimants," which states the lands which have been sold in the matter, and calls on all persons who object to the schedule so lodged as in No. 13, to file objections on or before a day named in the notice, and to appear on the "hearing," which I fix for a day about five weeks distant; also to add a schedule to the notice, setting out any old charges, judgments, &c., of which no information can be obtained; and, finally, to give directions as to the papers in which such notice is to be advertised. 15. On a day immediately prior to the "hearing" of the schedule, to examine the notice and other requisite papers and certificates, (seven in all); and to ascertain that such final notice has been

served on the six classes of persons required to be served by the rules of the court. 16. To enter all rulings made by the Commissioner in the "ruling book," and to keep that book indexed for reference; also to deliver attested copies of the rulings to all persons who may apply for them. [If short, such copies are made by my clerk on the spot; if otherwise, they are bespoken in a book kept for that purpose, and copied for the General Clerk's officer, where they are delivered to the party bespeaking them on payment of three half-pence per folio]. 17. When the final schedule is settled by the Commissioner, it is my duty to prepare a fair copy thereof for signature by him, and to enter on such fair copy all payments and other memoranda showing the disposition of the funds, so that every such schedule may present a complete list of all the payments, and answer the purpose of an account-book. 18. To make out "orders for payment" in the "money-order book," and make a duplicate or counterpart of each order: the original order, when signed by the Commissioner, is transmitted by me to the Accountant's office. 19. To make out orders for investment of fund in Government stock, or for sale of stock; and after same are signed by the Commissioner, to transmit them to the Registrar's office. 20. To examine drafts on the Bank for payment of cash, or for transfer of stock, and to initial them prior to their being signed by the Commissioners. 21. To make out orders for delivery of title deeds to such parties as may be entitled to them, and at a proper stage of the proceedings, myself to examine the deeds, or memorials, or copies, or other secondary evidence of the deeds, (in case they are not forthcoming,) in order to ascertain that the "abstract of title" is a fair and correct one, and accurately prepared from the deeds. 22. To act as Secretary to the third Commissioner, replying to communications which may be addressed to him in relation to the business of the office. 23. To examine the state of the various cases under the Commissioner's directions, and to write and transmit communications to solicitors on the subject of "dilatory cases," or cases which appear to have been a long time in the office without any effectual step having been taken in them, and to enter such cases and everything done in relation to them in a book known as the "dilatory book," for reference. 24. To give orders for the taxation of costs; such orders directing notice of taxation to be served on the persons who appear to me most interested in attending the taxation.

In the performance of the duties above enumerated, I have the assistance of one clerk. His primary duty is the custody of the numerous documents which are filed in the office, and which, amounting at present to over six thousand, are constantly augmenting in number. My clerk also assists in the performance of those of the above duties numbered 1, 2, 3, 4, 8, 9, 13, 16, and 18. The others are performed by me personally. My office is open to the public from ten o'clock to two o'clock each day. From two to five o'clock the time is devoted to the examination of schedules, searches, deeds, &c., which cannot be done amidst

interruption. My clerk is occupied after two o'clock in indexing the books, copying rulings, and other matters. The most severe duties of my office are the noting of abstracts, and the examination of searches (number 7 and 11 above). Little assistance can be given in the latter by a solicitor, and none at all in the former. These are matters which necessarily occupy much time, and call for unremitting care and attention. I have found office hours insufficient for the performance of these duties in particular, and have, since my first connexion with the Commission, been compelled to read and note abstracts at my own residence after office hours. During the spring and summer of last year, there was an unusual pressure of this kind of business, and I found myself under the necessity of devoting about two hours every evening to it, in order to prevent an arrear from accumulating.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The most convenient method of answering Question No. 3 will probably be, to give the history of a case in my office from its commencement to its close. At the beginning of every month a number of newly-presented petitions come up to be *fiated*—the mode of division being, that one-third of the petitions presented during each month are, at its close, taken to the office of each of the three Commissioners. Petitions are read, and orders (called "*fiats*") made thereon by the third Commissioner in the intervals of more pressing business, and without the attendance of any person: about 1,380 petitions have been "*fiated*" or "*dismissed*" by the third Commissioner since the Commission began operation in 1849. The *fiat* is made on the original petition, and is copied into a book, known as "*Commissioner's fiat book*;" the petition is then transmitted to the Registrar's office, and the duplicate copy filed in my office for reference. The next succeeding steps in the matter are chiefly of a routine character, and are taken in the various offices of the court, any application to the Commissioner being frequently unnecessary. If any application should become necessary, it takes place "*on notice*" to all parties who have "*entered appearances*" in the matter. The notices are examined by me prior to service, (as mentioned in No. 2 above). If the application is of an unimportant character, and does not affect any person interested, it is made as a "*motion of course*" on the sitting of the Commissioner, and before he enters into the "*list*." The distinct notices of motion served in this office amount to about forty per week; the number is, however, greatly increased at particular times; immediately prior to vacation, for example, when one hundred motions on notice are not unfrequently made and disposed of in a week. The Commissioner's "*rulings*" are made by him on the back of the copy of the notice, and are, on that or the following day, transcribed by me into the "*ruling book*," which is open for public inspection; copies of rulings are given to all who apply for them, (as mentioned in No. 16, above). As there is no machinery in my office for making attested copies of documents, attested co-

pies of the longer rulings are delivered to the public in the General Clerk's office; attested copies of short rulings are given to applicants in my office, without any charge being made for them. If the circumstances of the case do not call for any deviation from the usual course, nothing further is done in my office until the lodgment of the abstract of title, (as mentioned in No. 5 and 6, above). The abstract being properly prepared, and in conformity with all the rules relating to abstracts, is entered by me in a list, to be read in proper order: when read and noted by me, (as mentioned in No. 7, above,) the abstract as laid, together with my notes, before the Commissioner, and any objections to the title, or other observations which he may make, are copied, and communicated to the vendor's solicitor. "*Rentals*" and "*postings for sale*," when settled by the Master, (on reference to him for that purpose,) are lodged with me for final approval, and for directions as to the time and place of sale, mode of publication, &c., &c. These directions are given by me, subject to the Commissioner's approval; the case then passes into the "*auction department*," and nothing is done in my office until the title comes to be perfected, the "*schedule of incumbrances*" settled, registry and judgment searches examined, and title deeds compared with the abstracts; all of which operations are described in my reply to Question Number 2, above. The examination of searches is a very difficult and laborious operation, inasmuch as it frequently happens that from one to two hundred deeds and judgments appear on the searches, every one of which receives minute attention. The object of the vendor's solicitor is, in most instances, to show that these do not affect the estate sold in this court; and this renders the examination of affidavits and numerous other documents necessary. Also, the frequent consideration of such questions as—whether the owner of the estate for the time being had power to affect the estate by judgment or deed at the particular time when such judgment or deed appear on the search to have been given, and frequent inquiries as to the identity of the co-owners of judgments, also, as to the identity of lauds mentioned in deeds returned on the search; on the whole, this may be described as being one of the most laborious and responsible items of duty performed in this office—the reading and the noting of the abstracts being the other duty which occupies much time, and calls for extreme care and attention. On an average, one hundred and twenty-five *new cases* pass through this office during the year. After the schedule is provisionally settled, and all questions on title are disposed of by the Commissioner, a day is fixed for the "*hearing*," when all parties interested in the case attend, and all who object to the schedule, as provisionally settled, appear by counsel, in support of their opinions: the schedule is then on argument "*finally settled*" by the Commissioner, and a day fixed for "*allocation of the funds*:" a fair copy is then prepared under my direction, on which the "*allocation*" is made: orders for payment are made out by me in a "*money order book*," (as described in No. 18, above); and after being copied and signed, are transmitted to the Accountant's

office. The drafts on the bank are also examined and entered by me, before they are signed by the Commissioner. After discharge of all incumbrances, an order is made for payment of the surplus fund (if any) to the owner of the estate.

The above is an outline of a simple case in which no difficulty occurs. There are a variety of circumstances, however, which may occur to render a case more complicated; and some of these variations occur in the history of almost every case: several of them may as well be stated. It may be found impossible to effect the service of the conditional order for sale, as directed; an application is then made to substitute service. An error or omission in the petition frequently renders the amendment of the petition, or the presentation of a supplemental petition, necessary. Peculiarities in the tenures may render it necessary that renewals, or fee-farm grants, or partition orders, or grants under the recent Act, should be executed. Deeds of release by various parties are frequently required; or of conveyance to trustees for particular purposes; these deeds are, for the most part, submitted for approval by the Commissioners, prior to their execution. Applications by purchasers to be discharged, or for compensation, are frequent; also, applications to postpone a sale, or for a resale, or to sell subject to or else discharged from jointures, annuities, and other charges. It seldom happens that a fund can be allocated at once; sums of money are left in court for different reasons, and sometimes for considerable periods of time; separate accounts are opened with regard to some of these funds in court; the dividends paid annually or half-yearly to the parties entitled, and the principal reserved until some event, prior to the happening of which the fund is not payable to any person. In some cases the whole or a part of the funds realized on a sale is transferred to the credit of some cause, or petition matter, in Chancery: in this case, however, the searches are examined, and title investigated, as in the ordinary case, for *non constat*, that every person interested is brought before the Court of Chancery; and no such transfer is made without notice to every person who appears to be interested in the fund. A great number of other circumstances may occur to render the case to a greater or less degree complicated, and different from the simple outline given above. It will scarcely be necessary to allude further to them. It may, however, be broadly stated, that any deviation from the usual outline of a case takes place under the directions of the Commissioner, or, at least, with his sanction; and that almost every application made to the Commissioner comes, in the first instance, under the notice of the Examiner, who exercises a general supervision over the details of a case, and is responsible for the carrying out of the Commissioner's directions. I have not alluded to the procedure of any other office in the court, the terms of Question No. 3 precluding a detail of more than the practice of my own office. Perhaps I may be allowed to remark, that an outline of the principles and practice of the court generally, has very recently been contributed by me

to the "*Law Times*,"—the organ of the legal profession in England.

RICHARD DENNY URLING.

ANSWERS OF RICHARD ROTHWELL, ESQ., TO
QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Examiner to Baron Richards, Chief Commissioner, and I have held that office from 31st December, 1850, to the present day (20th of January, 1855), being upwards of four years.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The general course of practice and mode of procedure adopted in my office is as follows:—

Petition.—All petitions for sale, partition, or exchange, are, as of course, transmitted monthly from the office of the General Clerk to that of the Commissioners; and those laid before the Chief Commissioner are entered in a book, kept exclusively for that purpose in my office, and on being so entered, are submitted by me to the Chief Commissioner, with the accompanying abstract and all other papers lodged therewith. The Chief Commissioner then, as it suits his convenience, makes his fiat on each petition, either directing that a conditional order for sale shall issue, and stating on whom the same is to be served, or stating his objections, if any, to such fiat, and occasionally suggesting amendments or alterations in the petition. Whenever a fiat is made, authorizing the issuing of any order by the Registrar, I cause such fiat to be transcribed on the duplicate petition, which remains in the office of the General Clerk, and initial the same; but in case of objections by the Chief Commissioner to granting a fiat, a communication is forwarded by me to the solicitor having carriage of the proceedings informing him thereof, and requiring him to supply the information required. Indeed, in every case, I inform the solicitor by letter, or note, or otherwise, of the ruling on each petition.

Abstract of Title.—On production of the absolute order for sale, and a certificate of original deeds and documents lodged to vouch the abstract of title, the full abstract of title is brought into my office, and there examined in the various particulars required by the general rules and directions of the Commissioners; and where occasion requires, I get over from the Record Office the deed box, and see that the documents and muniments of title are truly abstracted. I also see that the abstract is prepared in conformity with the form prescribed by the printed directions of the Commissioners of the 1st November, 1851, and that same is, in all other respects, correct; and if the abstract appears to me to be unobjectionable in point of form, and in all other respects correct, I authorize the solicitor to lay the same before his counsel, with the five queries approved of, by the general directions of the Commissioners of the 1st November, 1851. On the abstract and opinion being returned and relodged in my office, they are then sent in to the Chief Commissioner,

with the petition and such documents as may be deemed necessary for his directions and rulings on the title.

Rulings on Abstract.—The rulings and directions of the Chief Commissioner are entered in the books, kept in my office for that purpose, called the books of "Rulings on Title" (of which there are now fifteen volumes in my office), and notification thereof given in each case to the solicitor having carriage of proceedings, who thereupon takes out a copy of such rulings, and should any objections or questions be raised upon the abstract of title by the Chief Commissioner, which is most generally the case, verified replies are lodged by the solicitor and examined by me previously to submitting them to the Chief Commissioner for his further consideration, and such original deeds or other documents as the Chief Commissioner may by his previous rulings have required to see, I then obtain from the Record Office, and lay the same, together with the verified replies of the solicitor, again before the Chief Commissioner for his final ruling thereon.

Searches.—Searches are sometimes brought in with the abstract of title, but that is not usually the case; but when the title, as stated on the abstract, is approved of by the Chief Commissioner and searches directed by him, the draft requisition for all such searches is then settled and approved of by me, and when brought in are examined by me as soon as possible, and if any thing turns up on the searches not stated or explained on the abstract, I bring the same before the Chief Commissioner, by whom the matter is further investigated.

Rental and Posting for Sale.—Where counsel has given a favourable opinion on the title, I certify the same to the Chief Commissioner, and thereupon he refers it, as a matter of course, to the Master to settle the rental; and the draft rental, when so settled, with a posting for sale, is brought by the solicitor before the Chief Commissioner to approve of and finally settle the same, and fix a day and place for sale.

The posting for sale is entered in a book, kept in my office for that purpose, called "The Sale Book." All sales had in the country require confirmation by the Chief Commissioner.

Lodgment of Rentals.—Fifty printed rentals are required to be lodged within one week from the date of the posting for sale, and if not so lodged, my duty is to require the solicitor to show cause before the Chief Commissioner why he has so omitted or neglected to lodge the same.

Private Sales and Country Auctions.—In cases of private sales or offers, the proposals are entered in a book, kept for that purpose in my office, and on notice to all parties who have appeared, a motion is made in chamber to consider the offer which is either rejected or confirmed as the Chief Commissioner may see fit, and ruled accordingly on the same book. If in favour of the offer, I send a certificate of the acceptance thereof to the Auction Clerk, which authorizes the preparation of the conveyance; and in cases of provincial sales, they are in like manner confirmed or rejected on motion before the Chief Commissioner, and a like certificate sent by me to the Auction Clerk.

Conveyances.—The sale having been had, the

draft conveyance is settled by the Master, and by him sent to my office, and the same is then examined by me and checked with the rulings of the Chief Commissioner on the title and rental, preparatory to laying same before the Chief Commissioner for his perusal and approval, and when disposed of by him, I send the draft conveyance to the office of the General Clerk.

Final Schedule of Incumbrances.—After the sale is had and purchase-money lodged, a rough sketch of the draft final schedule of incumbrances is brought in to my office, with all the searches and explanatory schedules in respect to the registry searches. The searches are then compared in my office with the draft requisition, and with the explanatory schedule of searches (which explanatory schedule contains abstracts of every act excepted, and also of every act returned on the registry searches,) and also with all the judgment searches, and the rulings and directions of the Chief Commissioner, and with the petition, abstract, rental, reports, and decrees in equity causes, claims, certificate of lien, certificate of the Paymaster of Civil Services as to land improvement and drainage, and having examined all these matters very fully, the solicitor having the carriage of the proceeding, arranges under my superintendence the draft final schedule for the ultimate adjudication of the Chief Commissioner, in which draft it is my duty to see that no incumbrance or act that could in any way affect the property sold is omitted, and also to see that proper explanatory observations are affixed to each item or claim therein.

Final Notice to Claimants and Incumbrancers, and service and publication thereof.—When the draft final schedule of incumbrances is so settled by me, it is brought before the Chief Commissioner for his approval for lodgment, which he endorses thereon, and fixes a day for the hearing of same, on which day all parties interested are required to attend before him, and also directs in what newspapers such final notice is to be inserted, and what parties are to be served with notice of the lodgment of same.

A duplicate of the final schedule of incumbrances is then examined in my office with the copy approved of by the Chief Commissioner, and sent to the office of the General Clerk for inspection by the public; the services of the final notice on all parties ordered to be served therewith and the due publication thereof are checked and certified in my office, previous to the hearing of the final schedule by the Chief Commissioner.

Hearing of Final Schedule.—The schedule of incumbrances is heard before the Chief Commissioner on attendance of all parties, either by counsel, solicitor, or in person, on the day appointed in the final notice, being about five weeks from the date of that notice, and written rulings are made by the Chief Commissioner on every item or claim and incumbrance thereon, which rulings are transcribed in my office and placed on the schedule opposite to each item ruled, and being compared by me, they are signed by the Chief Commissioner generally the following day.

(To be continued.)

CIRCUITS OF THE JUDGES.

SUMMER ASSIZES. 1855.	HOME.	NORTH-EAST.	NORTH-WEST.	CONNAUGHT.	LEINSTER.	MUNSTER.
	L. C. J. Lefroy. L. C. B. Pigot.	L. C. J. Monahan Justice Torrens	B. Pennefather. Justice Ball.	Justice Moore. Baron Greene.	J. Crampton. Sergt. Howley.	Justice Perrin. Justice Jackson.
Monday, July, 9	... ..	... ..	... ..	Roscommon	... ..	... ..
Tuesday, 10	... ..	... ..	Longford	.. ..	Wicklow	Ennis
Wednesday, 11	... ..	Drogheda	... ..	.. ..	... ..	... ..
Thursday, 12	... ..	Dundalk	Cavan	Carrick-on-Shan.	... ..	... ..
Friday, 13	... ..	... ..	... ..	... ..	Wexford	Limerick & City
Saturday, 14	... ..	... ..	Enniskillen	... ..	... ..	... ..
Monday, 16	Trim	Monaghan	... ..	Sligo	Waterford & City	... ..
Wednesday, 18	... ..	Armagh	Omagh	... ..	... ..	... ..
Thursday, 19	... ..	... ..	... ..	Castlebar	Clonmel	... ..
Friday, 20	Mullingar	... ..	... ..	... ..	... ..	... ..
Saturday, 21	... ..	Downpatrick	Lifford	... ..	... ..	... ..
Monday, 23	Tullamore	... ..	... ..	... ..	Kilkenny & City	Tralee
Tuesday, 24	... ..	... ..	Londonderry &	... ..	... ..	... ..
Wednesday, 25	Maryborough	Belfast and	City Galway & Town	... ..	... ..	... ..
Thursday, 26	... ..	Carrickfergus	... ..	... ..	Nenagh	... ..
Friday, 27	Carlow	... ..	... ..	... ..	... ..	Cork and City
Tuesday, 31	Athy	... ..	... ..	... ..	... ..	... ..

N. B.—The following are the hours fixed for the Opening of the respective Commissions :

At Dundalk, Monaghan, Armagh, Sligo, Wexford, Waterford, Clonmel, Kilkenny, Nenagh,						
Ennis, ... ..	... ..	... ..	... ..	... ..	... ..	10 o'Clock.
Drogheda, Omagh, Lifford, Wicklow, ..	... ..	... ..	... ..	... ..	... ..	11 ..
Trim, Maryborough, Carlow, Londonderry, Tralee, ...	... ..	... ..	... ..	... ..	... ..	12 ..
Tullamore, Downpatrick, Limerick, Cork, ...	... ..	... ..	... ..	... ..	... ..	2 ..
Belfast, Cavan, Enniskillen, ...	... ..	... ..	... ..	... ..	... ..	3 ..
Mullingar, Athy, Longford, Carrick-on-Shannon, ...	... ..	... ..	... ..	... ..	... ..	4 ..
Roscommon, Castlebar, Galway,	5 ..

PECTORAL AND COUGH MEDICINES.

OLDHAM'S COMPOUND SYRUP OF SMILAX.

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DUBLIN, JUNE 30, 1855.

THE recent case of *Doe dem. Tatum v. Catamore*, (16 Q. B. 745,) appears to us to put the law respecting erasures and interlineations on a satisfactory basis. That was the case of an ejectment brought by the assignee of a building lease which had been granted in 1813, and assigned to the lessor of the plaintiff in 1827. In the deeds, as produced, erasures and interlineations had been made, but not in material parts. For the defendant it was objected, that the deeds were not admissible unless some evidence were given by the party producing them to show when and where the alterations and interlineations were made. The judge held that such extrinsic evidence was unnecessary; and he directed the jury to judge from the deeds themselves whether they had been altered before or after execution—adding, that they had been in the possession of the lessor of the plaintiff many years, and it was not probable that he should either have taken them unless he believed them to be valid documents, or have tampered with them subsequently. A verdict having been found for the plaintiff, on a motion for a new trial, the court held, that the direction of the judge was right. Lord Campbell, C.J., in his judgment, quoted Co. Lit. 225, b., where it is said—"Of ancient time if

the deed appeared to be rased or interlined in places material, the judges adjudged upon their view the deed to be void; but of later time the judges have left that to the jurors to try whether the rasing or interlining were before the delivery;" and also a note upon this passage in Hargreave and Butler's edition of Coke upon Littleton, where it is laid down: "It is to be presumed that an interlining, if the contrary is not proved, was made at the time of making the deed" His Lordship added: "This doctrine seems to us to rest upon principle. A deed cannot be altered after it is executed without fraud or wrong. A testator may alter his will after it has been executed; and there is no ground for any presumption that the alteration was before the will was executed."

In the course of the argument Lord Campbell observed, "There appears to be a distinct rule as to bills of exchange and promissory notes, that an alteration must be explained. In *Cooper v. Bockkett*, (4 Moore, P. C. C. 419,) it was held that in the case of a bill, an alteration is to be taken as having been made after execution." The above view of the law is opposed to that which is laid down in Starkie on Evidence, last ed. 500, the result of the authorities, namely, "If, upon production of an instrument, any erasure or blemish appear upon its face, the party producing it ought to explain how the defect arose, and to show that it was made be-

fore the execution or that it was made after the delivery, by a stranger, if the erasure or interlineation has been made in an immaterial point." The law on this subject in this country was not quite so strict as in England, as it has been decided here in *Swiney v. Barry*, (Jones, Ex. R. 109,) that an erasure even in a material part of the instrument, if made by an unauthorized person, without the collusion of the party taking under the deed, will not vitiate it. The rule, as now established in *Doe v. Colamore*, is, we think, a sound one and based on common sense, as the opposite doctrine very nearly imposed on parties the *onus* of proving a negative. It is a decision which ought to be well known, as an idea of a different character has become prevalent, founded upon what has been propounded for law, in a work, which, although one of fiction, is perhaps the best legal novel ever written, and one object of which being to illustrate certain subtleties of our law, the author, in his notes, vouches for the position laid down in his text. Our readers cannot fail to see that we allude to that most fascinating work of Mr. Warren, "Ten Thousand a year," and its annals, of the imaginary cause of *Doe v. Jolter*, in which the hero of the tale is represented to have been stripped, for a season, of his hereditary estates in consequence of the rejection in evidence of an ancient title deed, which contained an erasure, notwithstanding that its custody had been unrepachable. The writer evidently conveyed what he conceived at the time to be the state of the law upon that topic; a state of the law, however, which must inevitably have led to hardship and injustice, and which it is satisfactory to see has, in conformity with ancient authority, been completely modified.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 203.)

Allocation and Distribution of the Fund.—Upon these rulings being made and signed by the Chief Commissioner, he directs that the case shall be again entered for further hearing for some day, not earlier than one week after he has made his rulings, and upon that hearing he proceeds to distribute the fund, save so far as any of the parties intimate an intention of appealing to the full court against his rulings. It happens also occasionally that the rulings made on the first hearing of the schedule are varied or modified by the Chief Commissioner himself, on the further hearing of the schedule; and, of course, it frequently happens that a final schedule cannot be disposed of or ruled in one or two days; oftentimes it takes very many days, and sometimes weeks, to dispose of a heavy

schedule, consisting of a great number of conflicting items and claims; but as far as practicable, the non-disputed items, or items which are not affected by the controversies existing in respect of other items and claims, are disposed of, and ruled, and paid, where that can be with safety done. When the final schedule is ruled, either wholly or partially as above explained, money fiats are then prepared in my office for payment of the various incumbrancers in whose favour rulings have been made, which fiats, when signed in duplicate by the Chief Commissioner (one part of which is always kept in my office,) are sent to the Accountant to enter, and by him to the Registrar to have money orders, payable at the Bank, made out in pursuance thereof; every money order when made out by the Registrar is then sent to me to be examined and initialed, previously to their being signed by the Chief Commissioner, and when so examined by me, and found to be in conformity with the fiat of the Chief Commissioner, it is signed by him and then by another Commissioner and returned to the Registrar, whose duty it is, when so signed and sealed by him, to deliver it to the proper party, by whom it is to be presented at the Bank for payment.

Surplus or Residue of Fund.—In case there shall be a surplus for the owner, which not unfrequently occurs, my duty is to see that all the creditors and incumbrancers in whose favour fiats were made, have been paid, and to make all necessary calculations (which latter duty I have to perform in all cases,) and before paying the surplus to an owner, an affidavit is required that such surplus is not charged, assigned, or put in settlement.

Trust Funds.—Various sums have been allocated in different matters to the trustees of particular deeds or settlements; but the trustees being dead, or the trusts not full, those sums cannot be paid out till new trustees are appointed. These sums are, generally speaking, invested by order of the Chief Commissioner, and retained to the separate credit of such trust, and in most of these cases the tenant for life of the fund is paid the dividends by bank orders, obtained by him from the Commissioners from time to time.

Motions and Rulings thereon.—In the course of the proceedings there are various rulings made by the Chief Commissioner in chamber, on notice and otherwise, which are entered in books kept in my office for that purpose, of which books there are at present eleven. These rulings, when it is considered necessary that they should be made orders of the court, are entered by the Registrar on the minute thereof, signed by the Chief Commissioner, being brought into his office, but all these rulings are subject to be farther considered, if any party desire that they should, by the full court.

Partitions and Exchanges.—In cases of petitions for partition or exchange, the petition and abstract of title are brought into the chamber of the Chief Commissioner, as in cases of petitions for sale, and if the ruling of the Chief Commissioner on title be favourable, a fiat is made by him on the petition, authorizing the entering of an order directing the service and publication of a notice to all parties interested, and requiring them to state their objec-

tions, if any, to such proposed partition or exchange, which is advertised and served as directed by the Chief Commissioner, regard being had in this respect to the practice as prescribed by the several General Rules of the court—viz., the 38th, 39th, 40th, and 41st General Rules, and to the forms of petition as settled by the Commissioners, which will be found in any printed book of the practice of their court. The advertisements and affidavits of service of such notice are then examined in my office, and the case entered in the list of the Chief Commissioner for hearing, who either dismisses the petition or makes a rule thereon, directing that a partition or exchange shall be had, and in most cases he directs that it be referred to the Master to approve of a proper person to survey and partition the lands, and, if necessary, to make a map or ter-chart thereof; and the Master is by the same order generally directed to settle the draft final order for partition or exchange, which, on being settled by the Master, is submitted, together with the survey, map, and surveyor's report, to the Chief Commissioner for his final approval.

Delivery out of Deeds, &c.—All deeds and muniments of title delivered out from the Record Office to parties, either temporarily or absolutely, by direction of the Chief Commissioner are so delivered out upon flats prepared in duplicate in my office, and signed by the Chief Commissioner, a copy or duplicate of each of which flats is always kept by me, and when that deed or document is to be retained for a limited time only, the flat expresses the time when the same is to be returned, in order that the Record Officer may enforce the due return thereof.

Books kept in Examiner's Office.—The following books are kept in my office:—Petition Book, one volume at present; Abstract of Title Books, two volumes at present; Rulings on Title Books, fifteen volumes at present; Order Books, eleven volumes at present; Conveyance Books, two volumes at present; Money Fiat Books, twelve volumes at present; Money Ledgers, two volumes at present; Sale Books, two volumes at present; Proposal Books, two volumes at present; Schedule Ruling Book, one volume at present; Deeds Delivery Book, two volumes at present; Book of Statements of Facts, one volume at present.

As to Inquiry No. 2.—The nature and particulars of the duties performed by me, as such Examiner, will, I should hope, appear sufficiently by the foregoing statement, and as I think it would only tend to unnecessary prolixity to repeat them here, I venture to omit doing so, but if required I shall supply this omission at any moment.

Time occupied by Examiner.—The time occupied by me in performance of the foregoing duties is, on an average, from ten o'clock in the forenoon to half-past five or six o'clock, afternoon, and sometimes to seven or eight, P.M.; and about two hours in the evening or morning of each day, according as business presses.

For the first two years of my appointment, the duties of the office of examiner devolved on myself alone, but they were then much lighter than at present, inasmuch as the Chief Commissioner at the

first commencement of the Commission did not take any chamber business, and was then and for some time subsequently in the habit of assisting in the full-court sittings of the Commissioners only. The chamber business was therefore originally discharged by the two other Commissioners, but that is not the practice at present, nor has it been for the last four years. For the last two years I have been allowed a clerk, at a salary of £100 a-year, to aid me in the discharge of my several duties; and he is generally engaged with me, on an average, from ten o'clock, A.M., to half past five o'clock, P.M., daily.

RD. ROTHWELL.

ANSWERS OF THOMAS WELSH, ESQ., TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Keeper of the Deeds, to which I was appointed on the 23rd December, 1850, having previously held that of Examiner to the Chief Commissioner, the Right Honourable Baron Richards.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

The nature and particulars of the duties pertaining to this office performed by me, with the aid of two Assistants, are the reception and safe custody of all title deeds, papers, and other muniments of title relating to estates brought into this court, and their production to the court, the Commissioners, or the Master when required, or to such other persons as they may authorize to inspect or receive same, and the issuing of the various certificates in relation to such deeds and documents required to be used in the course of the practice of the court. These particulars will more fully appear in my answer to the third question and the form therein referred to. The office hours prescribed by the General Rule of 18th October, 1849, viz., from 10 o'clock, A.M., till 4 o'clock, P.M., during the periods appointed for the sitting of the court, and from 12 at noon till 3 P.M., on all other days, are fully occupied in the discharge of those duties.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

In reference to the general course of practice and mode of procedure adopted in this office, I have to state that it can alone be carried out by the utmost accuracy in the system of book-keeping adopted; and as well for the purpose of brevity as of distinctness in replying to this question, I have adopted the annexed form, setting forth the number and nature of the books kept, accompanied by such explanatory observations as appear to me best calculated to answer the objects contemplated by this question; and to which form, therefore, I beg leave respectfully to refer the Commissioners, as embodying my answer thereto.

Book No. 1.—For entry of boxes for reception of deeds, &c., lodged from the opening of the Commission till April, 1850; 66 folios, with index. This book was originally kept in simple alphabeti-

cal order, but the indexes became so voluminous in little more than a year as to be highly inconvenient as a book of reference in daily use; in consequence of which book No. 2 was opened.—See observations thereon.

Book No. 2.—For entry of boxes from opening of the Commission to the present time; 190 folios, with index, condensed in dictionary form. These entries include all those from book No. 1, and contain the names of the owners, petitioners, and solicitors, in each matter, with the distinguishing number now affixed to each box, the indexes whereof are arranged in dictionary form for more convenient reference. These boxes are now placed in consecutive numerical order in the several record rooms, and as well for the purpose of maintaining the consecutive numerical arrangement for facility of reference as for preserving sufficient space in these rooms for new boxes daily lodged, those boxes which contain deeds and documents pertaining to estates sold and funds distributed, are removed to apartments in another building with new distinguishing numbers, the former numbers being transferred to the new boxes which thenceforth occupy the spaces thus left vacant. It may be right to observe that the "Record Rooms" are only capable of containing 1,662 boxes, whereas there are at present in the custody of the keeper of the deeds no less than about 2,050.

Book No. 3.—Containing entries of deeds, &c., lodged from January, 1850, to April, 1851; 153 folios, with index. No. 4.—Containing entries of deeds, &c., lodged from May, 1851, to December, 1852; 195 folios, with index. No. 5.—Containing entries of deeds, &c., lodged from January, 1853, to the present time; 180 folios, with index. In these entries (entitled in the several matters) appear the names and addresses of parties making each lodgment, and of the solicitor having carriage of sale, the number and description of the documents, and whether lodged subject to any lien, or claimed or not, or by whom, with other particulars; the documents, thus lodged, are compared with an accompanying schedule, in each case thenceforth kept in the office, the items therein being numbered to correspond with those endorsed on each document. These entries, as also their corresponding indexes, having become inconveniently voluminous for daily reference, a book now called the general ledger, No. 14 in this form became indispensable.—See observations thereon.

No. 6.—Containing receipts for documents delivered on undertaking to return same within a given time (from February, 1850, to December, 1850); 460 folios, with index. No. 7.—Containing receipts for documents delivered on undertaking to return same within a given time (from February, 1851, to December, 1852); 460 folios, with index. No. 8.—Containing receipts for documents delivered on undertaking to return same within a given time (from January, 1853, to December, 1854); 488 folios, with index. No. 9.—Containing receipts for documents delivered on undertaking to return same within a given time, newly opened, January, 1855. These books require daily examination, for the purpose of enforcing the compliance of defaulting parties with their several undertakings.

No. 10.—Containing receipts for deeds and documents finally delivered by order of the Commissioners or the Master, from July, 1850, to July, 1851; 180 folios, with index. No. 11.—Containing receipts for deeds and documents finally delivered by order of the Commissioner or the Master, from July, 1851, to December, 1852; 300 folios, with index. No. 12.—Containing receipts for deeds and documents finally delivered by order of the Commissioners or the Master, from December, 1852, to the present time; 245 folios, with index. By reference to these books, in conjunction with the four preceding ones, means are afforded of accounting for all deeds and documents originally lodged in each matter if not found with those remaining in their several appropriate boxes; and such reference is frequently necessary for the purpose of answering requisitions in respect to them from the Commissioners, the Master, or solicitors having carriage of the proceedings in each matter.

No. 13.—Lien ledger, from opening of the Commission to the present time; 150 folios, with index condensed in dictionary form. This book contains a transcript from all the daily lodgment books of such entries only as are accompanied by lien claimed, indicating the names of such claimants, and the folios in such lodgment books, where particulars may be found if necessary, thus affording great facility for answering constant inquiry or for issuing certificates of the parties claiming lien, if any, or if no lien claimed, according to the fact, and avoiding the necessity (in a great majority of cases) of referring to the several lodgment books or their extremely voluminous indexes for such information.

No. 14.—General ledger, from opening of the Commission to the present time; 494 folios, with index in dictionary form. On the completion of the book No. 13, its utility was found to be such as to suggest the expediency of adopting a like principle in reference to as many other subjects of constant inquiry as possible, the present ledger has been therefore compiled by transcripts (with condensed indexes) from other books, and conveys at one view the following information, viz.:—1. The number of each box, and consequently its particular position in the record rooms. 2. Whether any deeds or documents have or have not been lodged in any particular matter; and if so, by whom, with the number and folios in the day books in which the full particulars of such lodgments may be found if necessary. 3. Such estates as have been sold and funds distributed are distinguished from those still undisposed of. 4. The information contained in book 13 is also supplied by this book, which (in this particular) forms a duplicate affording additional convenience for reference. The books No. 13 and 14 are posted up daily, and all deeds and documents lodged or returned during each day are placed in the several boxes to which they belong, and deposited in the record rooms; all papers or documents in use during each day are also duly collected and arranged, and each document is returned to its appropriate place before the closing of the office.

THOMAS WELSH.

ANSWERS OF JOHN LOCKE, Esq., TO QUESTIONS
IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?
Auction Clerk, since 1st January, 1851.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

The duties more immediately connected with the preparations for sales; the sales and the lodgment of monies in bank; the time, 10, A.M., until half-past 4, P.M., on sale days often until 5, and even 6 o'clock.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

1. Registering the postings for sale. 2. Examining and attesting the newspaper advertisements for sale. 3. Attending and taking down the biddings, and the Commissioner's special orders at the public sales. 4. Comparing and certifying correct copies of each rental of estates sold, to be lodged with the Master. 5. Issuing orders for all lodgments of money in bank, and calculating the interest due on each lodgment. These duties require the keeping of three series of books. 1. The book in which postings for sale are entered. 2. The sales book, (court, provincial, and by private contract). 3. The bank titles book, in which the titles of each matter are registered.

There are four classes of certificates issued. 1. Certificate of advertisements of the posting for sale. 2. Certificate to lodge money. 3. Certificate of name of each purchaser, and lots and amount purchased by him. 4. Certificate of particulars of sale of all the lots in each estate sold. The two last are necessary for all purposes, in which evidence of the sale is required, either here, or elsewhere.

Making searches through the sale books and rentals, in order to satisfy inquiries made for public objects, or by private individuals, involves likewise much trouble and expenditure of time, more especially as there is no assistant in this office.

JOHN LOCKE.

ANSWERS OF MICHAEL O'LOGHLEN, Esq., TO
QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I was appointed to a clerkship in the Secretary's office, in April, 1850; and I now hold the office of Assistant Secretary to the Commission.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

My principal duty consists in the drawing and issuing of the cheques for payment of cash, and transfer of stock, inspecting powers of attorney, taking the receipts and affidavits of the different creditors, and drawing the orders for the sale of stock and investment of cash, and when not thus employed, or when the Secretary is engaged in court, or absent from any other cause, performing the duties which devolve upon him in his capacity of Secretary.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

I have to refer you to the Secretary's statements, which accurately details the course of procedure in our office.

M. O'LOGHLEN.

ANSWERS OF G. P. RICHARDS, Esq., TO QUESTIONS
IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

First Assistant in Registrar's office; appointed 26th November, 1849.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

Reading affidavits of service of conditional orders for sale and orders for attachment, and making same absolute, on production of certificate, if no cause shown; making out attachments and keeping an entry of same; drafting injunction orders to put purchasers into possession of lands sold; drafting miscellaneous orders made by the Commissioners and the Master in Chamber; attesting all copies of documents issuing from the office; signing requisitions for the Paymaster of Civil Services and Secretary to the Board of Works, to ascertain if any and what sum is due for drainage, &c., and forwarding same; making out certificates to stay proceedings in Chancery, on conditional orders for sale being made absolute, where a cause has been pending in that court; issuing all orders made, and copies of documents going out of the office; taking the scrivenerly charges thereon, and entering same in a book kept for that purpose; checking the books of the gentlemen who engross and enter the orders, and who make copies of documents filed in the office; comparing deeds of conveyances, and certificates of payment of purchase money with the Secretary when signing same, and attending Commissioners to witness the execution thereof; answering numerous questions relative to the practice of the court, &c. General office hours from 10 till 4 o'clock; but sometimes, from press of business, later hours must be observed.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

A full record of the proceedings kept on all matters in court, from the filing of the petition to lodging schedule of incumbrances; a record of all conveyances executed by the Commissioners, giving the date of conveyance, name of purchaser, amount of purchase money, and the lands conveyed, with their situation and contents; attaching the seal of the Commissioners to all conveyances executed; entering and filing all objections by tenants, &c., to the notice under the 13th General Rule; entering and sealing all notices to claimants' tenants, and notices of partition and apportionment; entering and filing answers received to the requisition forwarded to the Paymaster of Civil Services, and Secretary to the Board of Works, with the amount returned due for drainage, &c.; making out certificates of conveyances, executed for the purpose of discharging receivers under the Court of Chan-

cery; issuing certificates of objections, or no objections, as the case may be, by tenants, &c., to the notice, under the 13th General Rule, on settling rentals before the Master; similar certificate of objections to partition and apportionment; entering and filing all petitions dismissed by the Commissioners; filing copies of notice to tenants; filing copies of all conveyances executed by the Commissioners; sealing all orders and certificates of lodgment of purchase-money; issuing certificates to purchasers for the purpose of grounding application to the Master to get out deeds and leases relating to the lands sold; engrossing all orders that pass the seal of the court, and entering same in books kept for that purpose.

G. P. RICHARDS.

ANSWERS OF ANDREW E. CARLETON, ESQ., TO
QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I was appointed to the office of Second Assistant in Registrar's office in the month of February, 1851, and have thus nearly completed a term of three years.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

I shall first enumerate the books committed to my charge, which are as follows:—Record of Proceedings, Record of Conveyances executed, Paymaster of Civil Services' Book, Index to Objections by Tenants, Index to Objections to Partition or Apportionment, Book of Dismissed Petitions. In the Record of Proceedings, which consists of eleven folio volumes, the notices to tenants and to claimants, the dates and proceeds of sales, also the date and import of every order pronounced by the Commissioners, are minutely recorded. In the Record of Conveyances executed are entered the names of the grantees, the dates of such conveyances, amount of purchase-money, and description of property so conveyed. The Paymaster of Civil Services' Book contains the substance of his certificates as to the amount of monies chargeable under the following Acts:—Land Improvement, Arterial Drainage, Labouchere Drainage, Piers and Harbours, which certificate relates to lands about being sold, and is essential to the proceedings of the court. In the Index to Objections by Tenants the names of the objectants to the notice, under the 13th General Rule, and those of their solicitors, (if any,) are inserted. The Index to Objection to Partition or Apportionment contains the names of the objectants to either of these procedures, and those of their solicitors (if any). The Book of Dismissed Petitions comprises the title of the matter, date of filing of each dismissed petition, with the Commissioner's adjudication thereon. It is also my duty to compare accurately each notice to claimants with the absolute order for sale, also seal and enter it in the notice book, previously to its being signed by the Registrar. I have likewise to seal and enter in the notice book each notice to tenants. I am required to draw certificates of sale and con-

veyance, as being requisite for discharging the receiver in Chancery matters, in order to which the conveyance must be very carefully perused. I have also to give certificates of objections or no objections, as the case may be, to the notice, under the 13th General Rule, for the purpose of settling the rental, likewise in cases of partition or apportionment. Another of my duties is, to receive from the solicitors the deeds of conveyance to be executed, see that such deeds have been duly examined by the Commissioner's Examiner, and approved by the solicitor having the carriage of the sale; also observe that the proper documents be lodged therewith. To each of these conveyances, and the accompanying memorial, I am required to affix the seal of the Commissioners, prior to such conveyances being executed. These are my exclusive duties, as distinct from those performed by the First Assistant, in conjunction with whom I have also to assist generally in the office of the Registrar, in which I am engaged daily, from ten to four o'clock, and later, if necessary.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

With regard to the general course of procedure in this office, I have only to refer you to the report of the First Assistant, in which it is fully and clearly defined.

ANDREW E. CARLETON.

ANSWERS OF T. V. RICHARDS, ESQ., TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

The office I hold under the Incumbered Estates Commission is that of First Assistant to the General Clerk; having held office under the Commission since December, 1849.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

The time occupied by the discharge of my duties is, as prescribed by the General Rules, from ten till four o'clock each day; and on some occasions, when the duties of the office require it, to a later hour. My duty is the management of the general course of business in the office of the General Clerk during his absence, his presence being required, and his time exclusively occupied in the discharge of his duties as Taxing Officer in a distinct apartment, and for carrying out the details of which the Commissioners hold me responsible. I have endeavoured to enumerate such details in answer to Question No. 3. The care of the books of the office, (with the exception of the book containing the entries of the petitions lodged, which is kept by the Notice Clerk,) and the several other duties of the office, are divided between me and the Second and Third Assistants to the General Clerk in the following manner: I keep the accounts of the office, as set forth hereafter, and pay at the end of each week to the scrivenerly clerks the amount of their accounts for the copies made by them during that period, take their receipts for same, and enter them in the book kept for the purpose. I have also the

management and direction of the scrivenerly clerks and their office, and to see, in each instance where an attested copy is ordered of any document in the office, that a sufficient sum of money is lodged as a deposit to pay the clerk for copying it, there being no other fund applicable to that purpose, and keep a book properly indexed, containing the entries of claims lodged by creditors, in the general office. I attest copies of documents issued from that office, by affixing thereto the signature of Mr. Fitzgerald, the General Clerk, in his absence, and also sign the various certificates which the rules require to be given from this office. I administer oaths to parties bringing affidavits to the office to be sworn and filed, which is also part of the duty of Mr. Stewart, the Second Assistant, by whom I am also assisted in inspecting all affidavits, statements of facts, &c., sworn out of Dublin before Masters Extraordinary of the Court of Chancery, or other qualified persons, and in the duty and responsibility of seeing that same are in accordance with the general rules, and of receiving and inspecting the petitions brought in for lodgment in the office, whether sworn in the office or elsewhere, and in the former case to administer the oath to the party verifying same, and see that each petition is in proper form in accordance with the rules, being responsible in each instance that such is the case; and where an order is made by a Commissioner that a petition shall be amended, to see such amendment is properly made and duly verified. Mr. Stewart, the Second Assistant, as part of his special duty, has charge of the books in which appearances are entered, which he keeps duly indexed, and also enters in the book kept for the purpose, and indexes all objections to the draft final schedules, which are here lodged, while the Third Assistant, Mr. Burrows, has charge of the book containing the entries of the draft final schedules, and the entering and indexing of same. As regards the other and more general business connected with the general office—viz., the care and proper arrangement of the papers in the office, the production of same for public inspection, and their restoration to their proper places after such inspection or having been copied; the checking of the certificates of appearances, objections, and claims, with the books of the office, the comparison of affidavits when solicitors bring in their copies to attest, in accordance with the fourth general rule, the duty of furnishing the Taxing Officer with such papers as he may require on taxation of costs from this office, such as petitions, abstracts of title, conveyances, &c., we divide as equally as possible between us. We have also the charge of another office, in which all papers for which the limits of the general office do not afford sufficient space are removed, which are principally those documents, such as affidavits, objections, draft conveyances, &c., the dates of the lodgment of which extend from 1849, the date of the opening of the Commission, to the end of the year 1852.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The petitions, on which all future proceedings are founded, are lodged in the general clerk's office,

and at certain fixed periods transmitted thence to the Commissioners for their fiat, and having been fiatd, and the orders drafted by the Registrar, they are returned to the general office, and there retained for the inspection of the public or such other uses as they may be required for. All affidavits, on which applications to the Commissioners are grounded, or of any other nature whatever, (with the exception of those verifying documents which are lodged in the Secretary's office,) are filed here. Appearances are entered, and the appearance-books kept here, and all claims by creditors lodged, and proper entries of the lodgment of same made in the books kept for the purpose, and certificates of appearances for use on applications to the Commissioner or Master, and of claims for settling final schedule or other purpose are here given. The copies which may be ordered of any documents, save those lodged in the Secretary's office, are here bespoken, attested, and given out, an entry is kept of the amount received for them, and of the sums paid weekly to the scrivenerly clerks for making such copies, and a debit and credit account kept, and deposits are received here on the documents bespoken. The drafts of the conveyances from the Commissioners to purchasers are sent to the general office, on being approved of, and an attested copy is bespoken by the purchaser's solicitor, from which the deed is engrossed; and when the engrossed deed is brought in, the draft is sent to the office of the Examiner of the Commissioner who may have the direction of the matter, for the purpose of comparison, and when same is completed the draft is returned here, and afterwards retained. The draft final schedules of incumbrances are sent down to this office to remain for a fixed period, during which parties may file objections thereto, after which period has elapsed, however, the schedule is retained here. The objections to such schedules are filed here, and certificates of same given when required for the settlement of the schedules. The abstracts of title lodged for perusal of the Commissioners previous to a sale are verified, and received here, and from hence transmitted to the office of the Commissioner having the direction of the case, and having been read and approved of by him, are returned to the general office, and there remain. Statements of facts, whether for general directions or for conversion of leases in perpetuity into fee-farm grants under the late extension Act, are here verified and lodged; and when, as in the case of the petitions, they are fiatd by the Commissioners, they are retained here. Here, also, consents which have been made rules of court and the reports of the Master of the court are filed. Copies of rulings made by the Commissioners and the Master are given from this office to the parties who have ordered them, and the copies of affidavits brought in by solicitors for attestation are compared and attested.

THOMAS V. RICHARDS.

ANSWERS OF THOMAS NICHOLS MOORE, Esq.,
TO QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Clerk to the Chief Commissioner's Examiner, to which I was appointed on the 17th of January, 1853, and which I have held for now more than two years.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

My duties are as follows:—To enter petitions in reference book; to copy the flats of the Chief Commissioner on the duplicate petition; to enter abstracts of title in the abstract book; to examine all such abstracts, page by page, to ascertain if the several necessary formalities have been complied with, and to certify the result; to enter the Commissioner's rulings on title; to compare engrossed conveyances, and examine the maps annexed to such deeds; to check the requisition for searches in accordance with the directions of the Chief Commissioner; to compare with the registry search the schedule explanatory of the several acts excepted and returned on such search; to mark and initial such judgments and claims as are inserted in the draft final schedule of incumbrances; to check the service of the final notice to claimants, to ascertain if it have been published in the newspapers as directed, and to certify whether or not the usual requirements have been complied with; to examine affidavits of service of partition notice, to ascertain if it have been advertised agreeably to the directions of the Chief Commissioner, and to certify the result to him; to copy the Commissioner's rulings on the final schedule of incumbrances; to draw flats for payment in pursuance of such rulings; to post those flats in the ledger; to enter notices in the Commissioner's list; to compare and initial orders when entered by solicitors in the order books. In discharge of which duties my time is occupied on an average from ten o'clock, A.M., to half-past five o'clock, P.M., daily, except during the long vacation.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The course of practice adopted in the Chief Commissioner's Chamber is generally as follows: On the order for sale being made absolute, to apply for a fiat for delivery out of the original deeds lodged, to enable the solicitor to prepare a full abstract of title; and that document being brought in and verified (with an epitome of the abstract), if found conformable to the general directions of the Commissioners, an order is given to have it submitted to counsel, who having written his opinion on the title, and the abstract being re-lodged, it is laid, together with the petition and accompanying documents, before the Chief Commissioner, who expresses his opinion in writing thereon; the directions thus given by him are entered in the title ruling book, and a communication forwarded to the solicitor informing him thereof. If any objection be made, or further information required on any subject connected with the title, replies are sent in to such inquiries, and the papers in the case are again laid before the Commissioner. When the title is approved of, an order of reference issues, directing the Master to settle the rental and posting for sale, which, when settled, are

brought before the Chief Commissioner for his approval, and for the purpose of fixing a day for the sale of the estate. In the interim the draft requisition for searches is prepared, settled, and lodged; and when the search is made, a schedule explaining the acts excepted and returned thereon is brought in, compared, and examined. After the estate has been sold, the purchase money lodged, and the conveyances executed, the draft final schedule of incumbrances is prepared and brought in; and having been settled by the Examiner, is approved of by the Chief Commissioner, and a day appointed for further settlement thereof by him. The notice of lodgment thereof (final notice) is then served and advertised; the time for lodging objections to the draft schedule as prepared, having expired, and the day appointed for the hearing thereof having arrived, the Chief Commissioner makes his rulings on the schedule, allowing or disallowing the several claims therein, and altering the priorities of such claims, as the case may be: the matter is then re-entered in his list "to pay out" for that day week, when having confirmed or amended his former rulings, money flats are drawn, in pursuance of which the Registrar prepares orders on the bank for payment, which are signed by two Commissioners and by the Registrar, sealed with the seal of the Commissioners, and given out by the Registrar to the parties entitled to receive them. In cases where a petition is presented for the partition of lands, the fiat of the Chief Commissioner orders a notice to issue under the 38th General Rule, which is advertised and served as directed; and the day for hearing objections, if any, to the proposed partition having arrived, and the due service and publication of such notice having been certified to him, the Chief Commissioner pronounces an order, authorizing the Master to appoint a surveyor, if necessary, to survey the premises, and directing that a draft final order for partition be prepared for approval by the Commissioners, which draft, with the petition, &c., is submitted to the Chief Commissioner, and when approved of by him sent to the Registrar to be entered in his books.

THOMAS NICHOLS MOORE.

(To be continued.)

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By **ROBERT W. OSBORNE, Esq., Barrister-at-law.**

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NAMES OF THE CASES REPORTED IN THIS NUMBER.

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DUBLIN, JULY 7, 1855.

It is with feelings of national pride that we record the elevation of Mr. Willes to the English Bench, the second Irishman who has, within a very short period, received that distinguished honour. Indeed we might add, that of the four latest promotions to the post of puisne judge in England, no less than three have been educated in this country—two of them, Mr. Baron Martin and Mr. Justice Willes, being natives of our island, and the former having for some time practised at our Bar. We congratulate the English Bar in having at its head a Lord Chancellor, whose selections for this exalted office evince so much independence of spirit, and so little heed to the miserable claims of party, as to dare to elevate a man to the enviable and exalted position of an English judge purely upon the ground of merit. The public journals which have noticed this appointment, with some expressions of surprise, have unwittingly paid to the Chancellor a high compliment when they state that Mr. Willes was unknown outside of the Profession. They have just expressed, in other words, that the promotion was awarded to a man who minded his proper business, and left politics to care for themselves. That the new judge will justify the selection, and will add fresh lustre to the eminent judicial name which he

happens to bear, we have no doubt. It is probable that the immediate cause of his elevation was the prominent part which he took in the labours of the English Law Commission, and the passing of the statutes which have emanated therefrom; and it is not the first time that able men have risen to the Bench by a similar stepping-stone. We earnestly trust that the time is not far distant when the precedent so nobly furnished by Lord Cranworth will be followed in Ireland, and when political patronage will have less to do than heretofore in recruiting the ranks of the Irish Bench.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 212.)

ANSWERS OF WILLIAM J. GILLESPIE, Esq., TO
QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?
First Assistant to Accountant. My appointment bears date under Treasury Minute, 17th December, 1852.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

I have the sole charge of keeping, by double entry, the "estates ledgers," now five in number, containing a separate and detailed account of each estate sold under the Commission, and I have to compare and balance those accounts yearly with the Bank of Ireland.

The accounts now extend through 1,637 folios, and the greater portion of them being composed of two or more descriptions of funds, viz., cash, consols, and stock, and the state of the account, therefore, frequently varying, the labour and their responsible nature is thereby greatly increased.

The ledgers I have to post daily, to enable me to certify the balances every morning for a settlement of the Commissioners' fiats; and I have also to render balances for certificates of funds, (and be responsible for their accuracy, and the former to the Chief Accountant,) which are almost unceasingly being applied for throughout the day.

The hours prescribed by the Commissioners are from ten till four o'clock, but the absolute necessity of posting the accounts daily to a point, (as before explained,) frequently obliges me to exceed those limits; and when balancing the books with the bank, a duty which can only be accomplished during the summer vacation, I have to devote almost the entire of it for that purpose.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The Chief Accountant having fully answered this question with regard thereto, I respectfully refer to his communication.

WILLIAM J. GILLESPIE.

ANSWERS OF RICHARD F. FRIZELL, Esq., TO QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Assistant Notice Clerk, to which I was appointed on the 1st April, 1850.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

My time is fully occupied each day from ten until four o'clock.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

For the nature and particulars of my duties, and a detail of the general course of practice, and mode of procedure adopted in this office, I beg leave to refer to the report of Mr. Robert K. Piers, Notice Clerk (to whom I am Assistant), as the duties therein described are performed by me conjointly with that gentleman.

RICHARD F. FRIZELL.

ANSWERS OF HENRY FAWCETT, Esq., TO QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

The office I hold in the Incumbered Estates Court is Clerk to Mr. Urling, the Third Commissioner's Examiner; which I have held since January, 1853.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

As these questions have been fully answered and

explained by the Commissioner's Examiner, I beg leave to refer to his return, in which the duties of the office performed by him and by me are distinguished.

HENRY FAWCETT.

ANSWERS OF RICHARD H. V. ARCHER, Esq., TO QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Second Commissioner's Examiner's Clerk. I was first appointed in April, 1851, as clerk in Third Commissioner's Examiner's office; and on the first of January, 1853, I was removed to my present office, which I have held since then.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

In reply to these questions I have only to state, that both the particular duties performed by me and the general course of procedure in my office are fully detailed in the Examiner's answers to these questions, which I have read, and to which I beg to refer.

RICHARD H. V. ARCHER.

ANSWERS OF A. J. STEWART, Esq., TO QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Second Assistant to General Clerk, and I have held that office under the Commission since the seventh of December, 1849.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

My duties consist in entering in a book, with a proper index, all objections lodged to draft final schedules of incumbrances, indexing all appearances entered, receiving petitions, abstracts of title, affidavits, and objections, having first seen (if they have been sworn in the country) that the jurat of each is correct, administering oaths, taking deposits on documents bespoken, having first searched for and procured them (also initialing and keeping account of such deposit), giving them to the scrivenerly Clerks to copy, and checking the number of folios in each copy, when brought in by the said Clerks; entering in a book, kept for that purpose, the number of folios in such copies, when called for by the public, and attesting same, by affixing Mr. Fitzgerald's name to each copy, as directed by him; checking and signing certificates of appearances, claims, and objections; comparing affidavits, and attesting them; also entering the number of folios in each copy in a book kept for that purpose; receiving claims; producing for public inspection documents of all kinds lodged in this office, viz.:—petitions, abstracts of title, affidavits, schedules of incumbrances, objections, draft deeds of conveyance, &c.; generally assisting in the arrangements of the office; and answering questions as to the practice of the Courts.

The time occupied in the performance of the foregoing duties is generally from ten, A.M., to four, P.M., as prescribed by the Commissioners, but frequently press of business obliges me to remain to a later hour.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

I beg to refer to the First Assistant's report.

A. J. STEWART.

ANSWERS OF PETER BURROWES, ESQ., TO
QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold my present office, namely, Third Assistant to General Clerk, since the twenty-third November, 1853, having previously held the office of Second Assistant to the Accountant, such appointment bearing date the seventeenth December, 1852; and I have held office since the twenty-first of February, 1850.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

My duties are as follows:—To check certificates of appearances entered on the books of which there are six large volumes kept in the office; also of claims, of which there are five books; and of objections to the final schedules (two books). To keep a correct entry of the lodgment of such schedules, in a book kept for that purpose, with index. To receive deposits for copies of documents bespoken in the office; search for the originals, in bundles arranged for each month, and hand such to the Clerks to copy; also to give copy, when called for, to the solicitor who may order it, and to make entry of fees on same in book kept for such purpose. To hand documents lodged in the office to the public for inspection, when asked for (which duty occupies a great portion of the day, namely, from ten to four o'clock); such documents consist of petitions, final schedules, claims, abstracts of title, affidavits, statements of facts, objections to the final schedule, conveyances, masters' reports. To compare copies of affidavits, objections, and claims, with the solicitor who may bring same for attestation; receive fees on same, and keep correct entry in book for that purpose. To check the copying Clerk's accounts each week (twelve books in all). To tot, weekly, the book in which entries are made of all copies leaving the office, showing the number of folios and fees. To answer questions made by the public, and to attend to the general business of the office.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

As to the practice of the office, I beg leave to refer to the report of the First Assistant, Mr. Richards.

PETER BURROWES.

ANSWERS OF FRANCIS COSTELLOE, ESQ., TO
QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I am Assistant Accountant to the Commission; I received my appointment on the 24th November, 1853.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

My duties comprise keeping the fiat ledgers, four in number, the journal, and bank cash ledger. In the fiat ledgers accounts are opened for all estates in progress of payment, and all sums ordered to be paid and retained are entered therein. When the parties call for their orders they are then marked off as paid, and when the sums retained are disposed of they are discharged and re-entered for the parties to whom they may be ordered. On entering the fiats for payment it is my duty to mark on the back thereof any sums previously ordered and not called for, and all sums retained, for the information of the Chief Accountant, to guide him in the arrangement of the funds. Also when certificates of funds are required, I have, in like manner to extract all sums ordered to be paid or retained. On the accuracy of these books depend, in a great measure, the correctness of the certificates and distribution of funds. The bank cash ledger, which is very voluminous, is written up and balanced with the bank monthly. All sums paid during the day are entered in the journal. It is also my duty to exchange bank certificates of lodgments by purchasers, and take their receipts for same, when they are required for the purpose of their conveyances. These duties occupy my time during office hours, from ten to four o'clock.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

With respect to the general practice and procedure of this office, I beg to refer you to the Chief Accountant's report.

FRANCIS COSTELLOE.

ANSWERS OF LAURENCE MURRAY DOYLE, ESQ.,
TO QUESTIONS IN PAPER No. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I have been employed under the Commission since the 25th day of January, 1851, and hold the office of Third Assistant to Accountant since the 25th day of November, 1853.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

My duty consists in posting the payments of each day into the journal, drawing purchasers' receipts for bank lodgments, and entering the same each day in the lodgment book, folioing (or attaching the number of the page) every entry to be made in the general ledgers, and also lists of balances, when required, for settling Commissioner's fiats, furnishing a *Dr.* and *Cr.* copy of each account, properly balanced, to the solicitor having the carriage of the sale in each estate, and to any other party, when ordered by a Commissioner, which orders are of most frequent occurrence, writing up and again balancing such accounts, when returned for that purpose, entering the balance of each copy ac-

count, when copied or written up in the balance book, and assisting generally in the business of the office when required.

The hours occupied by me in discharge of the above duties are usually from ten to four o'clock, as prescribed by the Commissioners, excepting days of very onerous business, when, as a matter of course, the hours of attendance are completely subservient to the due completion of each day's business.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

The Chief Accountant having fully explained the practice, &c., of the office, I beg to refer to his report.

LAURENCE MURRAY DOYLE.

ANSWERS OF EDWARD G. SMITH, ESQ., TO
QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Assistant to the Keeper of the Deeds, and Muniments of Title, to which office I was appointed on the 30th November, 1853.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

The nature of the duties pertaining to this office performed by me, is to assist in the general business of the office, the nature of which will be found in the form forwarded to you by Thos. Welsh, Esq., Chief Officer of this department, and to which I beg leave to refer.

EDWARD G. SMITH.

ANSWERS OF WILLIAM DAVID GUMLEY, ESQ.,
TO QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

I hold the office of Assistant to the Keeper of the Deeds and Muniments of Title, to which office I was appointed on the 1st July, 1850.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

The nature of the duties pertaining to this office performed by me, is to assist in the general business of the office, the nature of which will be found in the form forwarded to you by Thomas Welsh, Esq., Chief Officer of this department, and to which I beg leave to refer.

WILLIAM DAVID GUMLEY.

ANSWERS OF CHARLES M. ORMSBY, ESQ., TO
QUESTIONS IN PAPER NO. 3.

1. What office do you hold in the Incumbered Estates Court, and how long have you held it?

Clerk of Statistics. I was appointed on the 1st of June, 1850, being four years, seven months, and twenty-four days.

2. State the nature and particulars of the duties performed by you, and the time occupied in their discharge.

Extracting from the petitions, as they are filed

in the court, the net rental of estates and the incumbrances affecting such estates, as stated therein; filing every rental of estates (or parts of estates) sold by the Commissioners; keeping a correct and most minute detail of every lot sold; furnishing statistical reports to the Houses of Lords and Commons, when called upon, &c. The ordinary hours of attendance are from ten o'clock, A.M., until four o'clock, P.M.; but when preparing parliamentary and other statistical returns (occupying about three months in the year), the hours of attendance are from nine o'clock, A.M., until eleven o'clock, P.M.

3. Give a detail of the general course of practice and mode of procedure adopted in your office.

Duties:—1. To keep a daily account of all petitions lodged in court, and enter in alphabetical order the net rentals and incumbrances, as stated in the petitions, which the estate was subject to, in a book prepared for that purpose. 2. To keep a record of all sales of estates by the Commissioners, whether sold by public auction in court, or by provincial auction, or by private contract subject to confirmation by the Commissioners, arranged as follows:—3. Number of lots put up for sale. 4. Number of estates and lots adjourned, stating the highest offer made. 5. Number of lots sold. 6. Matters in which owners were petitioners. 7. Matters in which the estates were vested in assignees. 8. Name of owner. 9. Name of petitioner. 10. Name of solicitor who had the carriage of the sale. 11. Solicitor's address. 12. Date of presenting petition. 13. Date of the conditional order for sale. 14. Date of absolute order for sale. 15. Date of sale by public auction in court, or in the provinces, or by private contract; as also the date of the confirmation of the sale by the Commissioners. 16. Number of lots sold on each estate. 17. Tenure of lots sold, whether fee-simple, fee-farm grants, lives renewable for ever, church leases, term of years, &c. 18. Outgoings of the estate, such as head, crown, or quit rents, tithe rent-charges, heriots, renewal fines, &c., subject to which the estate was sold. 19. The ordinance, poor law, and valuations, when ordered by the Commissioners, when stated in the rentals. 20. Amount paid for quit-rents, when purchased by order of the Commissioners from the Crown. 21. Stating the county, barony, poor law union, and electoral division, when stated in the rental. 22. Gross number of statute acres, annual rental, or valuation (when estate is unlet) of each lot. 23. Amount of mortgages, judgments, and other charges affecting the estate, as appeared on the petition lodged in each matter; as also the same charges as per final schedule, as settled by the Commissioners. 24. Amount of jointures, annuities, Government re-payments, and other charges, subject to which each lot was sold. 25. Amount of purchase money for each lot, whether acreable, house property, perpetual rent-charges, tithe rent-charges, chief rents or ground rents, advowsons, fisheries, and mines, &c. 26. Number of English, Scotch, and foreign purchasers, together with the purchase money invested by them; their addresses, as taken from the sales books, and the county in Ireland in which they purchased. 27. Total amount

of costs and other expenses of sales of each estate paid by order of the Commissioners—(this item is furnished by the Taxing Master). 28. Amount of money paid out by order of the Commissioners, including sums allowed to purchasers as absolute credits—(the Accountant furnishes me with this item). 29. Names and residences of the purchasers of each lot sold; the date of the conveyance executed by the Commissioners. Observations in my records:—accounting for, if possible, either the high or low figure which the estate sold for, such as the eligibility of the situation of the property as to locality, &c.; the favourable state of the tenantry, &c.; or, on the other hand, high head rents, renewal fines, annuities, poor rates, &c., &c., which the estate was sold subject to, &c.; as also, the quantity of bog on each lot sold, and any other particular which might prove interesting, as a record of the court. Lastly, To publish annually a statistical sheet, tabularly arranged, giving in a succinct form the results of the operations of the court, for distribution among the landed proprietors and other capitalists in Great Britain and Ireland.

CHARLES M. ORMSBY.

PAPER No. 5.—QUESTIONS ADDRESSED TO THE
LAW SOCIETY OF IRELAND.

1. Has the course of practice adopted in the Incumbered Estates Court been found to work satisfactorily for the due despatch of business, and has it met with the general approval of the profession or otherwise?

2. Do any defects or imperfections in that course of practice occur to you? and if so, state the same, and any remedies which you can suggest.

3. Can you suggest any modification or alterations in the constitution of the court, or in its practice or forms of procedure which would be calculated to make the system more perfect?

4. What are the peculiar circumstances in the constitution of the court, or its mode of procedure, which have mainly contributed to its successful operations?

5. What have been the practical results of giving a parliamentary title?

6. Ought the privilege of obtaining parliamentary title to be continued and made permanent, and should such privilege be confined to incumbered estates, or limited to lands of any particular tenure, or would it be expedient to extend it to all sales under the court?

7. What would be the comparative expense of a sale of the same property in the Incumbered Estates Court, and in the Court of Chancery by cause petition under the 15th section of the Chancery Regulation Act?

8. What causes the difference in expense between sales in Chancery and in the Incumbered Estates Court?

9. Have the costs of surveys, valuations, and advertisements in the Incumbered Estates Court formed any considerable portion of the expense; and do you think this expense could be diminished without injury to sales?

10. What proportion of a bill of costs for a sale

in Chancery consists of Law and Chancery Fund: Stamps, Office and other fees?

11. If the proceedings in Chancery were relieved from those charges, and its practice assimilated to that of the Incumbered Estates Court with parliamentary title, could sales be had there as quickly and as cheaply?

12. What is the comparative expense of a partition in the Incumbered Estates Court and in Chancery?

ANSWERS OF THE COUNCIL OF MANAGEMENT OF
THE INCORPORATED SOCIETY OF THE ATTORNEYS
AND SOLICITORS OF IRELAND TO QUESTIONS
IN PAPER No. 5.

1. Has the course of practice adopted in the Incumbered Estates Court been found to work satisfactorily for the due despatch of business, and has it met with the general approval of the profession, or otherwise?

Generally speaking, the course of practice adopted in the Incumbered Estates Court has worked satisfactorily, and met with the approval of the profession.

2. Do any defects or imperfections in the course of practice occur to you? and if so, state the same, and any remedies which you can suggest.

The defects in the present system arise from the insufficiency of the establishment to meet the great press of business in the court. This is especially felt in the examination of the title, direction for searches, settling of schedules, and distribution of the funds. We consider that the schedules should in each case be settled before the sale, without prejudice to the arrangement of the rental in the meantime. It would be desirable that a more perfect record of the proceedings (easy of access) should be kept, especially with regard to the payment of money and the data from which the sums due to each party are ascertained.

The settlement of the schedule before the sale would in many cases prevent a sacrifice of property, by affording to each creditor the means of seeing his position in point of priority, and so enable him, if considered advisable, to purchase a part of the property.

The records of the court are, for want of a sufficient staff and accommodation for holding them in a very unsatisfactory state; it often happens that documents are mislaid and cannot be found.

3. Can you suggest any modification or alterations in the constitution of the court, or in its practice or forms of procedure which would be calculated to make the system more perfect?

No, except what appears from the answer to the second query, and the necessity for an increased establishment. It would also be most desirable that the Incumbered Estates Court and the offices attached thereto should be removed to the vicinity of the Four Courts; the present situation is extremely inconvenient, and this is felt especially in regard to the difficulty of procuring counsel when required.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure,

which have mainly contributed to its successful operations?

The facility with which the Commissioners dispose of cases when brought before them, and the wide view they take of them; the avoiding of technicalities; the parliamentary title; the immediate confirmation of the sale; immediate possession; the small costs a purchaser incurs; the sales when rentals prepared being frequent and quick; the opportunity of communication with, and facility of access to, the Commissioner who has the case before him.

5. What have been the practical results of giving a parliamentary title?

An increased desire to purchase, and facility afforded of reselling or of raising money; a great majority of capitalists now object to lend money except on a parliamentary title. This observation applies especially to English and Scotch capitalists.

6. Ought the privilege of obtaining parliamentary title to be continued and made permanent, and should such privilege be confined to incumbered estates, or limited to lands of any particular tenure, or would it be expedient to extend it to all sales under the court?

The privilege of obtaining parliamentary titles ought to be continued and made permanent, and should be extended to all sales under the Court of Chancery.

7. What would be the comparative expense of a sale of the same property, in the Incumbered Estates Court, and in the Court of Chancery by cause petition, under the 15th section of the Chancery Regulation Act?

This is a very difficult question; probably, in a plain case, in which no abatement or change of interest would take place, the expense of such a proceeding in the Court of Chancery might not exceed that in the Incumbered Estates Court; but many circumstances may occur which would increase the expense in a Chancery proceeding, which would not have the same effect in the Incumbered Estates Court. When property is sold in several lots in the Court of Chancery a very heavy expense is incurred in making out a separate title for each purchaser, copies of all the deeds, decrees, orders, and searches having to be furnished to each. In such cases the expense of a sale in Chancery would much exceed that in the Incumbered Estates Court.

8. What causes the difference in expense between sales in Chancery and in the Incumbered Estates Court?

The heavy office fees, and Chancery fund stamps, and the making out of separate titles to each purchaser; but if the Court of Chancery had the power of giving a parliamentary title on the execution of the conveyance by the Master, and if Chancery fund stamps and office fees were abolished, we consider that the expense in each court would not materially differ.

9. Have the costs of surveys, valuations, and advertisements, in the Incumbered Estates Court, formed any considerable proportion of the expense; and do you think this expense could be diminished without injury to sales?

The expense of surveys, valuations, and adver-

tisements in the Incumbered Estates Court, do form a considerable proportion of the expense; the first two are most necessary and useful, and give great facility to making out accurate rentals, and preventing objection by purchasers, or leaving opportunities to them to seek for compensation. These expenses being absolutely necessary, could not, in our opinion, be materially diminished, and the services of respectable, competent persons secured. The expense of advertising may be diminished and a better mode adopted.

10. What proportion of a bill of costs for a sale in Chancery consists of law and Chancery fund, stamps, office, and other fees?

It is rather difficult to answer this, as the expenses vary very much according to the nature of the case; but we consider that the proportion of a bill of costs for a sale in Chancery, which consists of Chancery fund stamps, office and other fees, is about one-third, and this is exclusive of advertisements, surveys, valuations, and counsels' fees.

11. If the proceedings in Chancery were relieved from those charges, and its practice assimilated to that of the Incumbered Estates Court with parliamentary title, could sales be had there as quickly and as cheaply?

If the proceedings in Chancery were relieved from all fees and stamps, and if the same facilities existed in that court which exist in the Incumbered Estates Court (subject to certain alterations), and that the power of giving a parliamentary title was conferred on the Court of Chancery, we think sales might be had and the produce thereof distributed as quickly and cheaply in Chancery as in the Incumbered Estates Court; but in order to effect this, we think that there should be a very considerable change made in the mode of conducting and working the business of the offices.

12. What is the comparative expense of a partition in the Incumbered Estates Court and in Chancery?

The expense of a partition in the Court of Chancery is much greater than in the Incumbered Estates Court. It was almost ruinous under the old system, to proprietors, if the estate was large; and particularly to the plaintiff, if he had not an agreement with the other proprietors as to the costs down to the first decree.

PAPER NO. 6.—QUESTIONS ADDRESSED TO THE MASTERS OF THE COURT OF CHANCERY.

1. What is the general course of practice in your office with respect to proceedings for sale in cases under the 15th section of the Chancery Regulation Act?

2. Within what time after the presenting of the petition could a sale be had in your office by the exercise of ordinary diligence on the part of the solicitor, and in a case not presenting any peculiar difficulties or complexity?

3. Can you estimate what the average costs would be in an ordinary case from the presenting of the petition to the distribution of the funds?

4. Are there any means at present of preventing delay on the part of the solicitor in carrying on a

sale, or have the Masters any power to expedite the proceedings; can you suggest any remedy for such delays?

5. Is any delay at present occasioned in the prosecution of cases by the pressure of business in your office?

6. Is there at present any arrear of business in your office, or is the amount of business sufficient to occupy the time of your court?

ANSWERS OF WILLIAM HENN, ESQ., MASTER IN CHANCERY, TO QUESTIONS IN PAPER NO. 6.

1. What is the general course of practice in your office with respect to proceedings for sale in cases under the 15th section of the Chancery Regulation Act?

The general course of practice in my office with respect to proceedings for a sale in cases under sec. 15 of the Chancery Regulation Act, is as follows:—When the Chancellor's order, which is simply an order "to consider the matter of the petition, and proceed thereon according to the statute," is brought into the office, the solicitor who brings it in takes out a summons returnable, in general, within three weeks after its date, but occasionally, in pressing cases, within such shorter time as the Master chooses to limit, which is served, as a subpoena was, on the respondents, together with a notice under the 115th of the General Orders of the 27th March, 1843, requiring them each to appoint a solicitor, or name some dwelling-house in the city upon whom or where all future summonses and notices may be served, and apprising them that in case they do not enter an appearance, no further notice will be given them, and the Master will proceed *ex parte* in their absence. This summons is entered in the Master's long cause list for the day on which it is returnable, and is called on upon the day on which it appears in the published day list. Upon the case coming on to be heard, counsel for the petitioner opens the case, states the petition, and the relief sought. If the respondent attends, and does not object, the Master, upon proof or admission, as the case may be, of the deed or deeds, or other instrument creating the incumbrance on which he founds his case, takes down in his book the heads of an order, declaring the incumbrance a charge, &c. and directing an account of the sum due on foot of it, and of all other incumbrances affecting the premises; a posting for incumbrancers to come in by a certain day, and prove their respective demands, that the petition may stand as a charge, and, if the special circumstances require it, that petitioner file a further charge, with liberty to the respondent in either case to discharge it by a day also therein for that purpose limited. An order is then drawn up, embodying those rulings and directions. If the respondent does not file a discharge contesting the amount or seeking credits, the petitioner, on the expiration of the time limited for filing the discharge, issues a summons to take his charge as confessed; and thereupon, on the summons, which is always entered in the short cause list, coming on to be heard, the charge is marked allowed; but if the respondent has filed a discharge a summons is

issued to proceed on charge and discharge, which is entered in the short or long list, according to circumstances; and at the hearing the Master decides the questions raised by those pleadings between the parties. A similar practice is adopted with respect to the several creditors who file charges; and after all such charges and discharges have been disposed of, and the time limited for the creditors to come in has expired, the Master directs an order to be prepared and lodged in his office, generally within a week, reciting shortly the proceedings, that the Master has ascertained that there is due to the petitioner and the several creditors whose names he has set forth in the schedule annexed to the order, the several sums due to each for principal, interest, and costs, and their respective priorities; and that no other claimants had appeared; and in default of the respondent paying to the said several creditors the respective sums due, and the costs as so ascertained, within three months, that the lands and premises (stating them) be sold, &c., following the usual form of decrees in Chancery for sales, according to the old system. A summons is always issued to settle this order, which is served on the respondent and on the creditors who have filed charges, in order that they may have an opportunity of seeing that their rights are protected, and any errors, or omissions, or deviations, from the Master's decisions on the several charges and discharges are corrected or supplied. The time always allowed for payment, unless where the respondent consents to a shorter period, is three months; and if the money is not then paid, the solicitor for the petitioner proceeds to make out the abstract of title, which he lays before counsel, who gives his opinion and directs the necessary searches. When the searches are completed, which not unfrequently occupies a long time, the case is again submitted to counsel for his opinion, having regard to the different acts that may appear upon them, particularly the registry searches. If, in counsel's opinion, the title is satisfactory, the solicitor for the petitioner then takes out a summons for the Master to inspect and approve of the title; and if, on inspection, he sees no reason to dissent from or doubt the correctness of the opinion, he, upon the production of an affidavit that all the deeds necessary for evidencing the title are lodged in the Master's office, or are within the procurement of the solicitor, signs a certificate that he has inspected the abstract, and that it is, in his opinion, "a compliance with the 138th General Order of the 27th March, 1843." If the Master has any doubt as to the opinion, he confers with counsel; and if the counsel, either then or in his original opinion, states that any conditions of sale are necessary, a summons is issued for the Master to settle conditions; and not until they are settled and approved of by him does he sign the necessary certificate. When it is signed, the solicitor prepares a posting, that on a day (therein specified) usually six weeks after the date, the lands (stating them) will be sold at the time and place therein mentioned. This is signed by the Master, and at foot he specifies the papers in which it is to be published, and the number of times it is to be inserted in each. This is,

in truth, so far as title is concerned, the same practice that had been for several years followed in making out titles, and bringing estates to the hammer, under the old system of decrees; and though it has the appearance of being somewhat tedious, it was found to be the most effectual for obviating objections to titles, which were always the most formidable obstacles in the way of speedy and inexpensive sales in the Court of Chancery. Such is a short outline of the practice with respect to proceedings for sale in the ordinary routine of cases under the 15th section; but it very frequently happens that when the case comes into the office, objections are raised by the respondent to the right of the petitioner to have a sale at all, and matters of defence are put forward which throw upon the Master the necessity of exercising all the functions of a Chancellor, and either of decreeing the petitioner entitled upon principles of equity to the relief he seeks, and then performing the ordinary functions of a Master, or of dismissing the petition for want of equity, or on any other of the numerous grounds upon which the Chancellor decides, when raised by plea, answer, or demurrer.

How far it was in the contemplation of the framers of the Act to throw these onerous duties upon the Masters, I do not presume to speculate; but, when I first read the Act, I was under the impression that that section was intended to apply not to cases where equities were to be decided before the case could be sent into the Master's office, but simply to that class of cases in which, when the case was called on for hearing, the counsel for the defendant would have said he admitted the plaintiff was entitled to the relief sought, it being a matter of course to send it to the Master's office. According to the present practice, however, the court, except from what appears upon the face of the petition itself, never can form an opinion as to the precise category within which the case should be comprised, as the respondent is never served with the petition, nor has he, for aught that appears, any notice of its existence until it comes into the Master's office: then, for the first time, has he an opportunity of making any defence at all; and the consequence is, that the Master has frequently most important and difficult questions to decide, which are raised occasionally by a demurrer *ore tenus*, but generally by the discharge to the petitioner's charge, the discussion of which tends to create both delay and expense to the suitors, for in such cases it rarely happens that the defeated party rests satisfied with the opinion of the Master upon the point. If it was intended to give the Masters that which practically they now have to a great extent, namely, a "*divisum imperium*" as to jurisdiction with the Chancellor and the Master of the Rolls, some addition, it is respectfully submitted, should have been made to their staff, of the insufficiency of which, for the performance of the original ordinary duties of the office they have been ineffectually complaining for the last twenty years. It would also appear to me that, for the more effectual working of the Act, our jurisdiction should be more accurately defined. According to the opinion of the Lord Chancellor, when the case once comes into the office, we

have full, and he has not even a concurrent jurisdiction with us, but only by way of appeal; still the jurisdiction is not complete in each individual case, as we have no power to order the amendment of a petition, or to substitute service on a party out of the country, or to distribute funds; and as our jurisdiction, such as it is, extends only over the particular cases in our own offices, we are frequently embarrassed to know what to do in cases in which receivers are extended from cases not in our offices to cases within our jurisdiction; for as, in that state of things, any order to be made upon the receiver must be entitled and made in all the cases, and as our jurisdiction only extends to some of them, it becomes a question how far such an order of the Master could be enforced at all.

(To be continued.)

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DUBLIN, JULY 14, 1855.

WE are happy to observe that the bill for extending to this country the provisions of the English law for the speedy arrest of absconding debtors, has gone through the third reading in the House of Commons, and is likely this session to pass. Measures similar to the present were discussed in former sessions, and the bill of last year we reprinted in our miscellaneous columns, and made some suggestions as to the improvement of its details. It was, we believe, postponed for want of time, and not, like its predecessor, rejected in a very thin house. The object of this bill may be shortly stated to be that of enabling certain local functionaries provisionally to exercise the authority now confided in the judges of the superior courts, in ordering the arrest of absconding debtors. We still retain the opinion which we last year expressed, that the class of officials thus proposed to be entrusted with the execution of this measure is not sufficiently extensive, and that, unless the resident magistrates of Ireland be added to the list, the new law will in many instances be abortive. In England, the County Court judges and District Commissioners of Bankruptcy, who are the functionaries mentioned in the English Act, being resident in their respective localities, may suffice to give effect to it; but in Ireland the

Assistant Barristers, as we all know, do not reside in their counties, and the mayors and recorders of corporate towns are, in many districts, not easily accessible. We hope, therefore, that it may not be too late to make the addition to the bill which we have suggested. We are, however, glad that, incomplete as the measure is, it has arrived at its present stage, and that the opposition which it has unworthily encountered from a few, has been so far defeated, and we trust that it will eventually be made to effectually answer the purpose for which it is intended.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 220.)

Another of the results flowing from this enactment is, that petitions are hourly presented for the most paltry sums, to the utter ruin of all parties concerned, except the solicitor, who absorbs the whole fund in costs. A man executes his bond, with warrant, in a principal sum, say of £20, on this the obligee enters judgment, and then, under a recent statute, registers it as a mortgage; and the moment he has done this, he files a cause petition for a sale and a receiver. I have seen cases in which receivers were sought over properties where the interest on the charge did not exceed six pounds a-year. In like manner administration suits are instituted where the whole amount of the assets do not amount to £50, and it is impossible that any human being but the solicitors can benefit by them. It would, I respectfully conceive, be desirable to li-

mit, if possible, a minimum, beyond which a party should not be at liberty to proceed under that statute. It is also to be observed, that nothing is said in the Act as to the re-hearing of a cause, whether or not we have any jurisdiction to re-hear, or within what time we should be at liberty to do so.

I feel that in making these comments I have diverged widely from the question I professed to answer; but, as I presumed that one of the objects of the Commissioners was to ascertain the practical working of the Act, I have ventured to make these few observations on what appear to me to be impediments in the way of its efficiency. I say nothing to the fact of its being a system directly the converse of that adopted in England, to which I thought—but now take it for granted very erroneously—that considering our laws are, generally speaking, the same in both countries, and that the reports of English decisions are binding authorities on us here, sound policy would have suggested that the practice of the courts in both countries should have been as nearly as possible assimilated.

2. Within what time after the presenting of the petition could a sale be had in your office by the exercise of ordinary diligence on the part of the solicitor, and in a case not presenting any peculiar difficulties or complexity?

By ordinary diligence a sale could be had in a case not presenting any peculiar difficulties or complexity, and in which the creditors were few, in four or five Terms at farthest.

3. Can you estimate what the average costs would be in an ordinary case from the presenting of the petition to the distribution of the funds?

I cannot satisfactorily answer this query at present. I should think the Taxing Officer ought to be able to answer it, or if time were allowed, and a search made in the Registrar's office for the final orders pronounced by the five Masters, allocating funds after sale had, an average might be easily struck; but this would require time, and the orders of all the Masters should be referred to.

4. Are there any means at present of preventing delay on the part of the solicitor in carrying on a sale, or have the Masters any power to expedite the proceedings; can you suggest any remedy for such delays?

There are, in my opinion, quite sufficient means at present existing of preventing delay; they are, I think, to be found furnished by the Orders Nos. 111, 113, 114, 116, 117, 119, 120, 121, of the 27th of March, 1843, which are applicable to all cases under the 15th section of the Chancery Regulation Act; and the Chancellor's order, No. 37, of the 31st July, 1851; and I could not suggest any remedy for the purpose of obviating delays caused by the suitors or solicitors in the conduct of the suits, that could, in my opinion, be more effectual. To the principles on which many of those orders have been framed, I, in common with my brother Masters, respectfully object; and, as regards the practicability of carrying them all out, I have only to say, that I concur entirely in the opinions expressed by Master Litton. But there is one species of delay for which I know no remedy but a total change in the whole existing system, a change

which would have the effect of diminishing the number of judges, and returning to the old system of the division of labour, which allotted the decision of principles to one class, and the execution of details to another. The mind that is eminently qualified for the discharge of one duty is not unfrequently very ill qualified for the performance of the other; and when both are imposed on the same individual, one or other of them is frequently not done well. This in itself tends to impede the despatch of business: but, in addition to this, there are now in Dublin no fewer than ten distinct Equity Courts, all sitting at the same moment; seven at the Four Courts, viz., Chancery, Rolls, and five Masters' offices; and at Henrietta-street, three judges, who frequently sit in separate courts at the same time. The consequence is, that the Master frequently finds it impossible to get counsel to attend him; and as no solicitor has, or can have, a sufficient number of clerks to attend upon all the courts at the same time, cases are often called on, when neither counsel, solicitor, or clerk, is, or can be, in attendance; and although one of the Orders of 1843 directs that the Master shall not, except under very special circumstances, wait for counsel, yet that Order, which was framed when Masters only acted in their ordinary magisterial capacity, cannot be acted on when the Masters are sitting as Equity Judges. Were they to act on it, they would only increase delay and multiply expense, as their decisions (if, indeed, they could, in the absence of counsel, pronounce any) would never be acquiesced in; the consequence of which would be, that very unjust expense would be thrown on the suitor, and the termination of the suit would be very greatly retarded. I have myself lost, in this last Term, from this cause alone, hours equal to three whole official days. Striking out the cases will not remedy it; and to impose upon the solicitor the necessity, at the peril of costs, of having a clerk in constant attendance, where so many courts are sitting at the same time, would be most unjust. In England this state of things does not exist, because there is a particular bar attached to each court; but here, not one of the Master's offices would, on the present scale of remuneration, give bread to two counsel in each office; and besides in England there are but five courts, whereas here there are no fewer than ten, sitting at one and the same time. The only remedy I can see for this is, as I have said, a change in the whole system; what that change should be I do not pretend to say; but I feel perfectly satisfied, that without a radical change the business of the Incumbered Estates Court can never, without great detriment to the public interest, be transferred to the Court of Chancery; and that if the system now in operation in Chancery be continued, there will in a few years be a total destruction of uniformity, both of decision and of practice. There is no book here that provides or defines any precise practice for the Masters. The English books of practice do not apply to a state of things so totally different from that which exists in England. And as no one of the Masters can know what the others are doing during each day in their respective offices,

and there are no reports of their decisions, (for such reports would not remunerate the reporters for the expense of printing,) the result is, that the same point, so far as relates to practice, is sometimes decided as many ways as there are Masters. Any system, even an indifferent one, steadily and uniformly acted on, would, in my humble judgment, be greatly preferable to those eternal changes, which have so jumbled and confounded what has been with what is, that no human being can tell what is or what is not now the practice.

5. Is any delay at present occasioned in the prosecution of cases by the pressure of business in your office?

There is in my office delay at present occasioned in the prosecution of cases by the pressure of business, and the other causes I have taken the liberty of stating.

6. Is there at present any arrear of business in your office, or is the amount of business sufficient to occupy the time of your court?

There is an arrear of business, but not to a very considerable amount; the number of cases of all descriptions now undisposed of in my long cause list does not exceed sixty, in the short cause list there is no arrear. Prior to the Chancery Regulation Act I never had an arrear; but to keep it down I was obliged to sit—and did sit—many hours, in each year, more than those prescribed by the Orders, as may be seen by reference to my annual returns, besides being occupied several hours in evenings at my own house; at present, notwithstanding all my efforts, I cannot keep down the arrear; and were it not that the proportion of sales to the petitions for sales is in my office scarcely as one to ten, it would continually increase; but the moment the incumbrances are ascertained here, the party, if there should happen to be the slightest complication of title, immediately goes to the Incumbered Estates Court for a sale, as there he can get a parliamentary title (and that court adopts and acts upon the Master's orders, ascertaining the amount and priorities of the incumbrancers, and distributes the funds accordingly);—by far the greater part of the delays and expenses in Chancery being occasioned by the courses which must necessarily be adopted in order to clear the title, so as to bring the estate to the hammer free from objections. Since the passing of the Act I have held but seven sales under it, the particulars of which I have stated in a schedule at foot, while, in the same period, no fewer than eighty petitions have been lodged, on the greater number of which proceedings have been taken, and orders made.

WILLIAM HENN.

[Here follows the Schedule referred to.]

ANSWERS OF EDWARD LITTON, ESQ., MASTER IN CHANCERY, TO QUESTIONS IN PAPER NO. 6.

1. What is the general course of practice in your office with respect to proceedings for sale in cases under the 15th section of the Chancery Regulation Act?

Having had communications with Master Henn, Brooke, and Lyle, (Master Murphy having been ill,

and unable to attend our meeting,) I have arrived at the opinion, "that the general course of practice, with respect to proceedings for sale, in cases under the 15th sec. of the Chancery Regulation Act," are the same in all the Masters' offices. Some minute differences exist, as to the arrangement of the different proceedings, and the periods at which certain acts are to be done, in the progress and prosecution of the suit; but the general course of practice is the same, and the slight differences which may be found to exist, do not, in my opinion, at all affect the interests of the suitor, and make a very slight difference, indeed, in the time taken to prosecute the suit to a final hearing and order.

The general practice in my office is this: when the order of the Chancellor, referring the matter to me, shall have been made up and taken out of the proper office of the Court of Chancery, the solicitor for the petitioner brings the order into the office of my (the Master's) Examiner, takes out a summons, and enters the case for the first hearing; this is served on all proper persons, and as this first hearing of a cause involves important questions, as to parties, the mode of putting the rights of the suitors in issue, the right of either party to have the documents in the hands of the other party brought into the Examiner's office, and the extent and character of the postings for creditors and incumbrances, for these reasons the summons for hearing is always (with me) entered in my long cause list; but as, in general, they are not of so heavy a character as general long causes, my practice has always been, and continues to be, to place them at the head of the long list of the Term, and thus secure to them an early hearing; and the hearing of them has been had, in every instance, within the first ten days of the commencement of each successive Term.

At this hearing such order is made as is suited to the exigencies of the case of suitors at both sides.

Sometimes the petition is ordered to stand as a charge, to be discharged, if the respondent shall not attend at the hearing, in three weeks after notice that it does so; or if he shall attend, in three weeks after the day of hearing and order.

Sometimes the petitioner being advised that the phraseology of the petition has been too wide to bring forward his case in full effect, seeks to file a charge in aid of his petition, in which case the Master names a time for so doing, and also directs that the respondent shall file his discharge within a certain time after notice of the charge—three weeks is the usual time, but often under peculiar circumstances a further time is asked for and accorded. After charge and discharge, or discharges only, filed, the case is again entered for directions, and the Master gives such directions for the examination of either party by the other, on personal interrogatories, and by an examination by affidavit or otherwise, as the case may require, limiting the time always. When that time shall have expired, the case is entered again for plenary hearing, and the charges of the various incumbrancers, who may have filed charges, as also the rights of the peti-

tioner, are adjudicated upon; and all rights and claims being made the subject of judicial decision, the order or decree is directed, that is, settled by the Master; and, giving the usual time for objections, signed, unless there be an appeal from that order within the time prescribed by the Chancery Act, and the rules and orders which have been made by the Chancellor thereon, the order becomes final and conclusive, and binds all rights involved therein. There is then a posting for a sale, and that varies in length of time from three months to six weeks, under the peculiar circumstances of each case. There is no fixed or binding rule on this subject, and I think in nine cases out of ten in my office, three months is the time given.

Preliminary to the actual sale there is the same inspection of the abstract of title by the Master, the same class of opinion of counsel upon that abstract, the same affidavits as to the truth of the abstract, and as to the necessary deeds to make out title having been lodged in the Examiner's office, and as to the proper parties being before the court, as are required by the settled practice in every equity cause, before the Chancery Act, and as directed by the rules and orders found in O'Keeffe's Rules and Orders, and in Lord Plunkett's Rules and Orders, and in those of Sir Edward Sugden (now Lord St. Leonards).

I have endeavoured to compress, and this is as brief an answer to the first question as I have been enabled to give.

2. Within what time after the presenting of the petition could a sale be had in your office by the exercise of ordinary diligence on the part of the solicitor, and in a case not presenting any peculiar difficulties or complexity?

Taking into consideration the time which generally must elapse from the time of presenting a petition till the matter is heard before the Chancellor, the time allowed after the order is brought into the Master's office for charges and discharges, the directions for examinations, the examinations, the posting for creditors and incumbrances, the adjudication upon all claims, and the postings for a sale, a sale could be had in my office, in a case not presenting any peculiar difficulty or complexity, by the exercise of ordinary diligence on the part of the petitioner's solicitor, in from eight to twelve months, as I can best calculate.

I have subjoined a paper in the nature of a schedule, which discloses the actual periods consumed in cases where I have pronounced decrees or orders for a sale, the particulars and items of which paper will go far to present an accurate reply to this second question.

It is observable how few sales actually took place after the absolute decree or order pronounced for sale.

This has been always produced by the following two causes, and will always be so, so long as the Incumbered Estates Court shall continue: firstly, that having had all matter of right settled, and finally adjudicated upon and affirmed by the Master's order, the parties desirous of obtaining a parliamentary title, which is much preferred to a title given by a decree or order of the Chancellor or the

Master, remove the case at once to the Incumbered Estates Court. The Commissioners adopt the Master's order, if it has not been altered or reversed on an appeal, and if it has been, they adopt the Chancellor's or Rolls' order, made on appeal, as conclusive in almost all cases of all the rights involved therein, and adjudicated upon thereby, and so adopting it, they sell at once; thereby giving a parliamentary title, which I am bound to say is greatly preferred by purchasers to any title made out either pursuant to private contract, or under a decree of the Court of Chancery; and secondly, because the respondents frequently pay off the amount of debts and costs, when the time for an actual sale is approaching, or has arrived.

3. Can you estimate what the average costs would be in an ordinary case, from the presenting of the petition to the distribution of the funds?

I have no means of estimating the costs named in the question; but a reference to the records of the Taxing Master's office will present the answer to this question at once.

4. Are there any means at present of preventing delay on the part of the solicitor in carrying on a sale, or have the Masters any power to expedite the proceedings; can you suggest any remedy for such delays?

I am of opinion that the law and practice of the Courts afford abundant means to the suitors of preventing delay on the part of the solicitors in carrying on a sale; that the Masters have no power to expedite the proceedings; and that I cannot suggest any remedy for such delays; and I must add, that I do not think that any remedy which could be suggested, beyond those at present existing, and which are in the easy and inexpensive power of every suitor, is necessary, or would be useful.

Master Brooke did, at our meeting of the Masters, suggest something in addition to the rules already existing upon this subject, as a further remedy against delay; and if his mind in that respect has not been changed by the opinions expressed by the other three Masters, he will probably in his answer to this question suggest it.

My opinion is, that any additional means of forcing a party to proceed in the prosecution of a suit beyond those which at present exist, would be mischievous, immoral, and unjust.

The means existing at present are, the dismissing a petition for want of prosecution; or if a respondent does not desire that, the cheap remedy for applying for the carriage of the proceedings, a matter always entered in the Master's list of short causes, and which (as there never is an arrear of short causes) can be moved and adjudicated upon on the third day after the summons shall have been issued.

If a solicitor shall delay to proceed, contrary to the wish of his client, the client may dismiss him, and have another solicitor. If the solicitor and client concur in delaying other parties, the remedy I have named is open to those parties without delay, and with scarcely any expense.

What right has Parliament or any court of justice to compel parties to litigate against their will?

Often, after a suit is instituted, a petitioner, who had his order of reference, or even his decree for a

sale, takes pity upon his adversary, and gives him time. In family suits a petitioner delays, because he wishes not to ruin his relative.

In other suits, where doubtful questions exist, delay gives time to imparl and to compromise; delay gives time to the respondent to pay by degrees, in cases where, if he were to be pressed, he could not pay at all; in all such cases—and they are very many—and many others, to force parties on would be to ruin them—often on both sides. Again, there are cases where petitioners having had their decree for a sale, or a right to a decree for a sale, elect to lie by, and get their demand paid by a receiver. In house property of a bad description, subject to heavy head rents, if the sale be pressed, little will be had from it; whereas house property of that kind, well managed, often produces an actual income of considerable amount.

Are not the suitors, who know their own interest, the best persons to conduct their own cases? Is it not enough that the law and practice have provided the means of forcing on the adversary at once at the most trifling expense?

At law, in analogy to the remedies I have named as existing in a court of equity, they have the "judgment of non-suit," the "judgment of non-pros," and the service of notice of trial.

Was it ever considered that any functionary of the Courts of King's Bench, Common Pleas, or Exchequer, was to call before him the suitors, or their attorneys, to account to them why it was that they had not joined issue, or gone to trial? A very obvious answer would be, "we know our own business better than you can do." Has any one ever considered that it was portion of the Lord Chancellor's duty, or that of the Master of the Rolls, to inquire into, and control the causes of delay in the prosecution of an equity suit, from the time of filing the bill or petition till the hearing of the cause or matter; yet I must say that either of these high functionaries, or the Chief Justice of the King's Bench, or the Chief Baron of the Exchequer, or the Chief Justice of the Common Pleas, could do it better than any one of the Masters of Chancery:—first, because these functionaries have not, in discharge of their judicial and official duties, to devote one-half of the time which is necessary to the due discharge of any one Master's official and judicial duties; and secondly, because from the extended arena of contest in the Master's office, where, at times, there are some twenty, thirty, or forty litigants (as in the case of a creditor's suit, where the incumbrances are numerous, and there are deficient assets,) it is wholly impracticable to arrive at the fact as to with whom the delay rests, if really unnecessary delay at all exists.

But even if this were not so, how is it humanly possible that any judicial or official functionary can know, or even guess at the fact, as to which are the suits improperly or unnecessarily delayed. To make even an approach to the attainment of such knowledge, he must necessarily be armed with an extended corps of legal detectives, who must add to this office another, that of spies and informers, whose duty it must be, whenever a cause is found to have been delayed, to visit the office of the solicitor who

has charge of it, to ask him all his reasons for the delay (in many cases the solicitor would betray his client if he were to expose them, as for instance, infirmity in his case, or a failure in his evidence), then to communicate with the client to ascertain whether the solicitor has spoken truly. All these duties must be performed to arrive at any thing like a conclusion as to whether a cause has been properly and conscientiously delayed, or whether it has been improperly delayed.

The five Masters in Chancery have already, in their published pamphlet, in reply to one published by the present Master of the Rolls, declared their unwillingness and their inability to undertake those degrading and impracticable duties; and they seek for some instance of any such duties having been ever undertaken by any judicial functionary, and some ground to lead to the belief that they could be either successful or useful. If there should be further legislation in that direction, for the reasons I have already stated, my opinion is, that it should provide that the duties to which I have adverted should be undertaken, at least, in the first instance, by the Lord Chancellor, or by the Master of the Rolls, as the Lord Chancellor's judicial assistant in the Court of Chancery, and by one of the judges of the courts of law.

As one who practised at the Bar for thirty-one years—for the last twenty-five years almost exclusively in courts of equity—and who has, in addition, served for twelve years as a Master in Chancery, I must emphatically record my deliberate opinion, that any further advance in an effort to expedite proceedings will be ineffectual; and, if effectual, would lead to results immoral, injurious, and unjust.

5. Is any delay at present occasioned in the prosecution of cases by the pressure of business in your office?

No delay is at present occasioned in the prosecution of causes by the pressure of business in my office.

As to short causes, there never is, or has been, a single case in arrear.

As to my long causes, my long list is—as is the Chancellor's Term list—a new list each Term, made up on the second day of Term; and for the twelve years during which I have been a Master, I have never had (save in one instance, where a long illness caused an arrear of thirteen causes) a single case in arrear at the commencement of each Term. On the second day of each Term I have commenced the hearing of the long cause list of that Term, so that, at the end of each sittings, I have never had (save in the instance I have named) any long or short cause in arrear. The Chancery Act has, of course, added considerably to the number of causes, and if a greater number of cases had been prosecuted to an actual sale, of course the incidents of a sale would have caused delay.

As I have said, there is not any arrear of business in my office; but the amount of business is not only sufficient to occupy the time of my court, but requires, to achieve the object of keeping down all arrears, more prolonged daily sittings than a man less blessed with health and strength than I am could give.

It is better for me to give practical evidence of this. The number of hours named for the judicial sittings of the Masters in Chancery are five hours daily, during the Chancery sittings of each Term—that is to say, from the first day of Term till both the Chancellor and the Master of the Rolls have risen—three hours daily, during the general vacations, and two hours daily during the long vacations.

I have sat in the discharge of my judicial and official duties much, in each year, more than the amount of hours thus defined.

The number of surplus hours beyond the average of these stated hours have been :—

	Surplus hours.
In the first year of my Mastership,	404
In my second year,	266
In my third year,	261
In my fourth year,	290
In my fifth year,	270
In my sixth year,	306
In my seventh year,	387
In my eighth year,	332
In my ninth year,	337
In my tenth year,	283
In my eleventh year,	169
In my twelfth year, ending Nov. 2, 1854,	63

EDWARD LITTON.

[Here follows the Schedule referred to.]

ANSWERS OF WILLIAM BROOKE, ESQ., MASTER IN CHANCERY, TO QUESTIONS IN PAPER NO. 6.

1. What is the general course of practice in your office with respect to proceedings for sale in cases under the 15th section of the Chancery Regulation Act?

Master Lyle having kindly permitted me to see his answer to this question, I find it substantially describes the course of practice in my office with respect to proceedings for sale in cases under the 15th section of the Chancery Regulation Act. I need not trouble the Commissioners by repeating it here, more especially as I shall find it necessary in my answer to the fourth question to go through the several steps in detail, with a view to point out delays and their remedies.

2. Within what time after the presenting of the petition could a sale be had in your office by the exercise of ordinary diligence on the part of the solicitor, and in a case not presenting any peculiar difficulties or complexity?

I have set out, in Appendix A, annexed to these answers, a list of the eighteen sales which have actually taken place in my office under the 15th section of the Chancery Regulation Act, with their respective dates, furnished by my Examiner, Mr. Smith. Judging from that table, and from my recollection of the causes which retarded some of the cases there mentioned, it seems to me that the petitioner's solicitor, using ordinary diligence, and not encountering any particular difficulties, *ought* to bring the lands to a sale in ten months after filing his petition. But the average of the eighteen cases in Appendix A is about twenty-two months, more than double the period, and, deducting four of them, which were

unusually retarded, the average of the remaining fourteen is about seventeen months. This latter period may therefore be taken as the average time now occupied in cases of ordinary character. In my answer to the fourth question I will state how I think this period may be considerably reduced.

3. Can you estimate what the average costs would be in an ordinary case from the presenting of the petition to the distribution of the funds?

I have no personal knowledge or experience enabling me to give any information on the subject of this question.

4. Are there any means at present of preventing delay on the part of the solicitor in carrying on a sale, or have the Masters any power to expedite the proceedings; can you suggest any remedy for such delays?

In answer to this question I must consider, separately, the several stages in which delay may occur.

1st. The interval between filing the petition and the Chancellor's order of reference; the average length of this period in the eighteen cases in Appendix A is fifty-four days.

2nd. The interval from the hearing before the Lord Chancellor to the lodging of his order of reference together with a copy of the petition in the Master's office; the average in Appendix A is twenty-five days.

3rd. From lodging the petition in the Master's office to the first hearing before the Master.

This period is allowed to give the respondents notice, and that they may enter appearances.

4th. From the first hearing, on which the Master gives his directions as to pleadings and parties, to the second, on which he gives directions as to proofs.

During this interval the petitioner, if directed so to do, files his charge supplemental to his petition; or, if necessary, applies at the Rolls for leave to amend his petition; and he publishes such advertisements as the Master directs; in this period also the respondents file their discharges.

5th. From the second to the third hearing, when the decretal order ought to be made.

This is the time for the parties to prove their case by affidavits or depositions, or by other evidence. In the eighteen cases in Appendix A, the average time which elapsed from the first lodging of the petition and order in my office, to the pronouncing of the decretal order, comprising the last three intervals and their hearings, is six months and twenty-six days.

6th. From the pronouncing of the decretal order to the lodging of it, finally settled, engrossed, and initialed by the Master, with the Registrar of the Court of Chancery.

This takes about a fortnight; the solicitor is obliged by the General Order of the Court to lodge the draft in a week from the time he receives the Master's direction to prepare an order; it is immediately settled by my Examiner, to insure its being in the usual form and according to my notes, and a summons then issues to settle it before me, which comes on for hearing in three days, when it is discussed, and finally settled in the presence of counsel; after which it is forthwith engrossed and filed in the Registrar's office.

7th. From the decretal order to the sale.

This is occupied in making out the abstract of title, consulting counsel, making searches, obtaining leave to sell subject to conditions of sale (where such are necessary,) and settling such conditions; finally advertising, at a proper interval before the time of the sale; the average in Appendix A is twelve months and twenty-two days.

It is obvious that every possible delay must take place in one or other of these seven stages. I will, therefore, consider them *seriatim*, with reference to the fourth question.

The Master has no control whatever over the first or second intervals; but as I am asked to suggest remedies for delay, I propose that these two stages be entirely swept away. They appear on an average to occupy seventy-nine days, nearly three months, and involve the expense of a hearing before the Chancellor, for which I see no adequate reason. Let the solicitor, on lodging his petition at the Rolls, proceed immediately to lodge a copy in the Master's office; if the Master is qualified to decide much more important questions which daily come before him, he may be trusted to determine, subject to an easy and immediate appeal, the bounds of his jurisdiction.

The next three intervals, extending from the lodging of the petition in the Master's office to the decretal order for a sale, are entirely under the Master's control. Their average length in my office has, so far, been nearly seven months. An obvious shortening and cheapening of the proceedings of this period would arise from abolishing two of the three hearings before the Master; the first and second are nearly useless. In the first, in most cases, he merely directs that the petition should stand as a charge, with liberty to the respondents to file discharges; in the second he directs the parties as to their mode of proof, whether by affidavit or otherwise. There is no analogous proceeding, either in the present system of the Chancery practice in England, or in the old proceeding upon bill and answer. The only reason for the existence of these two steps is, that they formed part of the old system of practice in the Irish Master's offices, upon which the new jurisdiction of the 15th section was grafted. But I am of opinion, that the parties should be permitted to file such pleadings and make such proofs as their counsel advise, and I know of no benefit which arises from taking it out of their hands.

I propose that every cause petition lodged in the office shall be deemed a charge, and that every person whom the petitioner shall think proper to serve, so as to make him a party, shall be at liberty, within a limited time after service, to file a discharge, first entering an appearance. On this being done, there should be, in ordinary cases, a joinder of issue and proceeding to proof, without consulting the Master; and when the evidence is closed, the first hearing should take place. I would have all these proceedings placed under strict limits as to time; not to be enlarged but by an order. I would have one rule, as to evidence, applicable to all cases, defining how far, and in what cases affidavits may be used; and so the parties would be relieved from the expense

of obtaining, as now, the Master's special direction on the subject in every case. Special cases would need distinct rules, and could be easily provided for. For instance, when the petitioner only desires an account, or to amend his petition; or, in case the respondent considers he has a defence, such as would justify a plea or demurrer under the old practice.

The sixth interval occupies about a fortnight, and hardly admits of being shortened. It is most usefully employed in insuring that the decretal order shall accurately express the points decided on, and the evidence upon which it is founded.

The seventh interval is the longest of all, and the Master has but little control over it. It is that in which the abstract of title should be prepared, counsel consulted, searches made, conditions of sale and rental settled, the title approved of by the Master, and the sale advertised. The average time for all this has been nearly thirteen months. I believe the length of this period is chiefly caused by the delay in the Registry Office in furnishing searches.

It is to be remembered, that every decretal order for a sale, *in invitum*, must give the debtor at least three month's time for payment; according to the old practice, it was three months in case of a mortgage, and six in every other case. But acting under the very extensive powers given to the Masters, by the 17th section of the Chancery Regulation Act, in all that concerns the expediting of suits, I have not in any case given more than three months, unless the debtor gave me reason to believe that he really intended to pay the debt, and had grounds for hoping to be able to do so. In all such cases I have given ample time, so long as a reasonable expectation of payment could be shown to exist.

One mode of shortening this period, which I have practised, has been, in all cases where no reasonable hope of payment is shown, to direct the solicitor, in my decretal order, to proceed forthwith to make out title. I do this that the three months' interval may not be lost, but usefully employed in preparing for the sale.

I believe every step in the proceedings might be usefully expedited by a general order to the effect, that the Master, in every order, should name a time, during which only the order should have validity, unless renewed by a special application; or the principle of Lord St. Leonards' eighty-first order of 1843 might be applied, whereby a cause petition would stand dismissed with costs, unless brought to its proper termination within a limited time; but I should think the former mode would be more efficacious, and more easily adapted to the special circumstances of each case.

I have spoken of delays more or less remediable under the present system; but I must also state those which are inherent in the *system itself*. Besides the Chancellor and the Master of the Rolls, there are five Masters in Chancery, and three Commissioners of the Incumbered Estates Court; in all, ten equity judges, holding as many courts, and all open at once, and busy every day: besides the common law and other courts. It is impossible that counsel and solicitors can attend them all, or

even that a solicitor can provide an intelligent clerk to represent him in each court where he may have business; the result is, that part of every day is wasted in discussing applications for postponement. Few cases of any weight can be fairly commenced until after several adjournments; and it constantly happens that, when an argument is prolonged to the second day, some distant day must be appointed to secure the attendance of all the counsel. A kindred evil, derived from the same root, is, that these unnecessarily numerous petty courts of equity, held each in a separate room, without any general attendance of the Bar, or of the public, carry no authority with them, and are consequently deprived of the important aids which authority and public respect are sure to supply.

Questions of the greatest weight, and involving the largest amount of property, are discussed with one counsel on each side, and he, sometimes, of very limited experience. Cases, half argued, are brought to a stand-still for want of documents, of which ordinary foresight might have taught the necessity. It often happens that, after publication has passed, and the final hearing has made some progress, it turns out that no regular or skilful direction of proofs has taken place, and that some most important fact has been left unproved.

It may, perhaps, be thought too trivial to be stated here, but it really seems to me the best illustration of my meaning, to describe what frequently occurs in my office. When a case in my list is called on for hearing, there is nobody present connected with it but one or two uninstructed clerks, who ask leave to go and call their counsel; the second case is then called on, and the third, and so on to the end of the list, all with the same result. The clerks have dispersed to look for counsel, and solicitors, and papers, and I am left alone. I have often waited an hour and more before any counsel has appeared; and if I had kept an account of the time so wasted, and could deduct it from the hours of attendance at my office, I am convinced it would exhibit a serious diminution. I might, on such occasions, strike out all the cases, and oblige the parties to take out fresh summonses; but the expense of a summons, with its service, is serious; and, as the Taxing Master would not allow the solicitor this expense, even as against his client, I could not, in fairness, refuse the solicitor an opportunity of excusing himself, which would occupy much of my time, without any benefit to the suitors; besides, I think it hard to punish the solicitor for what, under the present system, is unavoidable.

Upon the whole, more than four years' experience of the plan of making Masters in Chancery do the work of judges, leads me to believe, that it never can be satisfactory to the suitors, or sufficiently command public respect.

5. Is any delay at present occasioned in the prosecution of cases by the pressure of business in your office?

There is no delay in my office at present caused by the pressure of business, nor has there been for many months, I might, I believe, say years, save only that, for the first two or three weeks of each

Term, there is a crowd of cases, but they are soon disposed of. There is not one single case in arrear in my office, and the summons of each day is in the list of the third day after, and is, almost always, then disposed of, if the parties are ready; but I am often obliged to yield to their applications for adjournment.

6. Is there at present any arrear of business in your office, or is the amount of business sufficient to occupy the time of your court?

I have answered already that there is not any arrear. The amount of business is not enough to occupy the time of my court. Thirty hours a week, for thirty-nine weeks, constitute the annual time of the Master's sittings, if he was to sit every day, and was fully employed, that is, 1,170 hours. But I find, by the return made in November last to the Chancellor, under the 16th section of the 4 & 5 Wm. 4, c. 78, that the number of hours during which I attended at my office in the preceding year, was 860, leaving 310 unoccupied, though all my business was done. Not less than one third of that time was occupied by business relating to receivers, and all that class of business is in a course of rapid transference to Master Lyle's office. He, I believe, (illustrating the value of the division of labour,) has adopted a uniform system, by which he is skilfully and satisfactorily managing the greatest part of the receiver business of the court.

Supposing that branch of the other Masters' duties removed, and they provided with competent assistance, by the appointment of additional officers, who would undertake the laborious and responsible details, which require no judicial skill or experience; and, supposing the various causes of delay above suggested, met by suitable remedies, I conceive that each of us might dispatch a great deal more business than he does at present.

In Appendix B I have set out a statement, also prepared by Mr. Smith, my Examiner, of the number of petitions referred to me under the 15th section of the Chancery Regulation Act, in each year, from the 14th August, 1850, (the date of the Act,) to 14th August, 1854, and the number of orders made by me, distinguishing interlocutory orders from final.

WILLIAM BROOKE.

[Here follow Appendices A and B.]

(To be continued.)

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DUBLIN, JULY 21, 1855.

THE session of Parliament draws to its close. As might have been reasonably anticipated, from the agitation of men's minds consequent on the mighty struggle in which the United Kingdom is now involved, very few legal reforms have been accomplished this year, and whilst the pages of Hansard and the Blue Books will show that the session was unusually stormy and laborious, the dimensions of the Annual Statute Book will be unusually curtailed. In one respect indeed it is useful that a check should occasionally be given to the furor for Law Reform. When great and organic changes have been effected, as they have unquestionably been of late years, it is well to pause, in order that the newly-founded systems may be properly understood before proceeding further; but there are, in other departments of our jurisprudence, abuses not hitherto assailed, which loudly call for amelioration.

Of these stands foremost the present state of the law respecting the grant of probates of wills and letters of administration, and for two sessions has this subject engaged the attention of Parliament. There can be little doubt that but for the frequent discussion relative to the conduct of the war, an Act would this year have been passed for consolidating the various English testamentary jurisdictions—pre-

rogative, consistory, and peculiar, into one general Court of Probate, simplifying the procedure of that court, and opening it to members of the profession of the law, instead of confining audience, as at present, to a special class of practitioners. It is to be hoped that this scheme, which was permitted to proceed to an advanced stage before it was postponed, will be early resumed next year, so as to give Ireland an opportunity of getting a similar reform. It is true that we do not suffer here at all the same inconvenience as is felt in England, as we have one prerogative jurisdiction in place of two; but the system, nevertheless, demands essential improvements.

Another measure introduced during the present session is the bill for enabling the owners of settled estates to grant and effect sales of leases. This is one, which the activity that pervades every branch of industry and art at the present day, renders essential to our national prosperity. If land is to continue to form the subject of strict settlement, (and there is no reason why, under proper restrictions, it should not do so,) a measure of this kind is absolutely essential. It is impossible at present to foresee whether there will be time for this bill to become law before the session closes. At all events, if necessarily postponed, it will engage early attention next year.

Of a nature somewhat akin to this is the bill just introduced for the extension of the land jurisdiction

of the Court of Chancery in Ireland, founded upon the Report of the Commissioners. This will probably form a leading feature of the legal legislation of next year.

Most of the few legal measures of the present session apply only to England, as, for example, that relating to the summary remedies on bills of exchange, and the extension of the summary jurisdiction of magistrates in cases of petty larceny. Should these work well, we may reasonably expect that Ireland will be allowed to participate. Attempts, however, at exceptional legislation have not as yet been abandoned.

A notable instance of this class consumed much of the valuable time of the House, and led to much acrimony of expression. We allude to that celebrated agrarian scheme, so diametrically opposed to all those principles of political economy, of which Free Trade is the type; one which, with various modifications, successive governments, whilst professing to adopt, for the sake of conciliation, have done their best so to neutralize as to render its enactment a matter of indifference to its advocates. We allude to the Tenants (Ireland) Compensation Bill. Without commenting upon the character of the various elements of which the bills which have borne this title have been composed, we may say this, that we ardently hope that if such a measure do at any time hereafter pass into law, the plan will not be devised solely for the good of our nation, but that England will be admitted to share in its equivocal benefits.

We hope that next session will witness the commencement of the practical labours of the Commissioners for Consolidating the Statute Law.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 228.)

ANSWERS OF JEREMIAH JOHN MURPHY, ESQ.,
MASTER IN CHANCERY, TO QUESTIONS
IN PAPER NO. 6.

1. What is the general course of practice in your office with respect to proceedings for sale in cases under the 15th section of the Chancery Regulation Act?

The practice in my office, with respect to such sales, is the same as that existing before the passing of the Chancery Regulation Act. Upon the original hearing, under the Lord Chancellor's order, postings for incumbrancers to come in and prove charges in six weeks, are directed; to be discharged by the proper parties in three weeks. If either the party to file the charge or the party

to discharge omit to do so within the times respectively limited, he must, at *his own expense*, issue a summons to have his charge or discharge received. If no discharge be filed within the time limited, the party filing the charge must issue a summons to take it as proved. When all charges and discharges have been ruled, it is the duty of the solicitor having the carriage of the proceedings to serve a notice on all parties and creditors to show cause why a peremptory summons should not issue, to settle the *final* order. When such order is made up by the solicitor, a summons (similarly served) is issued to settle it—when settled and signed, the solicitor forthwith proceeds to make out title, issues a summons to settle conditions of sale (if necessary), and when these are settled, a further summons is issued to inspect and certify the abstract of title. When the abstract is certified, a posting for a sale is signed by the Master, and duly published.

2. Within what time after the presenting of the petition could a sale be had in your office by the exercise of ordinary diligence on the part of the solicitor, and in a case not presenting any peculiar difficulties or complexity?

In such a case a sale can, with proper diligence, be easily had in six months from the time the order is brought into the Master's office, so far as my office is concerned: before that time the Master has no control over the petition matter.

3. Can you estimate what the average costs would be in an ordinary case from the presenting of the petition to the distribution of the funds?

I am wholly unable to answer this question, never having seen, to my recollection, a bill of costs in such a case, but I am satisfied that the amount of such costs is considerably greater than it ought to be; and that it could be rendered less under a proper and in a great degree self-working system, and one leaving less depending on solicitors than the present system, which is, in my opinion, productive of delay and of expense, acting upon and re-producing each other—the expense producing delay, and the delay expense.

4. Are there any means at present of preventing delay on the part of the solicitor in carrying on a sale, or have the Masters any power to expedite the proceedings? can you suggest any remedy for such delays?

The means at present adopted to prevent delay on the part of the solicitors are. 1. The Master limiting the time for filing charges and discharges. 2. Making (as I invariably do) the party applying after the time limited, pay the costs of obtaining permission to file the charge or discharge, including the costs of summons, &c. 3. By the Taxing Master not allowing these costs to the solicitor against his own client (which I presume he will not), if the delay was caused by the solicitor's neglect. 4. The power given to the Master upon the application of any party or creditor, in case of delay on the part of the solicitor having the carriage of the proceedings, to transfer it to the party applying, and to make the solicitor in default pay the costs of the application. The only other remedy which I can suggest, consistent with the present course of proceeding, and which appears to

me to be feasible, (although I am bound to state the other Masters, or some of them as I believe, object to it, by reason, as they perhaps justly consider, of the great difficulties attendant on it,) is that the Master should, in the first instance, limit a time, within which the solicitor having the carriage of the proceedings should obtain the Master's final order; and, secondly, that such final order should, in all cases, limit a time within which the same solicitor should have the abstract of title certified, and the posting for sale issued; and in case the Master did not, before the expiration of such periods, enlarge the time upon a proper case, made by affidavit, his Examiner (who should keep proper entries for the purpose, as now, with regard to receivers' accounts) should take the necessary steps to place the matter on the Master's list for his consideration, whereupon the Master should transfer the carriage, and otherwise deal with the costs of the matter, as might be expedient. This would insure a judicial supervision and control over any delay, on the part of the solicitor, and thus tend to produce the requisite diligence.

5. Is any delay at present occasioned in the prosecution of cases by the pressure of business in your office?

Yes, arising from two causes—first, the unusual magnitude of some three or four cases which have been lately before me, involving disputed partnership, and other accounts of long standing, and the protracted *ex vivo* examination of witnesses. Secondly, my unavoidable absence from my court for a fortnight, occasioned by severe illness; this pressure is but temporary.

6. Is there at present any arrear of business in your office, or is the amount of business sufficient to occupy the time of your court.

There is an arrear of business entered in my office at present, which, if I can get counsel to attend, will probably be brought up in a fortnight, or at the most three weeks, including the current business, so as to leave no arrear of any cases entered for hearing within two clear days, being the earliest time at which they are capable of being heard. Generally speaking, for some time past there has been no arrear of cases entered for hearing in my office undisposed of. Judging from the amount of business brought before me, during the last two years, I am bound to state that it would not have been sufficient to occupy the whole time dedicated by the existing rules to the business of my court; for owing to the absence of counsel and solicitors during the vacations of the Lord Chancellor and Master of the Rolls, or the times when they do not sit, and during circuits my time has been comparatively unoccupied; and I have been compelled very frequently, after an hour's sitting, to postpone cases, which might then have been disposed of, until the Terms or the court's sittings—and yet there has been seldom any arrear of cases entered in my list. Cases of great apparent importance and complexity are daily coming into my office, under the 15th section of the Chancery Regulation Act, such as heavy administration and partnership suits. Until these are in a further stage, I cannot undertake to state, whether the business of my court is or is not likely

to occupy my whole time during the current year. I regret that I cannot give a more satisfactory answer to this question.

JEREMIAH JOHN MURPHY.

ANSWERS OF ACHESON LYLE, ESQ., MASTER IN CHANCERY, TO QUESTIONS IN PAPER NO. 6.

1. What is the general course of practice in your office with respect to proceedings for sale in cases under the 15th section of the Chancery Regulation Act?

The solicitor having the carriage of the proceedings brings into the Master's office a copy of the petition and order of the Chancellor referring same, and takes out a summons for hearing for a day twenty-one clear days after the date of summons, and one fortnight after the date of service on respondent. When the case is put into the list, pursuant to the summons, the petition is opened by counsel, and if the respondent appear to defend the case, and the evidence be ready in support of the petitioner's right, and on behalf of the respondent against it, the case is heard and an order made thereon, either declaring the petitioner's right or dismissing the petition. If the respondent do not appear, sufficient evidence is taken to show the petitioner's title, and if an account be necessary to ascertain the amount due to him on foot thereof, an order is made, for the most part, that the petition do stand as a charge, with liberty to respondent to discharge it within three weeks, or such other period as may be thought proper. If a discharge be filed, another summons issues on the petition standing as a charge, and the discharge to it, and further evidence is read, or if not ready, the mode of taking it is directed. If no discharge has been filed, a summons issues to take petition standing for a charge as proved. When charge proved in either mode, directions are given for a decretal order. The solicitor for the petitioner having obtained such directions, prepares a draft order, which must be lodged in the office within a week, and a summons is then issued to settle it. This done, the decretal order is settled, signed, and filed. If the order be for payment of a sum due, a time, usually three months, is given for the payment, and in default thereof, in cases where the petitioner is entitled to it, a sale is ordered; and in the latter case the petitioner is directed to advertise for all persons having charges on the lands to come before the Master and prove same. The time given for those charges to be filed is usually four weeks, and if charges are filed, discharges may also be filed, pursuant to directions previously given as to the persons who are to be at liberty to file same. A summons is then issued upon each charge, and the discharge thereto, and evidence is laid before the Master in support of the charge and in opposition to it, and the Master makes his order accordingly, allowing or disallowing it in the whole or in part. Meantime a receiver may be appointed in fit cases, and the petitioner, if prepared to nominate one, and have an understanding from him to act, may have him appointed by name in the order, which

may also measure the amount of his security, and contain an order on the tenants to pay their rents.

When a sale is ordered in default of payment, the solicitor may, according to the practice in my office, make out an abstract of title, and take the opinion of counsel thereon; prepare requisitions for the searches directed by counsel, and lodge them in the different offices where searches are to be made, though, I believe, in some of the Masters' offices this is not permitted until the respondent has made default in payment within the time allowed him. When the searches are completed in the offices, the solicitor should inspect same, and, if nothing appear thereon to affect the title, should make an affidavit that such is the result of the searches, and should bring the abstract, opinion, and affidavit into the office, and issue a summons to inspect the title; and, if any conditions of sale have been directed by counsel as necessary, obtain an order to sell, subject to such conditions, and settle same. Upon the summons the conditions are settled, title approved of, and a posting for sale directed. A posting then issues, usually for a sale on a day in Term or sittings in court after, at an interval of six weeks or two months, and the mode of publication is directed. If the sale be held in the office, and that a sufficient price be offered on the day of sale, the purchaser is declared, and he is required to lodge the one-fourth of his purchase-money in bank, and on production of a certificate of lodgment enters a rule to confirm sale. When this rule is made absolute, the purchaser pays in the remaining portion of his purchase-money, and is entitled to have a conveyance of the lands executed to him. The petitioner, as soon as the sale is confirmed and money lodged, obtains an order to allocate same, and on this files a statement showing the funds in bank and the rights of all parties, petitioner and creditors, to same; issues a summons upon the order, and brings the matter before the Master, serving all parties. On this summons the Master ascertains the rights of the parties to the funds, with their several priorities, and declares same; and having obtained such order the petitioner must go to the Chancellor or Master of the Rolls for an order for payment.

2. Within what time after the presenting of the petition could a sale be had in your office by the exercise of ordinary diligence on the part of the solicitor, and in a case not presenting any peculiar difficulties or complexity?

There have been nine orders for sales in cause petitions, under the 15th section of the Chancery Regulation Act in my office; and I have appended to these answers a schedule showing the dates of the several proceedings from the order transferring the cause into the office until the sale, from which it will be seen, that the time from the presenting the petition to the sale has been very various. This must necessarily be the case from the variety of difficulties which the several cases present in the way of making out title. I should say, however, that by the exercise of ordinary diligence on the part of the solicitor, and where the respondent does not interpose any difficulties, a sale might be had in the

space of twelve months. The case of *Ryan v. Massy* was rather a complicated one; and though a period of three months was allowed to intervene between the obtaining of the order and the bringing it into my office, the sale was had within a few days of one year after the order was obtained.

3. Can you estimate what the average costs would be in an ordinary case from the presenting of the petition to the distribution of the funds?

I have no mode of estimating the average costs of the proceedings; such can easily be obtained from the Taxing Masters of the court.

4. Are there any means at present of preventing delay on the part of the solicitor in carrying on a sale, or have the Masters any power to expedite the proceedings; can you suggest any remedy for such delays?

The only means that I am aware of to prevent delay on the part of the solicitor in carrying on a sale, are the powers given to the Master on the application of any party interested in the matter to transfer the carriage of the proceedings to his solicitor, when the solicitor for the petitioners or other person having the carriage of it is guilty of unnecessary delay. This power I have always, in proceeding under references previous to the Chancery Regulation Act, freely exercised, and am prepared to do so equally in cause petitions under the 15th section of that Act. But I do not think that the Master could usefully attempt, of his own mere motion, and when not called upon by any of the parties interested, to exercise any control over the proceedings, or to try to force them on. He may give short intervals between the different stages of the proceedings, require his orders to be brought in and perfected within short periods after directions have been given for them, and he may perhaps somewhat expedite the matter by permitting some proceedings to be taken, *de bene esse*, whilst the time is running, on the expiration of which they would perhaps more properly be done. As in the instance mentioned in reply to the first quere, where I and some of the Masters permit the making out of title to be proceeded with before the time given to the respondent to pay the demand, has expired, *and so far, and in such manner*, I consider the 37th General Order of the Lord Chancellor, dated the 31st July, 1851, may in some measure be effectuated; but I am persuaded, that any attempt to institute an inquiry into the conduct of a solicitor, where such conduct is not complained of either by his own client, or by others, would be utterly futile, and probably productive of mischief. The Masters have no means of knowing of the necessity of such an inquiry, or powers of carrying it on, with which the Chancellor and the Master of the Rolls are not equally invested in the Equity Courts, or the chief judges in the law courts; and it has never been thought advisable to require those functionaries to force the suitors on to a termination of the matters in litigation before them.

5. Is any delay at present occasioned in the prosecution of cases by the pressure of business in your office?

There is no delay at present occasioned in the prosecution of cases by the pressure of business in

my office. A solicitor bringing in an order can have a summons to proceed upon it on the first day after the prescribed period when the summons can be made returnable under the rules of the court, and the case may be heard on that day if the parties are ready.

6. Is there at present any arrear of business in your office, or is the amount of business sufficient to occupy the time of your court?

There is no arrear of any kind in my office at present. Every case ready for hearing may appear in *my list of the day*, and very seldom stands over unheard, unless postponed at the instance of the parties. The arrear, however, is prevented by considerable exertion, and I think the amount of business quite sufficient to occupy the time of my court.

ACHESON LYLE.

[Here follows the Schedule referred to.]

PAPER NO. 7.—QUESTIONS ADDRESSED TO THE MEMBERS OF THE BAR.*

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

2. Have you observed any defects or imperfections in that course of practice?—If so, state the same, and any remedies which you can suggest.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court or any and what part of it should be introduced into Chancery?

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

7. If the Court of Chancery had power to give a Parliamentary Title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former court possess, should be continued in the Court of Chancery?

* The above Paper was sent to the following members of the Bar—Richard Deasy, Esq., Q.C.; Hamilton Smythe, Esq., Q.C.; Robert Longfield, Esq., Q.C.; C. Rolleston, Esq., Q.C.; E. Hayes, Esq., Q.C.; B. C. Lloyd, Esq., Q.C.; P. J. Blake, Esq., Q.C.; Alexander Norman, Esq.; James Rogers, Esq., Q.C.; David Sherlock, Esq., Q.C.; R. K. Warren, Esq.; W. B. Drury, Esq.; E. B. Lawless, Esq.; and William Smith, Esq.

The above gentlemen were selected, as practising in both courts—the Court of Chancery and Incumbered Estates Court.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

10. What, according to your experience, have been the practical results of giving a Parliamentary Title?

11. In your opinion, should the privilege of obtaining a Parliamentary Title be continued and made permanent?

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary Title by submitting his Title to a judicial investigation?

13. Should the privilege of obtaining a Parliamentary Title be limited to lands of any particular tenure?

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

ANSWERS OF ROBERT LONGFIELD, ESQ., Q.C. TO QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

According to my experience, confirmed by frequent discussion with intelligent members of the Bar and solicitors, the course of practice and procedure adopted in the Incumbered Estates Court has, on the whole, worked remarkably well. Had the system been earlier established in this country, and been made permanent, it would have worked still more successfully, as I am convinced that some injustice and individual hardships arose from the system having been introduced to meet a sudden necessity, produced by the long-continued abuses of the Court of Chancery, and from the duration of the Commission being limited. The Legislature in effect said an enormous mass of property must be sold within five years. The temporary renewal of the Commission had, of course, some tendency to check this evil.

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

I have, from time to time, observed some defects and imperfections in the practice of the Commission, not, however, to the extent which might have been anticipated from the introduction of a new and untried system, dependant for its success on the constant and active personal exertions of the Commissioners. The chief defect is, I think, this—that the proceeds of the sales are not distributed with the

same promptitude with which the other proceedings are conducted. The Commissioners have frequently noticed this subject, and have endeavoured to prevent this delay, but have not wholly been successful. There is a great delay caused by the Registry of Deeds' Office; the searches ordered by the Commissioners are often four and six months before being completed, and this without, perhaps, any culpable remissness on the part of the solicitor having carriage of the sale, or of the officers of the Registry Court. There has been a great increase of business in the Registry Office, produced by the working of the Incumbered Estates Commission. Searches must be made with care; but few officers can be employed at the same time at the books, and hence, probably, the delay in getting in the proper searches. I think that it might be expedient not to permit a sale to be advertised until the searches were produced, and the schedule of claims first lodged. The final schedule might thus be expedited. I must, however, observe, that even with every disadvantage of delay from searches, &c., the distribution of money proceeds with a rapidity and despatch wholly unknown to the old practice of the Court of Chancery. Many instances occur in this latter court of the investigation of title after the sale, occupying two, three, four, and even eight years, during which the purchase money of the estate is undistributed.

It would be, I think, desirable to limit a time for appealing from orders of individual Commissioners to the full court, as in cases of appeal from the full court to the Privy Council. The situation of the court has, I consider, been an obstacle to the more popular and effective working of the Commissioners. The attendance of the Bar could not be as readily obtained as at the Masters' Offices or Four Courts; it is inconvenient to solicitors, tends to isolate that court and the practitioners from the other courts and members of the profession, and this is in itself a disadvantage. There is also some want of subordinate officers in the departments of the Commission.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

The circumstances in the constitution of the Court of Incumbered Estates and its practice to which I consider its successful operations are mainly attributable are the following:—The court was in itself, at its commencement, a complete, original (not delegated) and absolute jurisdiction, and not a mere alteration of an old defective system, or an appendage to a court *then* in the very greatest disrepute—the Court of Chancery—from the unreformed abuses of which arose the necessity of a new tribunal. The Act 12 and 13 Victoria, c. 77, the Incumbered Estates Act, it is a remarkably clear and well-drawn statute, penned by no ordinary draftsman, and containing provisions meeting the very points in which the practice of the Court of Chancery was then defective. The 9th, 10th, 15th, 21st, 23rd, 24th, 27th, 30th, 42nd, 49th, 50th & 52nd sections were highly important and well considered provisions. The Commissioners framed

plain General Orders, sanctioned by the Privy Council, and circulated forms of application, petitions, charges or claims, notice to tenants and creditors, abstracts of title, schedule of incumbrances, &c., so that an intelligent solicitor, without the aid of counsel, and without the embarrassment of pleadings, could present a petition for sale of an estate and sell it, realize his client's demands, and distribute the proceeds of the estate. The ascertainment of tenancies and a Parliamentary title, without any expense to a purchaser, were very attractive features in the system. To solicitors a facility—by some, indeed, considered a reprehensible temptation—was afforded, of conducting a sale in the Incumbered Estates Court, by proceedings in the court being exempted from fees and stamps, and by their costs being insured out of the funds without regard to the priority of their clients' demands. Much abuse was heaped on this particular provision, which was said to be directly at variance with the practice of the Court of Chancery, and in the last Incumbered Estates Continuance Act the section was modified, by declaring that of petitions presented after that Act by incumbrancers, the petitioner should only have his costs in the same priority with his demand, unless the court ordered otherwise. This was conceived to be adopting the rule of Chancery, while in reality it is a complete departure from it. In Chancery the cost of a creditor's suit in which the estate was sold, was divided into two portions without the least solid foundation for any such division—the 1st, the portion up to the final decree, was paid only in the priority of the claim; the 2nd, including all the costs of making out the title, of the sales, adjournments, investigation of title after sale, and to the final allocation, called "post costs," was paid as the first charge out of the fund, and money was always liberally advanced out of funds in court to the solicitor on foot of these costs. These might amount, as in *O'Byrne v. M'Mahon*, to several thousand pounds. Now the costs paid out of the funds of the Commissioners were strictly "post costs," and since the recent modification of section 30 it might happen that a creditor proceeding in Chancery under section 15 might be paid all the costs, save the comparatively small preliminary costs, up to the final decretal order in the Master's office, as a first charge; when, if the same creditor sold the estate before the Incumbered Estates Commission, he could get no portion of his costs save with his demand. In my judgment, there is no valid reason for punishing a creditor whose security has not proved to be ample by depriving him of his full costs. The costs of sale, including all those incidental proceedings necessary by the forms of the court should be paid, in the first instance, out of the proceeds. The rule giving costs only with the demand is one of comparatively recent introduction into the Court of Chancery in Ireland, and did more to produce an utter stagnation of creditors' suits and stoppage of sales than can be well imagined.

The ascertainment by judicial investigation, concluding all parties, of the tenancies, was a valuable power and duty imposed on the Commissioners. It proves very satisfactory to purchasers, and, I

think, it has also greatly conduced to the protection of the tenants, both under the Court of Chancery and under the embarrassed proprietors whose estates were sold. A purchaser is freed from all litigation from tenants or claimants of tenancies not named in the schedule, and the poor tenants have their rights secured to them. The 50th section is a highly important one; but for it, I consider, the Commissioners would have been almost powerless. The first injunction or prohibition would have destroyed the prestige and useful power of the court. The Commissioners would have found it impossible to continue their labours. But I am induced to consider as almost the most useful part in the constitution of the Incumbered Estates Court its modes of appeal both to the three Commissioners sitting together, and to the Privy Council. By the Commissioners sitting together to hear appeals from orders made by each in chamber, uniformity of practice was quickly established, cases were reheard and at a very moderate expense, by judges well acquainted with the practice of the court, and without the least prejudice in favor of or against individual decisions, and, in a great majority of cases, the judgments on appeal to the full court gave satisfaction. The Court of Final Appeal to the Privy Council, I have always regarded as the best equity Court of Appeal which could be devised, and I think it so valuable that it should, in my opinion, be adopted, (with some slight improvements), in any alteration of the equity jurisdiction in Ireland. There is practically no appeal at present from the decision of the Lord Chancellor. The enormous expense and lottery of an appeal to the House of Lords are a luxury to be indulged in only when the property at stake is very large. The costs in nine out of ten cases act as a direct prohibition on such appeals; and I rather think that the difficulty and expense of appeals to the House of Lords are felt as a very serious grievance by suitors in the Court of Chancery.

I have incidentally stated that the simplicity of the proceedings in the Incumbered Estates Court has essentially contributed to its success: any solicitor or his clerk can understand the statements in a petition and final schedule, or rental, &c.—all is plainly stated, and the schedule especially is a common tabular statement in chronological order and with appropriate columns for the various claimants and owners of incumbrances, when and how created, by whom, in whom vested, how much due, and observations. The eye at once catches dates and names. The contrast between a report in Chancery *e. g.*, in *Delacour v. Freeman*, *Buist v. Tennant*, finding priorities, and a final schedule, *e. g.*, *Lord Mountcashel's* or *Lord Belmore's*, would be striking, both as to volume and simplicity. The novelty of the court involving the appointment to all its departments of new men, and generally young men, not wedded or trained to any old system, and all emulous of working the new jurisdiction, had, I doubt not, an important effect in the successful operation of the court.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered

Estates Court or any and what part of it should be introduced into Chancery?

If the powers of the Incumbered Estates are transferred or given to the Court of Chancery, the practice must also, I conceive, be adopted, at least in its leading features. The essential difference between a sale by the Commissioners and by the Court of Chancery, as at present conducting its sales, is, that in the one the Commissioners really sell, investigate, and adjudicate carefully and solemnly on the title. The Master in Chancery does not. A sale in Chancery is merely conducted by solicitor and counsel, and I have no doubt that decrees, reports, allocations, &c., are equally the work of the suitors, and not of the judges. The practice (speaking of it as a system), should be transferred, together with jurisdiction, and with such judicious alterations as experience may, from time to time, suggest; the ruling idea in the alterations being always to make the Master more the real decider and investigator than at present. It would, I conceive, be most injurious to transfer the power of the Incumbered Estates Court to Chancery, unless the practice of the latter is greatly altered.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

With the present great pressure of business in the Incumbered Estates Court, while the business of the Court of Chancery, under the 15th section, is not, I think, at all developed to the extent which a few years will see it attain, a small estate can, perhaps, be sold as promptly in Chancery as by the Commissioners; but the money would not be as soon distributed. The sales under that section have been few and trifling; and I know of no large estate yet sold under it—indeed for the last twenty years the only really extensive sale made by the Court of Chancery was that of the Blessington estates. That, however, took place under the powers of a private Act of Parliament, which considerably facilitated the sale, diminished the expense, and obviated the necessity of a tedious investigation of title. The sale itself was the sole business of the Master for weeks. The Belmore, Mountcashel, and Portarlinton estates were sold by the Commissioners in a day or two each, and quite as well. The time required in either court to sell large estates must, of course, greatly increase, but in a far greater ratio in Chancery. I must also observe that the system of proceeding under the 15th section, although a decided and most valuable improvement on the mode of dealing with such cases by the Court of Chancery, is capable of being much simplified and expedited. The trifling formality of a hearing before the Chancellor should be got rid of; so the hearing before the Master, counsel opening again the petition, stating his case and proofs, and taking a decretal order, making up this order, all proceedings by charge and discharge, final decretal order, &c. The object of the Masters, (perhaps by some to be commended,) seems to have been to assimilate their proceedings, under section 15, to those which took place under the old course of the court. Their true object should have been to avoid all such

analogies, and to have originated a simple and cheap method of proceeding, regardless of all old traditions and ceremonies.

7. If the Court of Chancery had power to give a Parliamentary Title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

If the Court of Chancery had power to give a Parliamentary title, I do not think, unless the system of procedure was greatly changed, that court could sell estates as quickly and as cheaply as in the Incumbered Estates Court; and, for the following reasons; such a power would at once attract much business to that court, and of a kind most tedious and embarrassing to a judge. There is more real exertion of mind in selling one estate with Parliamentary Title than ten without it. This answer must of course be understood as applied to the Court of Chancery as at present constituted, with the existing Masters and their officers, already, I think, nearly fully employed. I have known an account of charges affecting an estate sold by the Commissioners, pending in Chancery from 1848 to 1854. I see no reason to think that similar cases might not, if the estate to be sold in Chancery were long in any family, be of frequent occurrence. It would, however, I am sure, be quite possible by an increase of Masters and working staff of the Court of Chancery, by a judicious revision of the system of procedure, and a watchful check and supervision of the cases pending, to make that court expeditious and efficient in the selling of estates. Some of the necessary alterations I shall indicate in answering questions Nos. 15 and 16.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former court possess, should be continued in the Court of Chancery?

In case the powers of the Incumbered Estates Court are transferred to the Court of Chancery, it certainly would be unfair not to continue the exemption from fees and stamps in Chancery proceedings. It will, I think, be found that the great outlay for fees and stamps necessary heretofore in Chancery had a most prejudicial effect on the progress of a cause in that court. It operated as a heavy burden on solicitors and suitors, and from an inability merely to defray the expenditure suits were delayed and often stood still. All writers on social and political questions are disposed to concur in censuring taxes on legal proceedings. The subject has the same complete right to the free use of the tribunals of the country to defend his property and his life. I would be disposed to recommend a small uniform court stamp (not exceeding 6d.) on every document, not for the purposes of revenue, but of authentication. Law fund stamps are of a very recent introduction, and should never have been permitted.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

It is impossible at present to make any trustwor-

thy comparison between the rapidity and expense of proceedings to sell estates under the 15th section of the Chancery Act and by the Commissioners of Incumbered Estates. No returns have, so far as I am aware, been published or made by the Masters, similar to those from time to time furnished by the Commissioners, setting forth the petitions pending in each of the Master's offices, dates of reference by the Lord Chancellor, dates of hearing before Master, of decretal order, final decree, sale and allocation or winding up, so far as they have been finally disposed of, and the costs. Without a comparison of clear returns, applying to all petitions concluded or pending under section 15, and those presented to the Commissioners, any opinion expressed as to the relative expedition and expense of proceedings before the Court of Chancery and the Commissioners, must be only an imperfect deduction from some few selected cases, and subject to be affected by a preconceived professional bias in favour of the Commissioners or Chancery practice, as the case may be. It would, I think, appear, if the returns I have suggested were procured from the Masters, that in the proceedings before them the costs of fees to counsel, stamps, and fees were much larger than in the Incumbered Estates Court, while the costs of advertising, preparation of rentals, and survey, were larger in the latter court.

(To be continued.)

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DUBLIN, JULY 28, 1855.

We call the attention of our readers to a decision upon a question of great practical importance, which will be found in the reports of the present number. We allude to the judgment of Mr. Justice Crampton in the civil bill appeal of *Carr v. Tottenham*, relative to the amount of rate which a middleman is entitled to deduct from his head landlord. As the law stood from the 1 & 2 Vic. c. 56, to that of the coming into force of the amending Act—12 & 13 Vic. c. 104—the rule which regulated this deduction was one of remarkable simplicity and readiness of application. Section 74 had provided that where "the person occupying such property shall be liable to pay a rent, in respect of the same he may deduct from such rent, for each pound of the rent which he shall be liable to pay, one half of the sum which he shall have paid as rate, in respect of each pound of the annual value, (whether such rent shall be greater or less than such net annual value), and so in proportion for any less sum than a pound." This (section 74) propounded the rule of deduction, not as between the middleman and head landlord, but as between

the middleman and the occupying tenant. So long as that remained in force, in order to determine what amount the tenant was to stop from his landlord, it was enough to ascertain that the tenant had paid a particular rate of so much per pound, irrespective of the entire amount which he had usually paid. Suppose, for instance, that the premises had been rated at £10, and were subject to a rent of £40, the landlord, upon the tenant's production of the duplicate receipt for the payment of a rate at say 2s. in the pound upon £10, amounting to the sum of £1, was bound to give the tenant credit as against his rent, for half the rate—say 1s. in respect of each pound of his rent of £40—amounting in the whole to £2. Thus that tenant was actually enriched to the extent of £1 by the striking of every 2s. rate. That monstrously absurd and unjust state of the law happily no longer exists. The next section, (75), proceeded to regulate the amount of deduction as between the middleman and the head or next immediate landlord, and the rule given by this, when construed by the light of the immediately preceding section, was, as we have observed, of very easy application. It enacted, that "when any person receiving rent in respect of any rateable property, shall also pay a rent in

respect of the same, he shall be entitled to deduct from the rent so paid by him, a sum bearing such a proportion to the amount of rate deducted from the rent received by him, as the rent paid by him bears to the rent received by him." In the Poor Law Commissioners' edition of the Act, (1 & 2 Vic. c. 56), published in 1839, we find the following note appended to this section, for the purpose of exemplifying the rule there laid down: "The amount of rate deducted from the immediate lessor is half the poundage of the rate for every pound of rent received by him. The statement here is in the *terms* of the rule of proportion, but for practical purposes it will be found a better expression of the rule to call the share of all receivers of rent, from the immediate lessor to the lord of the fee, the half of the poundage of the rate." It is clear that as the third proportional was then half of the poundage of the rate on the rent *received* by the middleman, so the fourth proportional must have been half of the poundage of the rate on the rent to be paid by the middleman. But the 74th section has, as we have remarked, been repealed, and half the poundage of the rate, on the rent recoverable by the middleman is no longer *invariably* the third proportional. The amount of that rent has now ceased to be a material element in the account, except to ascertain the *maximum* amount of deduction by the occupying tenant.

The 11th section of the 12 & 13 Vic. c. 104, enacts, "that in making a deduction from such rent on account of any rate, which shall be made after the passing of this Act, it shall not be lawful for any occupier of property rated in or paying such rate to deduct thereout a larger sum than one half the amount of the rate, which he shall have paid in respect of such property." Thus we find that the deduction by the occupier is no longer to be one in respect of each pound of the rent, and it is in no case to exceed half the rate, and may be less than that, provided that the valuation exceed the rent. Hence the constant ratio which the deduction used to bear to each pound of the rent is wholly done away with. In ascertaining the deduction from the rent payable by the immediate lessor, upwards to the lord of the fee, section 75, as Mr. Justice Crampton observed, still remains in full force; but not so, the practical observations which we have already quoted. The third proportional is now completely altered, and nothing remains but to state, in each case, a sum in the rule of three for the ascertainment of the fourth proportional,

which is, as arithmeticians would say, no longer deducible *at sight*. For example, take the case of a house let at a rent of £60, rated at £40, and subject to the head rent of £20; if a rate of 2s. per pound had been imposed prior to the late Act, the head landlord should have allowed a rebate of precisely 20s.—that is to say, £20 at 1s., (half the rate) per pound. Now the case would stand thus: As £60 is to £20 so is £2 (half rate of 2s. on £40) to 19s. 4d. In other words, in the particular case now before us, the effect of this change of the law would be to reduce the deduction by the immediate lessor from his landlord to 2-3rds. of what it would previously have been, and that deduction would in all cases vary according to the disparity between the rack-rent and the valuation, never, however, in any instance exceeding the limit of half the poundage of the rate in respect of the rent itself, but which maximum it might possibly attain by reason of the valuation happening either to equal or to exceed the occupation rent.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 236.)

10. What, according to your experience, have been the practical results of giving a Parliamentary Title?

The practical results of giving a Parliamentary Title have been chiefly, I conceive, a greatly increased confidence in purchasers, an actual addition to the marketable value of incumbered estates—purchasers being willing to give much larger sums in consequence of not having to pay heavy costs on the investigation of title—and an increased facility of dealing with land. The costs of a purchase from the Commissioners average about 1 per cent. on the purchase money, while in Chancery the expense ranges from 5 to 15 per cent. In the newspapers advertisements are found every week either offering loans or requiring them, with notices that a Parliamentary Title would be preferred or given, though this, of course, is to the lender's solicitor a less profitable investment than a loan on the old system. Land is fast becoming a marketable commodity, easily transferable and largely dealt in, and this is, I conceive, a great national advantage. It will generally find owners in those best fitted to manage and retain it. Every other sort of title but a Parliamentary has grown into much disrepute. The Parliamentary conveyances are short and clear, and every man likes to understand that his title is absolutely unimpeachable. It has been ascertained, too, that the sole argument used against the powers of the Commissioners, "that they might sell one man's estate for another man's debt," ill founded even as argument, is utterly worthless as a fact. The terror and argument are alike now exploded.

11. In your opinion, should the privilege of obtaining a Parliamentary Title be continued and made permanent?

It would be a serious injustice to creditors and owners of estates not to render permanent the power of giving a Parliamentary Title. It will be readily perceived that discontinuing the power would be attended with the following results: The value of former Parliamentary Titles would at once be raised in the money market, and that of other estates depreciated. One would possess a considerable premium over the other, and owners and creditors would be sufferers. One class of estates would be readily marketable, the other not.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary Title by submitting his title to a judicial investigation?

The privilege should be equally extended to creditors' suits, and suits by an incumbered owner to divest himself of his embarrassments by selling portions of his estate, just as at present in the Incumbered Estates Court. Owners have largely availed themselves of the power conferred on the Commissioners of Incumbered Estates to sell at the instance of an incumbered proprietor; and I could name many cases where such owners, by early availing themselves of this privilege, have been enabled to terminate most expensive proceedings in Chancery, and preserve for themselves a considerable portion of estates, which a few years' litigation would have frittered away.

13. Should the privilege of obtaining a Parliamentary Title be limited to lands of any particular tenure?

It might be unnecessary to extend the privilege of giving a Parliamentary Title further than by the amended Acts is now vested in the Incumbered Estates Commissioners, viz.: Estates in fee or fee farm, and other interests classed in sections 16 and 17 of the first Act, and a contingent power in cases falling under section 2 of the Act of 1853; but I would rather be in favour of conferring the power as to estates of every kind, and on sales by the Court of Chancery, of Bankruptcy, or Insolvency, assimilating them to sales in market overt of personal chattels.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

I am confident that if the powers of the Incumbered Estates Commissioners were transferred to the Masters in Chancery, they would be unable to perform the duties of the Commissioners in addition to their other business. It seems to me that the Masters generally have as much business as they can efficiently and expeditiously discharge. There is every probability of a yearly increase in their ordinary business as the prosperity of the country revives and improves, and I have very little doubt that the business of any one of the Commissioners, divided amongst the present Masters,

would bring them in all the offices to a stand. It would be the most burthensome addition which could be made to the Masters' present duties. The mere reading of the abstracts of title and directing searches, now performed by each Commissioner personally, is, I conceive, the most arduous and fatiguing labour which can be performed by a judge. Every barrister could state that of all his business the most laborious and tedious, that requiring most care and involving the heaviest responsibility, is advising on titles. A very short title will require the labour of two, four, or more nights. The Commissioners are indeed a little assisted by their examiners noting the abstract, and at times by counsel's opinion, but the abstracts are always read by them carefully, their opinion formed on it, and judgment and registry searches directed personally. This one portion of their labour is so very great that I am sure it alone would, in addition to their other duties, entirely overburden the Masters, and without this duty being performed by the judge himself, it would be wrong to allow the court or Master, or any court, to give a parliamentary title. The sale would not be by the court or responsible judge, but by interested parties, by counsel and solicitors, creditors and suitors. Besides, the Masters would have both to learn a new system, very different from the old, and to forget the old, and experience will, I believe, tell that this double task is not an easy one. The Masters are zealous and painstaking officers, and I would not in the least be understood as depreciating their labours. One or two of them may have comparatively lighter duties at present than the others, but that accidental circumstance will probably soon be altered, and each year will add to the general business of Chancery, and increase sufficiently the Masters' duties. This answer must of course be taken in connexion with that I have already given to Question 7.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

I have before stated that one of the principal facts which contributed to the successful working of the Commissioners of Incumbered Estates was the mode of appeal, first to the full Court of Commissioners, and then to the Privy Council. If the duties of the Commissioners are transferred to the Masters a similar system of appeal should be established. An appeal should always be from an individual judge to a tribunal consisting of several. An appeal from one judge to another is seldom satisfactory, and there is virtually no appeal from the Chancellor. The Court of Appeal, which might sit weekly in the Nisi Prius Court, could be made a most valuable one by constituting it nearly as follows:—The Chancellor presiding in all appeals, the Ex-Chancellor, Master of the Rolls, Senior Master, three Chief Judges, and real Estate Court Master—four to form a quorum. All appeals from the decision of any of the branches of the Court of Equity should be first to this tribunal. I apprehend that the Chancery appeal Court in England has been found most beneficial, and from a

lengthened acquaintance with the feelings of suitors and of the legal profession in Ireland, I can state that the want of a good Equity Appeal Court, which might dispense with the necessity of an appeal to the House of Lords, and substitute a satisfactory tribunal consisting of several members, instead of the graduated appeal from the Masters to the Master of the Rolls, from the latter judge to the Chancellor, is much felt. The Judicial Committee of the Privy Council has been found to constitute an excellent appellate tribunal, and the Appeal Court I have suggested is closely analogous to it. The right of appeal generally should be limited as to time, *eg.*, two calendar months, unless when the long vacation intervenes, and then three would be an amply sufficient limit.

16. Can you suggest to the Commissioners any other matter of importance not included in your answers to the foregoing questions, and bearing upon the subject of the inquiry?

It may be well to remark that a mere transfer of powers from one tribunal to another has scarcely ever been a successful mode of legislation; but it may present a very desirable opportunity for remodelling a practice found defective or susceptible of improvement. The tenor of the Commission under the authority of which the queries which I have answered were framed, contemplates annexing to Chancery the powers of the Commissioners of Incumbered Estates, and perhaps of bringing summarily under the 15th section all cases now subject to the Commissioners' jurisdiction. This alone would be unsatisfactory, and I have little doubt would in the end prove a most imperfect machinery for the sale of estates. The general procedure of the Court of Chancery, and the jurisdiction of its members, require extensive alteration and improvement. Solicitors can now practise without the aid of counsel (and do so) in the Incumbered Estates Court, and within the few years that court has been in operation a marked improvement has taken place in the general knowledge of real property possessed by the solicitors practising there, and in their style of conducting business. They cannot be heard in the Master's office in the mere formal proceedings, under the 15th section. This should be remedied. Such a monopoly is injurious to the best interests of the Bar, as it is prejudicial to suitors. The ordinary proceedings to sell an incumbered estate are purely routine. An analysis of the petitions, decretal orders, &c., in such cases, would show that they have no essential difference; so as to the charges and claims. It is all routine. There should therefore be framed and circulated petitions, decretal orders, (rather conditional orders for sale), claims, schedules of incumbrances, and a solicitor of common intelligence could fill up these correctly, or with only occasional assistance in particularly difficult cases from counsel. The Masters should have original and not delegated jurisdiction, and have the rank and be styled Equity Judges. The Chancellor and Master of the Rolls should equally hear causes, and minor and lunacy matters, &c. The three Junior Masters for the time being should be the Commissioners for selling estates. A large court to sell estates in, and for

hearing appeals, with competent officers, should be erected. Above all, public triennial returns of the state of business, suits pending, sales, &c., should be rigidly enforced and published. Without these, or extensive alterations and improvements such as I have suggested, and a strict superintendence and public control kept over the progress of improvement in the Court of Chancery, the improvement which already has been effected in the working of the court will be neutralized. From many sources I have been informed that the English Chancery reform is already somewhat obstructed. Suits in that court seem returning to their primitive state of expense and delay. The general principles of Lord St. Leonard's Chancery Reform Bill deserve much attention, and might, with such modifications as the working of the system has suggested, be applied in Ireland.

ROBERT LONGFIELD.

ANSWERS OF CHARLES ROLLSTON, ESQ., Q.C.,
TO QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

In my opinion, and according to my experience, the course of practice and procedure adopted in the Incumbered Estates Court has worked very well; and I am sure no statute, so comprehensive in its object, and introducing such startling novelties into the system of legal and equity proceedings, ever passed which presented fewer difficulties of construction.

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

I think there are some things requiring remedy—though one can scarcely call them defects or imperfections in the practice—and I will state them and suggest remedies. Though one of the objects of the statute is to sell and distribute the funds with as much speed as is consistent with justice and right, yet several cases have undoubtedly been a long time in Court, and parties desirous of postponing sales or decisions against them, often show cause against conditional orders for sale or appeal from a single Commissioner to the full court, which, sitting as it does but two days in each week, and from unavoidable causes not even able to do that with regularity, and being often obliged to postpone cases involving serious questions from the difficulty of getting up counsel, owing to the situation of the court, cannot dispose of its motions as speedily as is often necessary, and always desirable. It is not easy to meet this evil; but although the decision of the full court gives most general satisfaction, still I would do away with it, and for its substitute refer to my answer to the next query. Another matter which requires remedy, in my opinion, is the mode of giving notice to tenants. I know many cases of hardship have arisen from parties having actually lost interests in land by not being served with notice or being otherwise informed of the proceedings to sell, as bearing on their interests; and I have had many cases before me exemplifying

this: for instance, middlemen holding valuable interests under the owner by leases, and their tenants being the occupiers, the latter are the persons served with the notice and returned on the rental, and after the sale the middle interest is gone, as the occupier has too often a direct interest in not letting his immediate landlord know anything of the notice. In cases where there is a receiver acting on a rental, or where an owner is the petitioner, whose rental attached to the petition is therefore likely to be quite correct, this evil may not arise; but in all other cases it may; and in the latter class of cases I would suggest that some one better qualified to ascertain tenancies and explain the notices than a common process-server or bailiff should be employed for that purpose by the solicitor, who should then be answerable to the court for the truth of the rental; or perhaps some stringent rule should be made to compel the owners to return true rentals, and the court could act on them. A third evil arises from the power that exists in any creditor, to however small an amount, and however low in point of priority, of presenting a petition to sell any estate, however large, of the most complicated title, by a solicitor who knows nothing of the lands, the rental, or the title, or where a single title-deed is or can be procured, or copies of them. This naturally causes imperfect abstracts, mistakes in rentals, and often a year's delay in looking for deeds, and expense of taking out memorials, otherwise unnecessary; and I need hardly say the registry affords little help in showing the trusts of a deed to a sufficient certainty. To remedy this I would make a rule, that any owner or other creditor who, on being served with the conditional order for sale, or without being so served, brought into the office within the time limited for showing cause (or such further time as the rule should specify), a full and satisfactory rental and abstract of title on which the Commissioner could at once act, verified by his solicitor and himself, together with all deeds and leases in his possession, or full and accurate information where they are—should have the carriage of the sale and his costs, whatever be the result.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

I do not understand why one Commissioner should have a different title and salary from the other two, with just the same duties and labour. In my opinion this very important court, if continued, should, like all other courts, have a head, but I would restrict his duties to flating all petitions, hearing all appeals, and disposing of what are now called full-court motions; this would give the Commissioners two days a-week more for chamber business each, which would be more than an equivalent for withdrawing chamber business from the chief Commissioner, expedite the business very much by accelerating what are called full-court motions, and enable the chief Commissioner, if a member of any other court, to give more time to its duties than he now could; and in this case I would leave the appellate jurisdiction from the

chief Commissioner just as it is at present, except that I would advise that the ultimate Appellate Court should have the power of awarding costs.

4. What are the peculiar circumstances in the constitution of the court, or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

That the same persons by whom the first step is directed in any matter, carry it out all through—the cheapness of the proceedings—the certainty of sales without opening biddings—the parliamentary title conferred on a purchaser—that the solicitor having the carriage is sure of his costs when he finishes his case.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court, or any and what part of it, should be introduced into Chancery?

The entire of it, except with such changes as I suggest in my answers to the second and fifteenth queries; and if the new business is thrown on the present Masters in Chancery, the whole will come to a stand still.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

Certainly not as effectual; and if I am to answer the question as to the relative speed—assuming the two petitions to be the only ones in each court, not as prompt; of course the promptitude depends on the other business of the court, which, according to its extent and nature, more or less accelerates or delays the proceedings in any one matter in either court.

7. If the Court of Chancery had power to give a parliamentary title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

I think not as cheaply, under its present system, and, as stated in my answer to the 6th section, may be more or less prompt according to circumstances.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former Court possess, should be continued in the Court of Chancery?

I certainly do. I am of opinion that any possible clog to the free transfer of land or property should be done away; and certainly that the exemptions in this query should be continued in the Court of Chancery.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

I cannot; but of this I am sure, from bills of costs which have come before me in both, that the sale in the Incumbered Estates Court is cheaper, except, perhaps, in the case of one creditor, one respondent, and one tenant on the land sold.

10. What, according to your experience, have been the practical results of giving a parliamentary title?

I think the parliamentary title one of the greatest benefits of the Act, and the first beneficial result is, that it certainly adds, and has added, to the value of the thing sold, and increased the purchase money. It also gives a security to a purchaser which, even under Chancery sales, he never had before, and facilitates the future transfer of property both in time and expense, the value of the former being often incalculable to a seller, and the latter a clear gain to both seller and buyer.

11. In your opinion, should the privilege of obtaining a parliamentary title be continued and made permanent?

Undoubtedly; I consider it a benefit both to the individuals selling and buying, and to the country generally.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary title by submitting his title to a judicial investigation?

I think the privilege should not be confined to incumbered estates; and as a proprietor of an unincumbered estate can now indirectly, by creating a charge, obtain and give a Parliamentary title, I would allow him to do so directly.

13. Should the privilege of obtaining a Parliamentary title be limited to lands of any particular tenure?

I think not; the less the estate is in value the more benefit its owner or purchaser will have, comparatively, by a Parliamentary title, if again disposing of it.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

I should say it would be impossible. I have known what would form the materials for five equity suits, and more, often decided on the settling of one schedule.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

I would leave the Privy Council the ultimate appeal, as now, and one appellate jurisdiction between the Master and it; and I would give that to the Master and it; and I would give that to the Master of the Rolls, as the Chancellor would sit in the Privy Council.

16. Can you suggest to the Commissioners any other matter of importance not included in your answers to the foregoing questions, and bearing upon the subject of the inquiry?

None, except the vast importance and advantage to suitors, my own profession, the solicitor's profession, and the public generally, to remove the Court of Incumbered Estates down to the Four Courts. I have heard solicitors complain that the affidavits filed in the offices are not made up in books and indexed at the end of the year, as in Chancery, which would expedite every one searching for an affidavit considerably; but as similar queries to

those I have answered have been submitted to solicitors and others, they can best speak of such inconveniences if they exist. In conclusion, I cannot help saying, that in my opinion it will be very difficult to amalgamate the Incumbered Estates Court and its practice with the Court of Chancery and its practice, without losing many of the benefits of the former court, and gaining for it not a single advantage. And as there must be additional Masters, many additional hands employed, and great confusion arising from the mixture of two systems essentially different in their nature, details, and objects, I have no doubt that it would be more economical to the Government, more satisfactory to all classes, and more beneficial to the country, that the Incumbered Estates Court should be a separate jurisdiction, if it is permitted to exist at all.

CHARLES ROLLESTON.

ANSWERS OF B. C. LOYD, ESQ., Q.C., TO QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

According to my experience, except for the precipitancy of the sales in the early period of the Commission, I think the course of practice and procedure adopted by the Incumbered Estates Court has, on the whole, worked well; but, the proceedings being in a great measure *ex parte* until the final schedule comes to be adjudicated upon, the system is not, in my mind, so well adapted for the investigation of disputed questions of fact, or the decision of difficult and complicated questions of law. I consider the practice adopted by the Masters in Chancery, under the 15th section of the Chancery Act, to be more satisfactory, which is this: when a petition is brought into the Master's office, it is usually directed to stand as a charge; the parties then attend before the Master, and if there are questions of fact to be investigated, or questions of law to be decided, the Master gives directions as to the most convenient course for having the former put in a proper course for investigation, and the latter properly raised for his decision. And when all the matters are adjudicated upon by the Master, his decisions are embodied in one order, which remains for the inspection of all parties for a certain time, in order that any person who considers himself aggrieved, may take the opinion of the Court of Appeal. Whereas, in the Incumbered Estates Court, the parties meet for the first time upon the occasion of ruling the schedule, which rulings are frequently accompanied by orders for payments made at the time. I think this system has had the effect of taking parties too much by surprise, either from not being sufficiently acquainted with the case they have to meet, or with

the effects of the rulings made as to the claims of other persons. I would suggest that the creditors upon the schedule should have the privilege of examining the abstract of title lodged with the Commissioners, and that the rulings, when made, should be embodied in one order, to remain for the inspection of all parties, and not to be acted upon for a short time, to be fixed by the court.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure which, in your opinion, have mainly contributed to its successful operations?

The peculiar circumstances in the constitution of the Incumbered Estates Court and its procedure which, in my opinion, have mainly contributed to its success, are: 1st, the practice of selling the estate in the first instance, and transferring the litigation from the land to the fund in court; 2nd—and the principal one—the practice of compelling the same judge, before whom the proceeding has originated, to bring to its final determination, subject only to the right of appeal. No one who has not had the opportunity of practical experience can appreciate the delay, expense, and miscarriage consequent upon the system of one judge communicating with another, through the medium of orders drawn in a technical form, and reports to be made in pursuance of such orders. I have known matters settled in half an hour in procedures on petition, under the 15th section of the recent Chancery Act, which would have taken many months to be disposed of under the system of references and reports.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court or any and what part of it should be introduced into Chancery?

In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, I should think a great deal of the practice of the former court could be introduced into Chancery. 1st. I think any tenant for life, or remainderman, should have power to petition for sale of the estate for a debt affecting the inheritance as well as a creditor. 2nd. I think the sale should be made at an early stage of the case, and the litigation transferred to the fund in court—at all events, in those cases where the estate is incumbered to half its value, and a form of conveyance, authenticated under the hand and seal of the judge, who makes the decree for a sale, should be sufficient. 3rd. That the same Judge or Master before whom the proceedings originate should have the disposition of the whole cause, subject only to the right of appeal. 4th. That some modification of the schedule system should be adopted. 5th. That the Judge or Master who rules upon the claim should also have power to make orders for payment and distribution of the fund, as well as every other order necessary to bring the cause to a termination. At present, the Masters who, under the 15th section of the Chancery Act, are empowered to adjudicate upon the merits of the whole cause coming under that section, are not permitted to distribute the fund, or even to make an order for

the substitution of service in the case of a party out of the jurisdiction, which is often a mere matter of course.

6. Is the proceeding for sale of an estate in Chancery, under the 15th Section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

7. If the Court of Chancery had power to give a Parliamentary title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former Court possess, should be continued in the Court of Chancery?

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

I think the proceeding for sale of an estate in Chancery, under the 15th section is quite as prompt, and if a Parliamentary title were given, would be quite as effectual a proceeding as a petition in the Incumbered Estates Court. I know of one case in which, although accounts had to be taken of real and personal estate, the purchaser was put into possession in four months after the petition was presented, the parties having consented to an immediate sale. I have annexed to this paper a statement furnished to me by Mr. Smith, Master Brooke's Examiner, which will show the number of petitions referred to Master Brooke, under the 15th section of the Chancery Act, as well as those in which a sale was prayed and afterwards decreed; and considering that most of these involved the taking of accounts of real and personal estates and the administration of assets, I believe it will be found to verify what I have stated. I think, also, that if there were an exemption from fees and stamps, the proceedings in the Court of Chancery would be quite as cheap, if not more so, than those of the Incumbered Estates Court, and that any difference in favour of the latter is owing to the exemption from those duties. The exemption from fees and stamps is considered a great boon by the solicitors practising in the Incumbered Estates Court, and, if possible, there should be the same exemption to proceedings in Chancery.

10. What, according to your experience, have been the practical results of giving a Parliamentary title?

11. In your opinion, should the privilege of obtaining a Parliamentary title be continued and made permanent?

According to my experience the practical result of giving a Parliamentary title has been beneficial, and should be continued, and made permanent in the case of all sales made under a decree of the court. I think the dangers arising from it have been exaggerated, and would be greatly counteracted, if the title were previously examined and investigated by competent persons appointed for that purpose, as it is done by the Incumbered Estates Commissioners. If there were

circumstances of suspicion, I think the court should have the power to withhold a Parliamentary title. And even if there were rights of third persons, with which the court might find itself incompetent to deal, such rights might be saved in the deed of conveyance as is done in private Acts of Parliament; but in other respects, in cases of sales under the courts, the title should be warranted. It is unfair, I think, to invite the public to become purchasers under the court, and not to guarantee the possession of that which is sold. At all events, the purchaser should be apprised of the nature of the risk he is to run. The giving of a Parliamentary title would have the effect of insuring a higher price for the estate, and would tend greatly to facilitate the transfer of land, which is so much to be desired.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary title by submitting his title to a judicial investigation?

I feel myself unable to answer this question. I suggested in an answer to a similar question of the Registration Commission sitting in London, that if there were competent persons appointed to investigate titles, persons submitting to such investigation, after placing the deed upon the registry, and giving notice of it as required, might, after a certain period, if the title be not impeached in the meantime, be permitted to acquire a warranted title, having somewhat the effect which a fine, with proclamations, formerly had. But all this would require great care.

13. Should the privilege of obtaining a Parliamentary title be limited to lands of any particular tenure?

The privilege of obtaining an unqualified Parliamentary title should, I think, be confined to estates in fee; but in respect to leasehold interests the title should only be warranted as against the lessee, and those deriving under him, but not as against the lessor. I believe the Incumbered Estates Court acts upon this principle.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

I think the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Court, if the system of references and reports were discontinued.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

In case of an appeal from the Master's orders, I would like to see an Appellate Court constituted like that of the Lords Justices in England, consisting of the Lord Chancellor and two other judges. An appeal from one judge to another single judge is not, at least under ordinary circumstances, satisfactory.

16. Can you suggest to the Commissioners any other matter of importance not included in your answers to the foregoing questions, and bearing upon the subject of the inquiry?

The only other observation occurring to my mind is with regard to the registry, and its bearing upon the investigation of titles. I think the system might be improved, and searches facilitated, that every thing which is to affect a purchaser should be put upon the registry, and that the registry should be made *actual notice* to all the world. But this subject is hardly within the scope of the present inquiry so as to warrant further observations.

B. C. LLOYD.

[Here follows the statement referred to.]

(To be continued.)

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DUBLIN, AUGUST 4, 1855.

THE current of public opinion appears of late to have set in strongly against the time-honoured system of patronage, in the recruiting of the ranks of the civil service. Whenever the voice of the people is thus raised, the evils of which it complains do not fail to be exaggerated; but it cannot be denied that there are many defects inherent in the mode in which such appointments are now usually made. A vast concession has been made to this cry for reform, by the throwing open to public competition the nominations to writerships in the East India Company's service, which hitherto lay exclusively in the gift of the Directors. The power of disposing of these enviable preferments, which secured to the fortunate nominees, if gifted with ordinary capacity, discretion, and good constitutions, a certainty of present competence and early independence, with a chance, if properly improved, of future affluence, was hitherto the flower of the prerogative of the Leadenhall-street rulers of the destinies of India. This spell is now broken, and the public at large, within certain limitations as to age, are now invited to compete for these golden advantages. Let us express a passing regret, that at the recent examination, so few of these prizes were borne off by Irishmen, and that in these few our venerable University had no part. Probably the miscellaneous nature of the subjects came upon some rather by surprise. We anticipate that this

discomfiture will not again happen. We have adverted particularly to this class, not by reason of anything peculiar thereto, but rather as affording a type of the change, which may be looked for as likely gradually to come round in other public departments nearer home. It must be admitted upon all hands that a public examination is a test of merit; it is certainly not the only test, but it affords some criterion. It is, of course, open to objections. The public examinee may perhaps, by dint of cramming, pass a fair examination, and still be *mentally* unfit for the duties which he has to perform. Again, he may be mentally qualified, and *morally* deficient. This must be conceded. But the error of the present system of selection through personal favour is, that except in a very few instances, the appointment is made quite irrespective of the mental or moral fitness of the candidate. In fact, we much fear that a large proportion of the junior appointments of the present day have been owing more or less to political considerations. To give a needy elector £5 for his vote, if done so awkwardly as to be *discovered*, is an offence in our political Decalogue. The receipt of this sum by the starving voter, who has no wares for sale but his country, is a crime of a still blacker dye. But the gift to the son of an influential elector, upon the recommendation of his borough member, of a clerkship in the customs or excise, is but an act of political gratitude. These unquestionable dogmas of our politico-ethical catechism might certainly refuse to bear the examination of the

casuists of another planet, remote from the influences surrounding us, but they somehow pass muster here. To this source of patronage we must add one of a somewhat more refined character—one which, however natural, and perhaps necessarily to be expected, so long as patronage itself exists, is a source of jealousy to the people. We allude to the appointments more especially in the diplomatic service, conferred upon the junior members of the aristocracy. Patronage is a plant of very gigantic growth, under whose protecting shade so many of those who are now called upon to lay the axe to its root have grown up, as to render their task a very irksome and invidious one. The present public movement is, however, one in the right direction. Although it may be impossible to abolish patronage altogether, owing to the impossibility of applying an educational test of fitness for the higher offices of the state, and it may be necessary to give a power of selection, where a number of competitors are evenly matched, we nevertheless think that means will yet be devised which will satisfactorily supersede, in almost every department, the present very faulty mode of choosing our public servants.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 244.)

ANSWERS OF EDMUND HAYES, ESQ., Q.C., TO QUESTIONS IN PAPER No. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

I am of opinion that, upon the whole, the course of practice and procedure adopted in the Incumbered Estates Court has worked very well.

2. Have you observed any defects or imperfections in that course of practice?—If so, state the same, and any remedies which you can suggest.

I do not profess to be particularly acquainted with the details of official practice in the court; I would, however, beg to mention the following matters:—

1st. In my opinion, the sales of the court ought to be conducted by a licensed auctioneer, and not in the presence of a Commissioner—a circumstance which may tend, I think, to damp biddings; they should be held, also, in some place of general public resort.

2nd. As a general rule, no conveyance should be executed without a map being affixed to it, and that a duplicate of this map should be preserved in court, for the purposes of future evidence.

3rd. I think an improved system of checks should be adopted with respect to the payment of money out of court. I may refer to the case of *Keogh's Estate*, lately before the Privy Council, in which I was

counsel, and which has suggested this observation to me.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

I think money should not be paid out of court, save upon the express order of a Commissioner, made upon notice to all parties; and that in the order should be specified, not only the name of the payee, but the character in which he is to receive it.

I would call attention to the 28th section of the 12 & 13 Vic. c. 77, by which it is provided that the conveyance of the Commissioners shall not prejudice or affect any right of common or any right of way, or other easement, on the land conveyed. The result of this is, that a person purchasing land, in the hope of getting a *clear* fee-simple, may find it so covered with easements as to make his purchase far from a desirable one. I do not see why the land should not be sold discharged of an easement, as well as of a tenancy, after due notice to all claimants: this notice might be given by advertisement in the *Gazette*, and by posting at the neighbouring police stations, &c.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

The circumstances which, in my opinion, have mainly conduced to the successful operations of the court are—

1st. The power to give what has been called a Parliamentary title.

2nd. The power of selling promptly, and so soon as it has been shown that there is a good cause of sale, an estate which the court has jurisdiction to sell.

3rd. The energy, diligence, and ability displayed by the Commissioners in carrying out the intentions of the Legislature, added to a uniform willingness to give every assistance to the solicitors and suitors who have occasion to apply to them.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court or any and what part of it should be introduced into Chancery?

I think the power of giving a Parliamentary title ought to be conferred on the Court of Chancery. It would be convenient, also, that the petition in Chancery, praying a sale for discharge of an incumbrance, should have annexed to it, as in the Incumbered Estates Court, a schedule of all incumbrances affecting the land to be sold. But I think it would be time enough for the court to direct a sale after the defendant's answer had come in, and the cause had been set down for hearing.

The practice of the Incumbered Estates Court, as to not opening biddings at the instance of persons desiring to purchase, should, by all means, be introduced into Chancery. I would also suggest, that if the practice of having sales conducted by a licensed auctioneer, in a public sale-room, and not before a Master, should be adopted, (as I think it

ought), it would be well to institute a practice, that the result of the sale should, within a limited time, be brought before the Master, upon notice to all parties; and if he approved of the sale, as to the mode in which it had been conducted, and the price which had been obtained, then that it should be absolutely confirmed.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

I have not had so much experience as enables me to answer this question satisfactorily.

7. If the Court of Chancery had power to give a Parliamentary Title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

I see nothing in the constitution of the Court of Chancery which leads me to think they could not.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former court possess, should be continued in the Court of Chancery?

I do not think that an absolute exemption from fees and stamps would be necessary. While, on the one hand, it is not to be expected that a court of justice should be supported by the fees exacted from the suitors, so, on the other hand, it is not desirable that litigants should be wholly exempt from such imposts. In my judgment, all that is required is, that they should be moderate.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

I cannot answer this query.

10. What, according to your experience, have been the practical results of giving a Parliamentary Title?

The practical results of giving a Parliamentary title in the Incumbered Estates Court have been—

1st. That when a decree for a sale has been pronounced in Chancery, the business of the sale is transferred to the Incumbered Estates Court.

2nd. Persons who would not otherwise resort to the court have brought their estates to a sale, for the purpose of facilitating a transaction with a proposed lender, on the security of such estates.

11. In your opinion, should the privilege of obtaining a Parliamentary Title be continued and made permanent?

Undoubtedly, I am of that opinion.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary Title by submitting his Title to a judicial investigation?

In my opinion, the privilege ought not to be confined to incumbered estates. The plain result of such a privilege is to increase the selling value of an estate. I do not see why that benefit should be conceded to one whose follies or misfortunes have forced him into court, and be denied to him

who, by a course of prudent management on the part of himself and his ancestors, has faithfully discharged all the duties he owed to society.

13. Should the privilege of obtaining a Parliamentary Title be limited to lands of any particular tenure?

I see no reason for doing so; but when land is held for a life, or for a short term of years, and the court sees that a sale would be detrimental to the interest of puisne creditors, without any very important advantage to the prior creditors, the court should be invested with a discretion to refuse a sale, and leave the rents to be received by a receiver.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

I think additional Masters (two at least) would be requisite.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

It appears to me that an appeal ought to be given to the Master of the Rolls, and from him to the Lord Chancellor, against any ruling of a Master, by which the rank or amount of an incumbrance should be affected. A deposit should be required, to deter a party from dilatory or frivolous appeals.

EDMUND HAYES.

ANSWERS OF P. J. BLAKE, ESQ., Q.C., TO QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

Considering this question as intended to apply simply to the routine of business, I think the course of practice and procedure has latterly, as a general rule, worked well. The regulation that the costs should be the first charge on the funds occasioned many great evils. No doubt it made certain that the Act should not have the fate of its precursor, which was intended to be worked out by the Court of Chancery, and it secured the court against the possibility of its proving a failure; but these advantages were more than balanced by the excessive temptations to present petitions on behalf of puisne creditors, whose charges were hopeless, and on behalf of nominal owners, for whom no residue could possibly exist. Since the court got into full operation, the mischief of the rule seems to have been so manifest that the Legislature removed the temptation, and the costs are not now of necessity the first charge.

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

The chief defect, in my mind, is too great laxity in the mode of ascertaining the rights and priorities of parties to the purchase money, and in the distribution and payment of it. This I attribute to the

idea which I know some persons officially connected with the court entertain, that the primary object of the Legislature was to transfer the land from incumbered to unincumbered owners, and that the distribution of the funds was, as compared with that object, of minor importance.

I think the practice of having a final schedule most excellent, but no alteration in it should, on any account, be made, unless based on objections in writing previously lodged, which should not alone state the nature of the objections, but should also shortly state the grounds of them, and the legal questions intended to be raised; this I think necessary by reason of the absence of all pleading in the court. A. B. simply stating that he objects because his claim is No. 9 on the schedule instead of No. 3, tells nothing; and where any serious controversy has arisen, I do not think, in my experience of the court, I saw many cases in which the settlement of the final schedule in chamber, *before the Commissioner having the conduct of the matter*, was not, at all events on one side, and frequently on both sides, unsatisfactory. I have heard several of my own profession and several solicitors complain of this. Before the full court, the questions and facts being known, the investigation is in general satisfactory.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

In addition to the observations in my reply to No. 2, I think a limit should be put to the system of surveying and advertising. One of the most eminent solicitors, and one having extensive business in the Incumbered Estates Court, told me that the rule as to the costs, and the system of surveying and advertising, were most mischievous, and tended to establish a low moral tone in that court. He expressed this in words more emphatic than I think it necessary to repeat. I have been assured that, in general, a large per centage, by way of *douceur*, is paid on the charges for advertisements and surveys. Practically this comes out of the fund, and such a system of dealing with the funds I consider most mischievous.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

The temptation of the cost as stated in No. 1; the statutable title to the purchaser; the rapidity with which business was despatched before the court got clogged; the utter impossibility of ever bringing old causes in Chancery to an end; the smallness of the outlay for stamps, &c.; and, lastly, the facility of communication with the Commissioners and officers, their civil, unceremonious, and business-like habits, and untiring perseverance.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court, or any and what part of it, should be introduced into Chancery?

I think that the sale should be effected without waiting for the accounts of debts, &c. I think the

proceeding by final schedule, with some modification, far preferable to the system of charge and discharge.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

When the Incumbered Estates Court had but little business to discharge, I believe sales could be had more promptly in it; but now that a great arrear of business has accumulated, I believe sales could be had as promptly in Chancery, unless questions should arise on the title; but until the statutable title is conferred by the Court of Chancery, sales in it never can, in my mind, be as effectual as in the Incumbered Estates Court.

7. If the Court of Chancery had power to give a Parliamentary title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

I cannot offer an opinion as to the cheapness, further than that I have heard the expenses of surveys and advertisements are extravagant. If the Court of Chancery were at liberty to give a statutable title, and to sell before the account of incumbrances was taken, I consider sales could be had in Chancery quite as promptly as in the Incumbered Estates Court.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former Court possess, should be continued in the Court of Chancery?

I consider it would be most desirable.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

I cannot.

10. What, according to your experience, have been the practical results of giving a Parliamentary title?

Most beneficial. It lessened the expense of sales, prevented delays, by rendering objections to title impossible, and by giving a new root, induced purchasers to give increased prices.

11. In your opinion, should the privilege of obtaining a Parliamentary title be continued and made permanent?

Most unquestionably. I cannot understand why a court of justice, with all its machinery to provide against fraud, should not be a "market overt" for the sale of land.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary Title by submitting his title to a judicial investigation?

I do not think it desirable that, by an act of the Legislature, any court should be made a piece of conveyancing machinery. It is one of the duties of all judicial systems to afford the means to a creditor of recovering his just debts. As ancillary to that object, I think a statutable title should be given; but I do not think the privilege should be

extended to unincumbered estates. I should apprehend that great frauds would be perpetrated if unincumbered estates could be sold and statutable titles given. In cases of incumbered estates the number of persons interested in the property would make it improbable, if proper precautions be taken that frauds could be effected.

13. Should the privilege of obtaining a Parliamentary Title be limited to lands of any particular tenure?

I think not, save where the interest is for a very short period, so as not to bear the expense.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

I cannot give a decided answer to this query. I doubt that they could.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

I think it quite necessary there should be such an appeal.

16. Can you suggest to the Commissioners any other matter of importance not included in your answers to the foregoing questions, and bearing upon the subject of the inquiry?

Valuations by surveyors should be wholly dispensed with. They afford opportunities, *which, I have been assured, have not been overlooked*, of effecting frauds. It may often occur that the party, whether owner or creditor, having the conduct of the proceedings, has an interest either to exaggerate or depreciate the true value of the land, or some particular lots. The Ordnance and Poor-law Valuation ought to suffice. Hitherto the Incumbered Estates Court has been looked upon more as an exceptional tribunal than as part of the established and permanent judicial system of the country—more in the nature of a court of claims, to regulate matters regarding the land, than as a court to administer rights between debtors and creditors. No doubt the latter duty has been, to a certain extent, discharged of necessity, but only as incidental to the former. If it be intended to make the court permanent, the rights of creditors, especially puisne creditors, should be attended to more carefully than heretofore. If it be plain that there will be a surplus after paying all incumbrances, the owner should have the conduct of the proceedings; and if it be plain that the fund will be deficient, the creditor who on the schedule of debts annexed to the petition appears likely to be the last paid, should have the conduct of the proceedings. These rules should be almost inflexible, no matter by whom the petition has been presented. Instances have occurred, I have been assured, where the non-observance of them led to great evils. There is one well-known case, where an owner, in the name of a trustee, or family creditor, had the conduct of the proceedings: the house, demesne, and extensive woods were sold in one lot, valued at about £1,400 per annum; and the owner bought back the estate

at a great undervalue, he having the command of the early incumbrances, which were mostly family charges, and for which he got absolute credit. Thus, the machinery of the Incumbered Estates Court was put in motion simply to diminish the burthens on the estate in the hands of the still incumbered owner, and to tail off creditors to the amount of some £20,000.

P. J. BLAKE.

ANSWERS OF ALEXANDER NORMAN, ESQ., TO QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

In my opinion the practice and procedure of the court has worked well; there is some inconvenience experienced from delay in the returning the abstracts of title.

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

I think there is some defect in the mode of discussing objections to the final schedule, from there being no counterstatement to the objection. I would advise that an affidavit should be filed in answer to the objection, and that a copy of such affidavit should be served on the objecting party two clear days before the meeting.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

I cannot.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure which, in your opinion, have mainly contributed to its successful operations?

They are many; amongst others—Parliamentary title; speedy transfer of land; the intimate knowledge the Commissioner administering the estate has of its title; the period at which the claims are adjudicated on, when the fund to discharge them is ascertained; the removal of the temptation to speculate on the costs of discussing and disproving the title; and the removal of receivers.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court or any and what part of it should be introduced into Chancery?

I would introduce the whole of the practice, save as in my reply to the second question, subject to the suggestions of some experienced men of the other profession, as to office details, of which I am ignorant.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

I am of opinion it is not as prompt or effectual. The system of charge and discharge creates delay, and the proceedings in relation to a sale are not as effectual.

7. If the Court of Chancery had power to give a

parliamentary title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

I think not, under the present system and practice in Chancery; I would, in addition to giving the Parliamentary title, adopt the practice.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former Court possess, should be continued in the Court of Chancery?

In all cases of proceedings for a sale, I would adopt the scale of the Incumbered Estates Court; and in all other cases I would considerably reduce the present scale in Chancery.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

I can give no opinion upon this from knowledge.

10. What, according to your experience, have been the practical results of giving a parliamentary title?

Many answers might be given to this, but the cases of *O'Beirne v. M'Mahon*, in the Equity Exchequer; *Kirkwood v. Lloyd*, in Chancery, and *Gardiner v. Blesinton*, with all of which I was familiar, establish, to my mind, the evils of not being able to give a Parliamentary title. In the last case an application was made for liberty to procure an Act to sell, and though the usual savings introduced into private Acts were in the Blesinton Estates Act, I have not, in all the many sales made under it, known a single title set aside.

11. In your opinion, should the privilege of obtaining a parliamentary title be continued and made permanent?

I think it should; and the last enactment, in reference to pleading in cases of such titles, is very salutary.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary title by submitting his title to a judicial investigation?

I think every proprietor should have the power of transferring a Parliamentary title on submitting same to judicial investigation.

13. Should the privilege of obtaining a Parliamentary title be limited to lands of any particular tenure?

I see no reason for confining the privilege, except in cases of disability or restraining covenants; in all others, the value of the thing to be sold would, in my opinion, be increased.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

I think if the jurisdiction were transferred, the present number of Masters must be increased by two, at all events.

15. What would you suggest as to the right of

appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

I would give an appeal in all cases under the 15th section, and the transferred jurisdiction to the Master of the Rolls, one Common Law Judge, and one Master, in rotation; and from that to the Judicial Committee of the Privy Council.

16. Can you suggest to the Commissioners any other matter of importance not included in your answers to the foregoing questions, and bearing upon the subject of the inquiry?

Nothing further occurs to me.

ALEXANDER NORMAN.

ANSWERS OF JAMES ROGERS, ESQ., TO QUESTIONS IN PAPER No. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

The course of practice and procedure in the Incumbered Estates Court has, according to my experience, worked well, with reference to the object for which that court was mainly established. The Act under which the court had its origin was, as it is generally understood, passed to facilitate the sale and transfer of incumbered estates, not so much with a view to the discharge of the incumbrances affecting them, as to substitute a different class of proprietary for the existing incumbered owners; and for this object, assuming no difficulty or doubt to exist in regard to the title in ownership of the estates, the course of practice and procedure has, in my opinion, worked satisfactorily; and I am not prepared to point out any defects or imperfections in that course of practice. But in my opinion evils do exist in the procedure relating to the ascertainment of the several charges and incumbrances affecting the estates, and which are to be paid out of its produce. The mode of ascertaining the subsisting validity of the charges, and amount due on foot of them, does not appear to me to be sufficiently scrutinizing. The only record by which these facts are ascertained is the final schedule of incumbrances, upon which are inserted, in the first instance, all the incumbrances within the petitioner's knowledge, those which appear upon the searches made in the course of the proceedings, and those which are put forward in the shape of claims filed by parties who have been prompted to activity by the several advertisements in the public papers, or otherwise. Of those incumbrances a considerable number is generally disposed of by the observation in the final schedule—"Nothing due on foot of this charge;" but it will be obvious that there are others which ought, in truth and fact, to be included in this latter category, but to which the observation is not

appended. This arises from want of information on the part of the party having the carriage of the proceedings, and from the apathy of an insolvent, or the ignorance or incapacity of an infant or absent proprietor, and other causes that may easily be imagined. In such cases it may happen that demands which have either been wholly or partially satisfied undergo little or no scrutiny, and will be paid to the prejudice of *bona fide* creditors p^uisne in point of priority. A check, to a certain extent, to this evil has recently been introduced, by requiring, before any money can be obtained out of the court, an affidavit to be made, ascertaining the identity of the party named in the order for payment, and that the sum about to be paid is justly due to such party. This test, however, being applied at the very latest stage, and in the absence of all parties interested in impugning the statement, affords, after all, but a very inadequate remedy. It is therefore suggested, that such verification thereto be transposed from the last to the earliest step in the proceedings, and that the demand in respect of each incumbrance in the final schedule, whether the subject of a formal claim or not, should be verified, as is the practice in Chancery, by the oath of the party entitled, or some other person, at the discretion of the Commissioner. This would involve the necessity, as in Chancery, of some notice to the party apparently entitled to the charge, and who has not actually intervened.

4. What are the peculiar circumstances in the constitution of the court, or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

The circumstances which, as it occurs to me, have mainly contributed to the successful operation of the court, are:—first, the giving to a purchaser a parliamentary title, without subjecting him to the expense and delay of any investigation in his own behalf, thus increasing the number of buyers, and materially enhancing the market value of the property; and, in the next place, the avoiding the wasteful expenditure of the fund, in taking an account of incumbrances which that fund will never reach; the latter object being accomplished by the disposing of the estate in the first instance, and only taking the accounts when the amount to be distributed has been ascertained.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court, or any and what part of it, should be introduced into Chancery?

If the powers of the Incumbered Estates Court should be transposed to Chancery, some part of the practice of the former court might, I think, be advantageously transferred, not only in regard to the important particulars just referred to, but in other minor details, as, for instance, the mode of settling the rental, and the specifying in the deed of conveyance the tenants on the estates and their tenures; the more ample power to compel the production of deeds; the confiding to a single judge the conduct and management of the same matter, from its first inception to its ultimate con-

elusion, a practice which has been partially adopted in petitions in Chancery, under the 15th section of the recent Act; and the not allowing the opening of biddings.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

The course of procedure in the Incumbered Estates Court involves inquiries in regard to the rental of the estate to be sold, which, however proper and highly desirable, have no existence in Chancery; and such investigation involves, not unfrequently, very considerable delay. I may instance a case in my own practice, in which objections taken by a tenant in the month of December, 1850, are still undisposed of, and all proceedings towards a sale of the estate still remain suspended. But for this delay, the proceedings of the Incumbered Estates Court would appear to me more calculated to bring the matter to a speedy conclusion than the proceedings in Chancery, under the 15th section. But, considering the distribution of the fund amongst the parties properly entitled to it to form an essential portion of the suit, I doubt, for the reasons I have before mentioned, that such proceedings in the Incumbered Estates Court are as effectual as those in Chancery in regard to the point last adverted to. In illustration and corroboration of this assertion, I may observe, that practitioners desirous of selling an estate for payment of incumbrances, not unfrequently adopt the following plan:—they proceed in Chancery, under the 15th section, up to the order for sale; they then present a petition, and proceed in the Incumbered Estates Court to have the estate sold; and, finally, remit the purchase money back again to Chancery, for the purpose of distribution; or have it distributed in the Incumbered Estates Court, in pursuance of the Master's report in Chancery.

7. If the Court of Chancery had power to give a parliamentary title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

I do not see how conferring upon the Court of Chancery the power to give a parliamentary title would diminish expense or delay, assuming the practice in other particulars to remain unaltered. Its tendency would, as it strikes me, be rather the other way, as imposing on the Masters a greater responsibility, and, if possible, a more minute and rigid, or at least more frequent, examination of the title, before submitting the estate for sale.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former court possess, should be continued in the Court of Chancery?

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

It is not in my power to offer any satisfactory information to the Commissioners upon the matters mentioned in those queries.

10. What, according to your experience, have been the practical results of giving a parliamentary title?

The practical results of giving a parliamentary title, according to my experience, are, that the purchaser enjoys the property he has purchased in perfect and conscious security from all adverse claims, and that when he comes to deal with it for the purpose either of sale or of raising money upon it, he has many advantages beyond those possessed by an ordinary proprietor: all deduction of title, anterior to his conveyance, is dispensed with; his estate possesses in a sensible degree a higher marketable value; and those who seek for investments in landed security manifest a decided preference for property clothed with such a title; and it may be added, as a further advantage, that the evidence of the title consists of a single, short, and unambiguous document.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a parliamentary title by submitting his title to a judicial investigation?

13. Should the privilege of obtaining a parliamentary title be limited to lands of any particular tenure?

Such being the results flowing from a parliamentary title, I can have little hesitation in saying, that the benefit should be continued and made permanent, at all events as regards cases where it can be at present obtained; and I see no reason why the privilege should be limited, or denied to an unincumbered proprietor, submitting his title to a judicial investigation.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

As I think it plain that the transfer of the powers of the Incumbered Estates Court to the Court of Chancery would very considerably increase the business passing through the Masters' offices, and as their time is at present fully occupied in discharging their existing duties, they would be unable to transact the additional business which would be thus imposed upon them.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

In all cases I would give an appeal from the Masters direct to the Chancellor, and thence to the House of Lords; conceiving that as questions of the most serious character, and of the most vital importance to the parties, constantly arise in the proceedings before the Incumbered Estates Court, it would be only right that the suitors should have the opportunity of having their cases decided in the most solemn manner, and ultimately by the court highest appellate jurisdiction.

JAMES ROGERS.

(To be continued.)

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DUBLIN, AUGUST 11, 1855.

THE recent Act for conceding to public companies the right of limiting the liability of their members, is, we are persuaded, a very important commercial reform. Our readers will recollect the Report of the Commission appointed to inquire into the state of the Law of Partnership, which, together with a selection from the mass of evidence taken by that Commission, we published in Vol. VI. The Commissioners were divided in their conclusions as to the feasibility of a change in the then law, which required that the liability of all the partners should be unlimited, unless expressly restricted by a particular Act of Parliament or Royal Charter; and the majority (five to three) agreed to recommend that the proposed alteration should not take place, as not being likely to operate beneficially upon the general trading interests of the country. The Commissioners whose opinion was adverse to the introduction of a system of limited liability, and who accordingly concurred in the Report presented to Parliament, were the three judicial members of the Commission, namely, the Right. Hon. T. B. C. Smith, who represented the Irish Bench, Mr. Justice Creswell, the English Bench, and Lord Currehill, (Mr. John Marshall, Lord of Session,) the Scotch Bench; also the mercantile representatives, Messrs. Slater and Bazely. On the other hand, the three practising barristers who sat on the Commission differed from their colleagues, thinking that, with

respect to joint stock companies, the power of limiting the liability of the shareholders ought to be conceded. It has rarely happened that the sense of the Legislature has gone so completely with the minority of those to whom an inquiry was entrusted than it has on the present occasion. With the exception of a few members holding a leading position in the mercantile world, and who seem to consider that the unlimited liability of the debtors is a wholesome check to rash speculation, and an inalienable privilege of the creditor, the proposed change appeared to be heartily welcome. Indeed, the only regret which, in the mind of the large majority, appeared to accompany the introduction of this measure was, that it did not go far enough, and that its usefulness would be impeded by the enactment of a *minimum* capital of £20,000 being necessary to obtain the benefit of the statute, and that this should be subscribed for in shares of at least a certain amount. By degrees the scope of the measure was enlarged in the Lower House, in order to suit the feelings which predominated; and when it went to the House of Lords the restriction as to a minimum of capital had been removed, so that there was no impediment, in point of theory, to the formation of a company or firm with a capital of £100. So great was the demand for the passage of this measure that the House of Lords consented to waive some forms in order to pass the Bill in the last week of the session, but in so doing they introduced some modifications which, in the eyes of many of its sanguine advocates, have seriously impaired its probable efficiency. They,

for example, passed a clause that the number of shareholders signing the deed of partnership should not be less than twenty-five; also provisions making the directors liable for the engagements of the company to the extent of misappropriated funds, and for a public audit of accounts. It has, however, been since plausibly suggested, that by a little management the barrier of the twenty-five subscribers could be got over, when fewer than that number were interested in the scheme, by reducing the value and increasing the number of the shares, and allotting one a piece to as many persons as would be requisite to validate the transaction. The only difficulty in such a case would be the apprehension lest the limitation would be ineffectual by reason of its being a fraud upon the Act. However, if the promoters were willing to treat their nominees as actual shareholders, regarding the small outlay attendant on this as part of the cost of the undertaking, there could be no doubt of its perfect regularity. There can be no doubt but that the great capitalists regard this change with little favour, professedly as tending to lower the commercial standard. It is, however, not improbable that a sense of self-interest may insensibly bias their opinion on this subject, and that a lurking dread lest a formidable competition to the existing monied interests may spring up from the bringing forward and clubbing together of the numerous little savings which the proprietors hitherto have been loath to risk in joint stock speculations. We rather augur from this opposition that the new law will further develop the national resources by the multiplying of capital. As to the alleged unconscientiousness of refusing to pledge to the creditor the united unlimited security of the debtors, it is idle to tell us that there can be anything unreasonable in so doing, when, by the original terms of the contract, the creditor is to look to be paid for what he supplies out of the assets of the company, or the unpaid subscriptions of the proprietary. Let him look well to that security which alone is offered, and if he do not, the fault will be his. The passing of this law will relieve the Board of Trade of a very irksome duty, namely, that of giving or withholding charters of incorporation with limited liability—a duty so invidious and exposed to obloquy, as latterly to have led to a fixed resolution on the part of that Board to refuse to entertain such applications. By the new law all this trouble and the attendant expense will be avoided; and while it is probable that the recent measure is far from perfect, and will require further expansion,

it is nevertheless progressive, and is one of the best results of the session.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 252.)

ANSWERS OF DAVID SHERLOCK, Esq., TO
QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

In my opinion, the practice of the Incumbered Estates Court has, generally speaking, worked well.

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

3. Can you suggest any modification or alterations in the constitution of the Court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

It appears to me that the expenses of rentals and valuations have been, in many instances, too great; and I think that the practice of the Court of Chancery, of selling without a valuation made for the purposes of the sale, better for the public and for the estate. I also think that the present practice of permitting purchasers to declare a trust without naming the *cestui que trust*, at the time of the sale, has led to underhand bargains, of which the purchasers, and not the creditors on the estate, have got the benefit. It appears to me, further, that a longer time than is usually allowed should be permitted to elapse between the settlement of the final schedule of incumbrances and the distribution of the funds.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court or any and what part of it should be introduced into Chancery?

In my opinion, the Master who decides on the rights of the parties should also distribute the funds; and that the omission in this respect in the Chancery Regulation Act should be rectified.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

7. If the Court of Chancery had power to give a Parliamentary title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

I think the proceedings in Chancery, under the 15th section, are as prompt and effectual as the proceedings in the Incumbered Estates Court; and that if the Court of Chancery had the power to give a Parliamentary title, the sales could be had there as cheaply, and more promptly than in the Incumbered Estates Court.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the

former Court possesses, should be continued in the Court of Chancery?

I think that the outlay required for fees and stamps is one of the greatest burdens of the suitors in the Court of Chancery; but I am unable to say how far it may be necessary to retain them for the purposes of revenue.

10. What, according to your experience, have been the practical results of giving a Parliamentary title?

11. In your opinion, should the privilege of obtaining a Parliamentary title be continued and made permanent?

I think the results of giving a Parliamentary title have been, and will be, most beneficial; and that the power to confer a Parliamentary title should be continued.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary title by submitting his title to a judicial investigation?

13. Should the privilege of obtaining a Parliamentary title be limited to lands of any particular tenure?

I think that the privilege of a Parliamentary title should not be limited to estates incumbered, or to lands of any particular tenure.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

In my opinion, the Masters of the Court of Chancery could, if assisted by registrars, to take down their rulings, and by imposing additional duties on their examiners, do the business of the Incumbered Estates Court, in addition to their present business.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

I think the right of appeal most valuable, particularly when proceedings are conducted in a summary manner, as the parties are very often unprepared in the first instance. I think there should be, in every instance, a right of appeal from the Masters to the Master of the Rolls, and from the Master of the Rolls to the Lord Chancellor.

DAVID SHEENLOCK.

ANSWERS OF ROBERT R. WARREN, ESQ., TO QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

I think the course of practice in the Incumbered Estates Court has generally worked very well. My own experience, however, is limited, as, in consequence of the situation of the court, it has been considered as rather of a private nature, and solicitors have chiefly reposed their confidence in a select bar. If the court shall be continued, it

ought to be removed to the Four Courts; and I am persuaded that the suspicions which are (most unjustly) entertained by many, as well professional as private persons, would cease, and the stream of justice would flow through that court not only pure, as it is, but clear, as it is not.

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

Some of the most important points of practice are—first, the rule of sale before the charges are ascertained; second, the distribution of the proceeds of the sale by means of a schedule of incumbrances; and third, the system of notice. 1. Seems generally beneficial; as preserving estates from the ruinous consequences of management by a court receiver; but, I think, facilities should be given to annuitants to object to the sale. Sometimes, I believe much injury to owners, annuitants, and puisne incumbrancers, by selling lands discharged of annuities, and throwing the annuitant upon the 3 per cent. dividends of the invested purchase money. 2. Saves the expense of the cumbersome system of prolix charges and discharges. I think the system of allocation and payment under the 27th and 32nd General Orders requires reform. Money should not be either allocated or paid upon statement, admission, or private and discretionary investigation. No sum should stand in the confirmed schedule until the title thereto was proved in public before the Commissioners; parties cannot, or ought not, to be required to file objections to a claim upon suspicion and at the peril of costs; and real objections may exist, or be disclosed upon an attempted proof of the title, in the presence of parties interested. 3. I think the system of notice extremely objectionable; the 47th General Order should be amended by expunging the concluding paragraph, and declaring that the party entering the appearance shall have the costs thereof, with his demand, if any, and that the Commissioner may direct the costs occasioned by the entry of such appearance to be paid by the party entering the same, unless he shall be declared entitled to a demand in the matter. The present rule deters parties from entering an appearance, and reasonable costs are not allowed so as to induce solicitors to take proper care of their clients' interests. One pound is usually allowed for filing a claim, when the demand is not disputed. Is this reasonable remuneration for the following services, a mortgagee being the client?—*a*, taking instructions for claim; *b*, drafting and engrossing claim; *c*, attending to file claim; *d*, entering appearances; *e*, attending one, two, three, or more days, with deeds, &c., on the settlement of the final schedule. Every prudent incumbrancer should enter an appearance, and every incumbrancer should have, with his demand, the costs which prudence obliges him to incur. In *Curtin's Estate*, (Nov. 1854,) the rights of Teresa Curtin were correctly stated in the draft of the final schedule, as her solicitor understood those

rights; on the afternoon of the day before the settlement of the final schedule, an objection was filed, and moved on the next day, without any notice. It happened that the counsel and solicitor concerned on another matter for Teresa Curtin was present in the Commissioner's chamber, caught the tenor of the objection, and were able to intervene and protect her rights. But for that *accident* Teresa Curtin would have lost £30 per annum for her life. This case shows the defects of the system of notice, and justifies the observation that a time for filing objections should be fixed with reference to the time appointed for the settlement of the final schedule, and the rule so made only relaxed upon such terms as justice required.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure which, in your opinion, have mainly contributed to its successful operations?

I attribute the success of the court to the following circumstances:—(a) the ability of all the Commissioners; (b) the ability, diligence, and courtesy of many of the inferior officers connected with the court; (c) the parliamentary title; (d) the small outlay to solicitors, in consequence of the absence of fees and stamps; (e) the rule making costs of petitioner the first charge on the fund; (f) the expedition with which sales were effected, and the proceeds distributed for some time after the court was first established. The latter circumstance is to be ascribed to the *clearness* of the field of labour on which the court entered, and which no longer exists. There is now much unavoidable delay in the chambers of all the Commissioners; and in one the accumulation of arrears is, as I am informed, immense; and I have no doubt but that a sale might be effected, and the proceeds distributed more rapidly in the Court of Chancery than in the Incumbered Estates Court, the circumstances of the estate being similar, and an equally active and intelligent solicitor having in each case the carriage of the proceedings.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court or any and what part of it should be introduced into Chancery?

I think the principle of allocation by means of a final schedule might be adopted with much advantage; some interval should be suffered to elapse between the confirmation of the schedule and the payment of the money. At present that interval is secured in Chancery by the necessity of an application to the court to pay out the monies pursuant to the report or order of the Master.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

7. If the Court of Chancery had power to give a Parliamentary title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

I think these questions should be answered in the affirmative, assuming that the point of fees and stamps was not intended to be an element in the answer.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former court possess, should be continued in the Court of Chancery?

I do not think it necessary; but without presuming to enter into the question of finance, I have long been of opinion that it would be for the public good to have the expense of the Superior Courts diminished; cheap, bad law, at the door of the peasant and the shopkeeper, is a moral evil; but the necessary expense of the Superior Courts (even though fees and stamps were totally abolished), with their remoteness from suitors' home, would check wanton litigation.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense.

I cannot make any statement in figures upon this subject, but in Chancery the expense must be greater, because of charges and discharges, of the investigation of title by counsel for vendor and purchaser, and of complicated conveyances. In this reply I do not take into account the very great expense incurred in the Incumbered Estates Court, for valuations, surveys, maps, and advertisements.

10. What, according to your experience, have been the practical results of giving a Parliamentary title?

11. In your opinion, should the privilege of obtaining a Parliamentary title be continued and made permanent?

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary title by submitting his title to a judicial investigation?

13. Should the privilege of obtaining a Parliamentary title be limited to lands of any particular tenure?

Unquestionably some of the practical results have been to increase the business of the court, and enhance the value of property. Owners have sold and bought in; capitalists have been attracted by the magic of a Parliamentary title, and persons with a little money have had such a facility of borrowing on the security of the estate to be purchased, that they were enabled to bid, and buy considerable estates. On the other hand, however, time alone will disclose the names of the absentees, the infants, the persons entitled to contingent and executory interests, who have lost their properties by Act of Parliament. Notwithstanding the ability of the *present* Commissioners, cases are from time to time developed in which the property of A has been sold to pay charges affecting only B's estate. This occurred, I believe, in *Robinson's Estate*, which was before the Commissioner in February, 1854, as to a *small* plot of ground. But with regard to the continuance of the Parliamentary title system, after the emergencies, real or supposed, of 1850, shall have ceased, it is to be considered how completely the rights of persons interested in land, subject to such a system, depend on the integrity, ability, industry, and learn-

ing of the Master or Commissioner; and the question must be asked, can it be assumed that while the office is one of second or third rank, and while political connexion is a chief road to office, and while real property learning, and laborious industry are rare, that every successive Commissioner or Master will possess *all* these *indispensable* qualifications, and will peruse the abstract, and the deeds, and the searches, in the manner recommended by Lord St. Leonards, and with the acuteness of the counsel for a purchaser, who knows that all his client is worth in the world depends on his opinion, and not on an arbitrary Act of Parliament.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

I think the Masters in Chancery could well do all this business. In some of the offices accident may have created some inconsiderable arrear, while in others (for instance, the office of the Receiver Master) there is a great want of business. Much might be done to assist the Masters; they require the attendance of an officer or registrar in their courts. Many matters of formal reference from his Honor the Master of the Rolls might be disposed of, under the control of his honor, by officers at present unemployed—*e. g.*, the examiners of the Court of Chancery have little or nothing to do, and the same observation may be made as to other officers. And if the system of Parliamentary title should be continued, a conveyancing counsel of high character should be attached to each Master, to *assist* in the investigation of the title. I think this counsel should be paid by fees, and not by salary. His duty should be to peruse the deeds and examine whether the abstract be correct or not, as well as to advise on the title; and the Master might afterwards act on the abstract, without reading the deeds. In the Incumbered Estates Court abstracts are sometimes sent to counsel, *selected by the person having the carriage of the sale*, and always, or almost always, without copies of the deeds; and, I believe, the deeds or copies are not read by the Commissioners, unless some peculiar necessity should be detected by their own experience and sagacity. In Ireland the practice has been to send copies of the documents to the counsel instructed to advise on abstracts of title. In consequence of this practice solicitors in this country have not been in the habit of preparing abstracts with the legal accuracy generally to be found in English abstracts of title. In this country solicitors neither are nor are called *lawyers*, and it is not expected that they should be acquainted with the rule in *Shelly's case*, the subtleties of cases depending on the preservation or destruction of contingent remainders, the requisites of valid recoveries, and such like legal matters. In *Roger's Estate* the title came before me: the owner claimed to be seized in fee, his title depending on the destruction of contingent remainders to his issue, and which it was stated he had destroyed by a recovery sufficient for that purpose, under the advice of that eminent and conscientious lawyer, the late Chief Justice Penna-

father, in the year 1823—the owner had raised money on that title. Some recital in one of the papers, not mentioned in the abstract, led me to suspect that a mortgage was outstanding in 1823, and I caused inquiry to be made. A mortgage of the fee made in 1760 *behind the abstract* was discovered, and the estate (or all of it not charged prior to 1817) has been saved for the owner's infant son. This recital had escaped the notice of Mr. Pennefather, and would not have been presented to the Commissioners upon the abstract. The petition had stated that the owner was seized in fee, and was amended upon the son's application to the court.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

16. Can you suggest to the Commissioners any other matter of importance not included in your answers to the foregoing questions, and bearing upon the subject of the inquiry?

I think the appeal should be in the first instance to the Lord Chancellor, or Master of the Rolls, with the assistance of a Common Law Judge or Master, according as the question was one of law or equity, and then to the House of Lords. I think the present intermediate appeal to the Master of the Rolls objectionable, as in case of decision by him against the view taken by the Master in the matter, the party in whose favour the latter has decided generally appeals to the Lord Chancellor, and the expense at the Rolls is fruitless. I also very much prefer that the final court of appeal should be the House of Lords, rather than the Privy Council of Ireland. The private loss incurred through increased expense is compensated for in the public benefit of the preservation of a uniform code of law, protected by the authority of a tribunal common to the Kingdoms of England and Ireland.

I desire to add one observation. Very few sales have been effected in the Court of Chancery, under the 15th section of the Regulation Act; but much expense has been incurred in petitions under that section, some praying a sale, and some a receiver pending a sale in the Incumbered Estates Court. The reason of petitions for sale without a sale following, has been the law or rule of the Incumbered Estates Court, by which the costs of sale are or were made the first charge on the produce of the sale, irrespective of the claim of the petitioner; and, consequently, after proceedings for sale in Chancery had been commenced, solicitors have (with or without the consent of the *insolvent* owners, or *prius* incumbrancers) presented petitions in the Incumbered Estates Court, and rendered the Chancery proceedings wholly abortive. In *Hart's Estate*, for instance, the lands were on the eve of sale by Master Murphy, when a petition was presented in the Incumbered Estates Court, on the part of a woman named *Molony*, residing in America, and who appeared to be the assignee of a judgment for £15 or £16, including costs, and affecting an estate in a state of hopeless insolvency. The result was the stay of the proceedings in Chancery, and a sale in the Incumbered Estates Court in January, 1855;

for many hundreds of pounds less than enough to pay creditors prior to *Molony*. The carriage was transferred to the solicitor for the petitioner in Chancery, after a motion strongly contested by two counsel on the part of *Molony*; and out of the fund *Molony's* solicitor will get his costs up to and including the motion for a transfer of the carriage of the proceedings. I had occasion, professionally, to bring the case under the consideration of his Honor the Master of the Rolls, who expressed much indignation at the proceedings; and the case was afterwards mentioned in the House of Lords by Lord St. Leonards, and, I believe, resulted in the amendment of the Act of Parliament. I think the Chancery rule—costs with the demand—is sound and beneficial. The concurrent petition in Chancery for a receiver is also objectionable, and furnishes an argument for the transfer to that court of all proceedings concerning the same estate and the same parties. I should say that one-fourth of the petitions presented under the 15th section of the Chancery Act pray for receivers pending sales in the Incumbered Estates Court.

I have thought it right to express my opinions *freely* on the question before me; and in doing so trust I have not been guilty of presumption unbecoming my position in my profession.

R. R. WARREN.

ANSWERS OF E. B. LAWLESS, ESQ., TO QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

Generally speaking, the practice and procedure of the Incumbered Estates Court has worked well, so far as experience and observation enable me to form an opinion.

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

In my opinion the title is not examined at a sufficiently early period of the proceeding; in fact, the purchaser may be in possession before it has been discovered, by the examination of the title, that the estate did not belong to the person named as owner. As the title is to be examined, it appears to me that the earlier this is done in the proceedings the better. Very important questions, as to the validity or priority of incumbrances, frequently arise upon the settlement of the final schedule, without having had the questions of law raised in any formal way; and, sometimes, without having the facts very distinctly stated. In practice, the mischief likely to arise from this is, that important or material facts do not receive a sufficient discussion or examination. The notice of every claim to be put upon the schedule, and of every objection to every incumbrance on the schedule, should be served upon every party on the schedule, and every claimant. I think the present system leaves it too much open to the party having the carriage of the proceedings, to assist or connive at the proceedings of a party bringing forward demands, which, if a better opportunity of contesting

them were afforded, could not be sustained in law or fact; but, on the whole, the practice of the Incumbered Estates Court, as to ascertaining incumbrances and distributing funds, is preferable to that of the Court of Chancery. There sometimes occurs a pretty long delay between the lodgment of the petition and its being read by the Commissioners; in other words, a long delay is caused before the conditional order for sale is made. I think it would be better if provision were made for procuring to be vacated or released, every judgment or incumbrance that is paid off in full. There is not, I believe, any record of payments kept in the Incumbered Estates Court, and if, at a future period, the owner of a judgment should attempt to enforce payment of it against the debtor, or against a surety, it might be impossible to procure evidence of payment of it.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

As to the constitution of the court, the fact of there being three Commissioners leads sometimes to delay in disposing of appeal motions before the full court, as the accidental absence of any one Commissioner will prevent the appeal from being disposed of; this causes delay. It is discretionary in Commissioners to sell. If they are to be constituted a permanent tribunal this should be altered, and full force should be given to an incumbrancer's right. There should be an absolute right of appeal to the judicial committee of the Privy Council, not subject to the discretion of the Commissioners. The title should be examined at an earlier period; more full notice of questions arising on the final schedule should be given to the parties interested in the discussion of them. Notice should be given to each tenant, personally, of how he is to be described upon the rental, in order that every tenant may be insured an opportunity of asserting his rights, which are to be learned by the conveyance to the purchaser.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

I think it was the priority given to the costs of the petitioner's proceedings that first made the court popular.

Its real and substantial advantages are, immunity from court fees and expenses, freedom from expensive pleadings, and expense of formal parties and formal proofs.

Parliamentary title, both as increasing the selling value of the land, and as a part of the machinery by which the land is resolved into money at an early stage of the proceedings.

The not requiring redemption by a puisne creditor of a prior mortgagee.

The fact of having the actual money proceeds of the estate to deal with instead of land assumed to be sufficient to pay every imaginable demand, and the consequent getting rid of a number of parties and additional discussion.

The fact that the funds are distributed by the same judge who adjudicates upon the rights to

them, and practically in the same proceeding in the cause, whereby the delay and expense of the allocation proceedings in the Court of Chancery are avoided.

The facility of having an appeal upon any separate or isolated questions as to the rights to any portions of the funds, without delaying the distribution of the rest, and without the expense of having a hearing of the entire case.

The partition procedure, which is a vast improvement upon the Chancery commission of partition.

The great advantage of a Court of Appeal in Ireland, at an expense which, compared to that of an appeal to the House of Lords, is merely nominal.

The liberal and comprehensive mode in which the Act has been worked by the Commissioners.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court, or any and what part of it, should be introduced into Chancery?

If a power to confer a parliamentary title be given to the Court of Chancery, I think it would be beneficial to adopt, in that court, the practice of selling the estate before ascertaining the particular rights of all the incumbrancers, many of whom may, from their position, have no real interest in the proceedings.

Also the practice of ascertaining the tenancies.

The practice of having the funds distributed by the same judge who adjudicates upon the rights to them, and who allocates them.

The practice of having the conditional order for sale made by the judge or officer upon reading the petition.

The practice by which all long pleadings are dispensed with, and the necessity of bringing a number of parties before the court done away with.

The practice of not giving to the owner of an incumbered estate three or six months' time to pay, after the decree made, as is usual in Chancery.

The practice of transferring from the petitioner, &c., the carriage of the proceedings, where any delay, not satisfactorily accounted for, has taken place. In the Court of Chancery it has always been too difficult to take the carriage of the proceedings from the plaintiff or another creditor; and such an application is sometimes considered an ungracious one. The 48th General Order of the Incumbered Estates Court imposes a duty upon the Commissioners, the strict performance of which must interfere with the regular discharge of their other duties; but it has served to establish the taking away the carriage of proceedings from a petitioner who does not satisfactorily account for delay.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

In my opinion, the proceeding for a sale under the 15th section of the Chancery Regulation Act, can (allowing for the advantage of a parliamentary

title) be made as effectual as the proceeding for a sale in the Incumbered Estates Court. That is, you can, in a petition under the 15th section, establish the petitioner's right, ascertain and bind the rights of all other parties, sell the estate and make title to the purchaser, and distribute the funds as effectually as you can in the Incumbered Estates Court, allowing always for the advantage that court has in being able to confer a parliamentary title. If the incumbrancers upon the estate are not many in number, and their rights not very obscure or complicated, I think the *order for sale* can be had as promptly in the Court of Chancery, under the 15th section, as it is now usually had in the Incumbered Estates Court; but as to the sale itself, it must be remembered, that the rule of the Court of Chancery is, in mortgage and equitable incumbrance suits, to decree payment, and in default of payment in three and six months, respectively, then a sale. This causes a great delay, to which the proceedings in the Incumbered Estates Court are not liable. It must also be remembered that, generally speaking, the order for sale in a 15th section petition, is not made until the rights of all the incumbrancers have been ascertained. If the incumbrancers are not many, the matter can proceed with sufficient expedition; but if they are numerous, there must be delay, as the ascertainment of every disputed incumbrance involves an inquiry into issues of law, or issues of fact, or perhaps both. Every one of the disputed incumbrances becomes the subject of a little suit before the Master, in which the pleadings are by charge and discharge. I have looked over the sale and order books in Master Murphy's office, and, without professing to have made an accurate analysis of the cases contained in those books, I think I may safely say, that in the majority of the cases the order for sale is made within a year from the time of bringing the petition into the office. I find a great many cases in which the order for sale has been made in five or six months, but then the order is generally for payment, and, in default, a sale in three or six months. There are some few cases in which the actual sale has been had within the year; but those were cases in which there were but very few, if any, incumbrancers besides the petitioners, and in which it is probable the respondents waived the three or six months' time. There are, on the other hand, several cases in which a delay of months, exceeding a year, occurs, between the bringing in of the petition and the taking of any further step by the petitioner. This may be ascribed to negligence, or to the pendency of some treaty of compromise, or to the *bona fide* desire to afford some indulgence to the respondent. Upon the whole, I think the proceedings for a sale and ascertainment of the rights of creditors may, by exercising fair diligence, be as prompt under the 15th section, as in the Incumbered Estates Court. But, if the incumbrances are numerous and contested, the *sale*, but not the sale and ascertainment of incumbrances, could be had more expeditiously in the Incumbered Estates Court. It must also be remembered that the proceedings towards a sale in the Court of Chancery are frequently delayed by

the necessity of having accounts of personal estates taken.

7. If the Court of Chancery had power to give a Parliamentary Title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

I think they could be had as promptly and as cheaply, except for the court fees and stamps.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former Court possess, should be continued in the Court of Chancery?

I do; I cannot see any advantage to the suitor, or any protection to the debtor, gained by continuing court fees and stamp duties.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense? I cannot.

10. What, according to your experience, have been the practical results of giving a Parliamentary title?

I think the practical results of giving a parliamentary title have been, to increase the selling value of land; to save expense, by having the fund ascertained and in hand before the ascertainment of incumbrances takes place; and from the same cause to expedite and facilitate the distribution of the funds.

11. In your opinion, should the privilege of obtaining a Parliamentary Title be continued and made permanent?

I think it should.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary Title by submitting his title to a judicial investigation?

I think it would be dangerous to extend the privilege of transferring a parliamentary title to the owners of unincumbered estates. I think it would require a more perfect and stringent law of registration of deeds than we have now, to secure the reasonable certainty of not doing an injury, by enabling any person to transfer a parliamentary title. As at present constituted, courts come to right conclusions upon the conflict of statements and proofs by opposing parties. But how or by whom is any question of an investigation into title to be raised or made when there is but one party before the court, and that one interested in preventing a real inquiry into the title? and if there be no conflict, to elicit the truth, what security is there for arriving at a sound conclusion? Would it not be but just and fair, supposing a power of conferring a parliamentary title were to be granted, to make a saving for persons under disability; and if that were done, the value of the parliamentary title would cease, inasmuch as the title would not be universally good against all the world.

(To be continued.)

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DUBLIN, AUGUST 18, 1855.

It is now some years since the remarkable innovation was made in the law of evidence, whereby objections to the admissibility of the testimony of the parties to the record were put an end to, and the actors in the suit permitted thenceforward to swear their respective cases. This change, like every other that could be named or suggested, did not of course produce unalloyed good. Shutting the mouths of those most concerned in the success or failure of the action, did certainly tend, in general, to exclude a mass of evidence of doubtful credibility, owing to the downright perjury from which the unscrupulous would not shrink, and the distortion which facts passing through a medium of self-interest would undergo in the memories and imaginations even of the virtuous. So far as the justice of the case may be in danger of suffering through such misrepresentations, the risk is not very great, as the contrariety of the testimony would naturally cause the jury to give credence to the side which was best corroborated by other witnesses, or by probabilities. Perhaps the most serious objection to such a system lies in the lowering of the standard of morality, by giving greater scope to false or at least reckless swearing. In order to diminish this evil as much as possible, the perjured witness ought to be made to feel the

terrors of the law more than has hitherto been the case, and judges ought not to hesitate to use the powers with which the Act has entrusted them to direct prosecutions for this crime. Looking, however, at the other side of the picture, it is impossible not to feel that great advantages have resulted from the removal of the impediments to the reception of the evidence of the parties. It would be difficult to estimate the multitude of cases which doubtless existed, of honest claims which failed, either wholly or in part, in consequence of the proof of such depending on the testimony of the claimant. Again, it is now rather a startling thought, that a man should be dragged into a court of justice to answer an alleged demand, without being able to require that his denial or explanation on oath of the facts adduced against him should be heard. We think that the cause of justice is at all times more likely to suffer by the suppression of what may be undoubted truth, than the statement of what is entirely false. The latter may, and probably will, be rebutted; of the former, no further account can be taken than if it had never existed. The present law of evidence on this head appears to be so sound, that its further extension would be advantageous. Whether the principle should be generally adopted in criminal cases, involves considerations of a somewhat different character. If a criminal were entitled to come forward as a witness on his own behalf, natural jus-

tice would require that he should equally submit to cross-examination, which would involve in degree the system of interrogation and self-crimination permitted by many of the foreign codes. The feasibility of allowing such testimony in criminal cases would consequently, in great degree, depend upon the policy of the principle to which we have last adverted. However, it is our opinion that in those cases of misdemeanour in which magistrates exercise a summary jurisdiction, and which may be matter for both civil and criminal proceedings, as, for example, assaults, trespasses, game offences, &c., the evidence of the defendant, except when on trial under indictment before a jury, ought to be received. There cannot surely be any rational pretence for its exclusion, and we are aware of great injustice having resulted from the law, as it now stands, refusing a fair hearing to a defendant. We trust that this little supplemental measure of reform will not escape attention next session.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 260.)

13. Should the privilege of obtaining a Parliamentary Title be limited to lands of any particular tenure?

I do not see the necessity for, or advantage of, limiting it to lands of any tenure.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

I do not think they could; they have not a sufficient staff of officers for the business. The two classes of business would interfere with, and retard one another; besides, it appears to me that the Masters' offices are reasonably full of business, sufficient to occupy the Masters in court during their business hours.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

If the duties of the Commissioners of the Incumbered Estates Court were transferred to the Masters, there ought, I think, to be a right of appeal to the Lord Chancellor, or rather, perhaps, to the Lord Chancellor assisted by two of the Masters; with a right of ultimate appeal to the Judicial Committee of the Privy Council, as at present, or similarly constituted, whose decision should be final, with power to give costs.

16. Can you suggest to the Commissioners any other matter of importance not included in your answers to the foregoing questions, and bearing upon the subject of the inquiry?

In the present system of proceeding, under the 15th section of the Chancery Regulation Act, the application to the Lord Chancellor for an order referring the petition to the Master, is I think, attended with no practical advantage. As the petitioner has to make out title under the court to the lands, the subject of the petition, I think that the earlier in the proceedings the steps necessary for this purpose are taken, the more expeditious those proceedings will be. I think the petitioner should make all necessary parties to his petition in the first instance, but should do so by merely naming them in their several characters in the petition, and serving them with notice. The Masters should have power to direct substitution of service of such notice and service out of the jurisdiction. The Masters who decide upon the rights of the parties to funds in court, should have power to distribute those funds. The Masters should, I think, be called, and have the powers and functions of, Vice-Chancellors, and should work out each cause from beginning to end; but, I think, they would require more assistance than they have now. In England there are conveyancing counsel, nominated by the Lord Chancellor, who assist, in many things, each Vice-Chancellor. In this country, where there are no counsel who practice only as conveyancing counsel, it would, I think, be necessary to appoint, permanently, counsel for the purpose, who should not merely examine titles and conveyances, but who should assist in the settlement of a schedule of incumbrancers, and the payment out of the funds. The Master's Courts should be as public in every respect, and as much subject to the influence of public opinion, as any of the Superior Courts. I would extend the principle of the Act 17 and 18 Vict. cap. 113; and in the case of an incumbrancer upon land, whose demand is, according to the present law, primarily payable out of personal assets, I would not require him to take an account of personal assets in the first instance; nor unless the owner of the real estate should show that there was in existence a legal personal representative and personal estate immediately available, sufficient for the payment of the petitioner's demand. I would alter the practice of the Court of Chancery, which decrees a sale, in default of payment, in three or six months.

EDMOND B. LAWLESS.

ANSWERS OF WILLIAM SMITH, ESQ., BARRISTER-AT-LAW, TO QUESTIONS IN PAPER NO. 7.

1. According to your experience, has the course of practice and procedure adopted in the Incumbered Estates Court worked well?

According to my experience, I think the course of practice and procedure adopted in the Incumbered Estates Court has generally worked well, regard being had to the enormous quantities of business to be disposed of.

2. Have you observed any defects or imperfections in that course of practice? If so, state the same, and any remedies which you can suggest.

It appears to me that in endeavouring to avoid the strictness of practice observed in the Court of Chancery in the ascertainment of rights, as well as

in the distribution of the funds, the Incumbered Estates Court has fallen into the opposite extreme. I consider the practice as by far too lax and irregular; and I may, in particular, advert to the schedules of incumbrances, and settlement thereof, and the very brief mode in which directions for payment out of the funds are given. I think that to warrant the payment out of money, and especially where the sums are of large amount, a precise order ought to be made and preserved in an order-book, and that it should specify precisely on what account the payment is made. Owing to the vast quantity of business to be discharged by each of the Commissioners, and the want of a secretary or registrar to take down more formally their orders, I have, in cases which came before me, found much difficulty in rightly understanding the memoranda under which payments have been made, or on what precise account such payments have been made.

A similar objection applies as to investments by the accountant, of which an example was detailed in affidavits made in a cause in Chancery, in which I was lately engaged as counsel, *Hamilton v. Barton*, by which it appeared that a direction to invest £2,000 in Government $3\frac{1}{2}$ per cent. stock to a separate credit having been made by a loose memorandum, when this was brought to the accountant, that stock being then closed, he, I suppose on the *cy pres* doctrine, invested part of the fund in the purchase of £3,000 consols to the general credit of the matter, for which no authority could be produced. The affidavit of Mr. Worthington, solicitor, filed in the Chancery case, on the 11th of May, 1854, contains the following passage:—"Saith, he has also made diligent inquiries from the accountant of said court for any fiat or directions in writing authorising an investment of the sum of £3,000, but same cannot be found; and said accountant has informed deponent that the slips of paper upon which said orders are made are frequently destroyed."

I have heard, from solicitors, complaints of the irregular order in which fiats for conditional orders for sale are made on petitions; that one petition may remain unnoticed for eight or nine months, whilst another filed six or seven months later may be fiatd on the day next following its presentation; and that this will appear if a return of the petitions presented with the dates of the respective conditional orders for sale be made:

I would suggest that petitions should be disposed of according to the order of priority as to the time of filing each.

The inconvenient locality of the court is the subject of general complaint; the effect being, as regards the Bar, to confine the practice chiefly to the very limited number of gentlemen who devote themselves more immediately to this court, and depriving the suitors of a more general power of selection. This might be easily remedied, as very extensive premises in Pill-lane, immediately contiguous to the Four Courts, have been for some time to let, which, by a small outlay, might form a suitable court and offices. I allude to the large concerns lately occupied by Mr. Mooney, Ironmonger, and several adjoining houses, that might readily be connected with the Four Courts by a covered passage.

It appears to me that the practice of the court with reference to *advertisements*, entails very great expense on estates that might be advantageously curtailed.

The practice so prevalent of having so-called *surveys and valuations* of estates made, appears to me to have been greatly abused. These "surveys" are notoriously merely enlarged copies of the ordnance maps, which as to sales in Chancery are generally adopted there; and as the poor law valuation and Mr. Griffith's valuation would be amply sufficient to guide the court, I think it perfectly idle to obtain a professional valuation which cannot be supposed to influence intending purchasers; whilst the sums charged for these "surveys and valuations" are quite preposterous, as the returns respecting them will show. An examination of the persons who have dealt in these "surveys and valuations," would, as I have been assured by respectable practitioners, show great abuses.

3. Can you suggest any modification or alterations in the constitution of the court, or in its rules or practice, which, in your opinion, would be calculated to improve the system?

I have, in my answer to query No. 2, suggested some alterations as to the practice of the court. I do not suggest any modification or alteration in the constitution of the court, being of opinion that although its institution, under the peculiar circumstances in which it originated, was beneficial, yet, that its temporary character should be regarded; and that it ought not to be continued beyond the necessity of the occasion which called it into existence. It is not, in my opinion, constituted, nor does it possess machinery to enable it to determine and dispose of the complicated rights of property which the court of Chancery does; and the consequence has been, that parties have been obliged to resort in many cases also to the Court of Chancery, as well as to Courts of Law, to determine questions which, if they had arisen in Chancery, that court would have also decided. In my opinion, the period for filing petitions in the Incumbered Estates Court ought not to be extended; but I think that the court ought to be continued until it winds up at least the principal portion of the business now before it, which would give it full occupation for several years, and towards its close any business not completed might be transferred to the Court of Chancery.

4. What are the peculiar circumstances in the constitution of the court or its mode of procedure, which, in your opinion, have mainly contributed to its successful operations?

The successful operation of the court is, in my opinion, to be attributed to the vast extent and number of incumbered estates, the embarrassments of the owners, as well as of the incumbrancers, increased by the pressure caused by the failure of the potato crop, which rendered the payment of rents, and consequently of interest on charges, in general impossible; to the anxiety of incumbrancers to relieve their pressing necessities, by effecting a speedy sale, in the hope of a speedy distribution of the purchase money; to the temptation originally held out to solicitors to bring cases into the court, by

the assurance that the costs would be paid in the first instance, without regard to the priority of any demand; thus inducing the presenting of speculative petitions in the names of so-called incumbrancers, to whose demand, in no event, would the produce of the sale extend; as well as in the names of "owners" utterly insolvent, having no real interest in the estate, but who might wish to serve their solicitors; to the advantage of being able to proceed with scarcely any pecuniary outlay or advances; the proceedings not being liable to stamp or equity fund duty, or to office fees as in Chancery (beyond mere scrivenerly charges), and credit being given for advertisements, bills, and for the charges for "surveys, valuations, and printing," until these matters should be paid out of the fund to be realised by the sale of the estate; and by the great advantage of sale with a Parliamentary title. These are, in my opinion, the peculiar circumstances in the constitution of the court and its mode of procedure which have mainly contributed to its extensive operations.

5. In the event of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think the practice of the Incumbered Estates Court or any and what part of it should be introduced into Chancery?

In the event of the granting to the Court of Chancery powers similar to those of the Incumbered Estates Court, I do not think that the practice of the Incumbered Estates Court should be introduced into Chancery. The practice of the latter court has recently undergone great alterations, and a modification of the practice similar to schedules of incumbrances has been adopted, which I consider better than that existing in the Incumbered Estates Court, to which I have already adverted.

In the event of the Legislature conferring on the Court of Chancery powers and privileges similar to those of the Incumbered Estates Court, of course various alterations and modifications of the practice in Chancery, with reference to such additional jurisdiction, would be necessary; and in such case the practice of the Incumbered Estates Court would, doubtless, deserve and receive due consideration as to how far it might be proper to adopt it.

6. Is the proceeding for sale of an estate in Chancery, under the 15th section, as prompt or as effectual a proceeding as a petition in the Incumbered Estates Court?

I think that the proceeding for sale of an estate in Chancery, under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850, conducted by a diligent solicitor, is more prompt than a proceeding by petition in the Incumbered Estates Court, owing to the accumulation of business there; and that if the former court could confer a Parliamentary title, and if the order for sale were immediate and not after a period of three months in foreclosure suits, or six months in other cases; in my opinion, a sale might be had in Chancery more prompt than, and as effectual as, in the Incumbered Estates Court. In fact, I entertain no doubt, but that in such case, a sale might be had in Chancery within a shorter period than has elapsed (in at least one case) between the presenting of a petition for

sale, and the making the conditional order thereon. The advantage of conferring a Parliamentary title, and the matters adverted to in my answer to query No. 4, have, in general, induced solicitors to proceed in the Incumbered Estates Court, even after having obtained an order for sale on a cause pending in Chancery.

7. If the Court of Chancery had power to give a Parliamentary title, do you think that sales could be had there as cheaply and as promptly as in the Incumbered Estates Court?

If the Court of Chancery had power to give a Parliamentary title, I think that sales could be had there more promptly than in the Incumbered Estates Court, and more cheaply, especially if the Court of Chancery possessed the same privilege that the Incumbered Estates Court does, of exempting suitors, in cases for sales of incumbered estates, from payment of office fees and stamp duties.

8. Do you think that it would be necessary, in case the powers of the Incumbered Estates Court were transferred to Chancery, that the exemption from fees and stamps, which proceedings in the former Court possess, should be continued in the Court of Chancery?

If the policy which created the Incumbered Estates Court is to be carried out by conferring on the Court of Chancery similar powers with the same object, I think that the exemption from fees and stamps which proceedings in the former court possess, should be applied to similar proceedings in the Court of Chancery. It does not appear to me just that the suitor for a sale in Chancery should be obliged to pay fees and stamp duties from which a suitor for the same purpose in the Incumbered Estates Court is exempt.

9. Can you estimate the comparative expenses at present of a sale in Chancery, under the 15th section, and a sale in the Incumbered Estates Court, and what causes the difference in expense?

If the Court of Chancery were enabled to confer a Parliamentary title, in my opinion a sale could be effected there, under the 15th section of the Chancery Regulation Act, with as little expense as in the Incumbered Estates Court; as I consider that the extra expenses for advertisements, and "surveys and valuations," in the latter court, would fully countervail the fees and stamps duties to which a suitor in Chancery is at present liable. The difference of expense in Chancery arises from the obligation to pay heavy office fees and stamp duties, which are applied towards defraying the expenses of the court, whereas, these expenses in the Incumbered Estates Court are defrayed out of the consolidated fund; and from the necessity of deducing strict title to the estate, involving the expense of releasing incumbrances, satisfying judgments, recognisances, &c.; settling conditions of sale; and the number of parties to ordinary conveyances, &c.

10. What, according to your experience, have been the practical results of giving a Parliamentary Title?

According to my experience, the practical results of giving a Parliamentary title has been to induce purchasers to prefer property sold with such title; to obtain a higher value for estates than they would

otherwise fetch: and to prevent litigation; although in some particular cases this may have led to injustice, owing to the want of notice to parties interested.

11. In your opinion, should the privilege of obtaining a Parliamentary title be continued and made permanent?

In my opinion, the privilege of conferring a Parliamentary title, in cases of sales of incumbered estates, ought to be continued as to petitions in the Incumbered Estates Court; to which it at present applies; and ought to be conferred on the Court of Chancery, and be as to that court, continued and permanent. With the great caution there observed, I think it exceedingly improbable that any particular case of injustice, from want of notice to any party interested in the ownership of the estate, would arise.

12. Should that privilege be confined to estates incumbered, or should the proprietor of an unincumbered estate have the privilege of transferring a Parliamentary Title by submitting his Title to a judicial investigation?

I think that privilege need not be confined to estates incumbered; for, I do not see any objection that the proprietor of an unincumbered estate should have the privilege of transferring a Parliamentary title by submitting his title to a judicial investigation, if he think fit to submit to the expense of such an investigation, which could be had as readily in such case as if the estate were incumbered. In fact, this has been substantially done under the Incumbered Estates Act, as I have known cases where incumbrances were created on unincumbered estates, expressly for the purpose of thereby selling the estate with a Parliamentary title.

13. Should the privilege of obtaining a Parliamentary Title be limited to lands of any particular tenure?

I think the privilege of a Parliamentary title should be limited to lands of the particular tenures comprised within the present Incumbered Estates Acts.

14. In case of a transfer of the powers of the Incumbered Estates Court to the Court of Chancery, do you think that the Masters could, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners?

In case of conferring powers on the Court of Chancery similar to the powers of the Incumbered Estates Court, I think that by a proper arrangement and distribution of the business of the Court of Chancery, the Masters could, in addition to their other business, discharge the duties with reference to all proceedings for sale there of incumbered estates, that is, as to petitions in *future*; but there can be no doubt that the Masters could not, in addition to their other business, discharge the duties at present discharged by the Incumbered Estates Commissioners, as to the existing business, before the latter court, which has accumulated to such a degree, that I think it would afford the Commissioners full employment for several years to dispose of it. Considering that the great bulk of incumbered estates in Ireland have already come within the sphere of action of the Incumbered Estates

Court, by which the political object for which that court was established has been, and is in process of being achieved, and that the very special circumstances in which it originated no longer exist, its temporary character should be observed; and as to the future ordinary cases for sales of such estates, I think that, as the permanent tribunal, the Court of Chancery, reformed as its practice now is, ought to be preferred; and that henceforth, that class of business ought to be restored to that court which, from its constitution and practice, I think best calculated most effectually to adjudicate on, and administer rights according to the long and well-established principles of equity. I have adverted to some new arrangement, and distribution of business, in Chancery, in consequence of the effects caused by the extended operation of the 15th section of the Court of Chancery Regulation Act, which has cast on the Masters a large portion of the business that, in ordinary cases, was heretofore transacted in the Rolls Court.

15. What would you suggest as to the right of appealing from the Master's orders in case the duties of the Commissioners were transferred to them?

I would suggest, as to the right of appealing from the Master's orders in the case supposed by this question, that it should remain as that right stands at present with respect to orders of the Masters, under the Chancery Regulation Act.

16. Can you suggest to the Commissioners any other matter of importance not included in your answers to the foregoing questions, and bearing upon the subject of the inquiry?

I think the right of appeal ought to exist in all cases, and not as under the Incumbered Estates Act, to rest on the discretion or will of the Commissioners. I think, considering the amount of property and the importance of the questions upon which the Commissioners are empowered to adjudicate, that an appeal should lie, as the right of the suitor, to the Privy Council, with an ultimate appeal to the House of Lords; and, if this right were conferred on suitors of the Court of Chancery *generally*, it would be a valuable improvement, when it is considered that the number of cases as to property of small amount, although of great importance to the parties, which the facilities and cheapness of the present proceedings in Chancery by cause petition have produced; that in more than nineteen cases out of twenty the average of the property in dispute, is in value under £1,000, or perhaps half that sum; and that the costs of an appellant to the House of Lords varies from £400 to £700 and upwards, which the appellant must pay, even though he should succeed in reversing the order; it will be found that, *practically*, in this large class of cases, the power to appeal does not exist; and considering the expensive forms required by the House of Lords, it would be felt as a great boon to suitors if an appeal were given in *all cases* from Chancery to the Privy Council, where cases might be re-heard at a trifling cost, with little delay, and the law might be satisfactorily settled on points as to which the Lord Chancellor, the Master of the Rolls, and one of the Masters, may, perhaps, have all differed.

WILLIAM SMITH.

PAPER No. 9.—QUESTIONS ADDRESSED TO THE
RIGHT HON. THE MASTER OF THE ROLLS.

1. Would it, in your opinion, be advisable to extend to the Court of Chancery the powers and authorities contained in the Incumbered Estates Act, or to confer similar powers on the Court of Chancery?

2. Would it be advisable to confer upon the Court of Chancery the power of giving to purchasers under the court infeasible titles?

ANSWERS OF THE RIGHT HON. THE MASTER OF
THE ROLLS TO QUESTIONS IN PAPER No. 9.

1. Would it, in your opinion, be advisable to extend to the Court of Chancery the powers and authorities contained in the Incumbered Estates Act, or to confer similar powers on the Court of Chancery?

I am of opinion that it would not be advisable to extend to the Court of Chancery the powers and authorities contained in the Incumbered Estates Act, or to confer similar powers on the Court of Chancery.

It has, I understand, been repeatedly stated by the Commissioners for the Sale of Incumbered Estates, that their conveyance under the 27th section of the 12th and 13th of the Queen, cap. 77, gives a good title to the purchaser as against all the world, without the least regard to the question whether the title is good or bad, or whether the Commissioners had any right whatever to sell the estate—in other words, that they may sell the estate of one man to pay the debts of another.

This is not an imaginary case—it has actually taken place.

Accordingly, under the construction which the Commissioners say is to be put on the statute, a gentleman in the possession of a family estate, on which there is no incumbrance whatever, may be turned out of possession of his house and land by a purchaser under the Incumbered Estates Court; and any remonstrance of his is to be met by the statement, that the purchaser has a parliamentary and indefensible title!!

When the Incumbered Estates Act was passed it was, in my opinion, a necessary measure, as no authority short of the despotic and unconstitutional power vested in the Commissioners would have been sufficient to meet the great evil which, under the peculiar circumstances of Ireland in the year 1849, called for a strong and immediate remedy; and it possibly might be advisable that the powers, now vested in the Commissioners, should be continued for a further limited period. But the question put to me involves the consideration, not whether those powers are to be continued in the Commissioners for a further limited time, but whether they should be permanently vested in any tribunal.

I am of opinion that those powers should not be permanently vested in the Incumbered Estates Court, or in the Court of Chancery, or in any other tribunal.

I entertain a strong objection to the system of exceptional legislation for Ireland. Those who

contend that there should be exceptional legislation are bound to prove the existence of an exceptional state of circumstances to justify such legislation. Such a state of facts existed in 1849; but I am not aware of any circumstances connected with Ireland, at present, to justify the permanent enactment of an arbitrary and unconstitutional law.

No person would venture to propose the introduction of a similar measure for England; and, if not, are you to establish, as part of the permanent law of Ireland, that any person in this country (although his estate may not owe a shilling,) is to be subject to have it illegally sold, and a parliamentary and infeasible title conveyed to a purchaser?

According to the law of England, if your property is sold by any tribunal without just cause, you have a remedy; according to the provisions which it is suggested should become the permanent law of Ireland, once the property is sold and the conveyance executed to the purchaser, no matter how flagrant the injustice may be, you are without remedy.

Such, at least, is the opinion which the Commissioners of the Incumbered Estates Court are said to entertain. If they do not entertain that opinion, it would be desirable the public should know what they consider to be the construction of the 27th section of the statute.

It is all very well to inform creditors and incumbrancers that they may claim against the fund in court, but what measure of justice would it be to a gentleman in possession, or entitled in remainder to a family estate, who should be turned or kept out of possession by a purchaser having a parliamentary title, to inform him that the purchase-money has not perhaps been all distributed, and that he might apply to the court for the purchase-money—such an answer would be a mockery.

A person entitled in remainder, after the death of a tenant-for-life, if he seeks to get possession, on the death of the tenant-for-life, may be told that the Commissioners (or the Court of Chancery, if you give that court the powers suggested,) sold the estate, and conveyed the fee to the purchaser, being of opinion that the tenant-for-life had an estate of inheritance. The remainderman, however clear and undeniable his title may be, is entirely without remedy.

If, however, the powers vested in the Commissioners for the Sale of Incumbered Estates are to be permanently vested in any tribunal, it would, in my opinion, be much more for the advantage of the public that they should be exercised by the Commissioners, and not by the Court of Chancery. The Commissioners have performed the important duties entrusted to them with great ability and caution; and it would be much safer that those arbitrary powers should be exercised by a tribunal whose attention is devoted exclusively to the one subject, (and which, on that account, is subject to much responsibility,) than by the Judges of the Court of Chancery, who have so many other duties to perform, that the proper investigation, by them, of the title in each case, would be out of the question.

According to the fourth section of the Bill now before Parliament, entitled, "A Bill for Securing the Titles of Purchasers of Estates sold under the Court of Chancery in Ireland," the security of every landholder to his estate would depend on the legal knowledge of the "barrister of fifteen years standing," and on the integrity of the solicitor who prepared the abstract of title.

A measure which would enable the Court of Chancery to give a parliamentary and indefeasible title, as against all *incumbrancers*, might be advisable; but such a measure would be subject to considerations entirely different from a Bill authorizing the Court of Chancery to give a parliamentary title against the *real owner of the estate*, who might never hear of the proceedings.

2. Would it be advisable to confer upon the Court of Chancery the power of giving to purchasers under the court indefeasible titles?

I am of opinion that it would be advisable that the law, which relates to the transfer of land, should be so simplified as to enable the owner of an incumbered or *unincumbered* estate to confer an indefeasible title by sale out of court; and if such power existed, it would follow, as a consequence, that the Court of Chancery could also (if the estate was sold in that court) convey an indefeasible title.

The mode, however, by which that object is to be attained is not, in my opinion, by conferring on the Court of Chancery the present powers exercised by the Incumbered Estates Commissioners, and thus enabling the Court of Chancery to sell one man's estate to pay another man's debts, (an event which, I am satisfied, would frequently take place in the latter court,) but by the radical reform of the law which relates to the transfer of land.

It is not necessary that I should explain how this is to be accomplished, having fully stated my views in answer to questions recently put to me by the Commissioners appointed in England to consider that most important subject;* but I am of opinion, on the grounds which I have stated to those Commissioners, that if the Government has courage to deal with the question, and to disregard the opposition of interested parties, that land may be sold with very nearly as little delay or difficulty as Government Stock; and that as indefeasible a title may be given on the transfer of the former as is now given on the transfer of the latter.

If those Commissioners shall report in favour of a substantial measure of reform, it will, I presume, be carried into effect; and it would be much better, in my opinion, to continue the powers of the Incumbered Estates Court for a further limited period, (instead of transferring them to the Court of Chancery,) until the Report of the said Commissioners shall have been made, and until it shall be ascertained whether the Government mean to take up the question of the reform of the law which relates to the transfer of land in England and Ireland, and which, in my opinion, it is the bounden duty of the Government to do.

* The Commissioners have been appointed to inquire "into the subject of registration of title, with reference to the sale and transfer of land."

It may be right to add, that what has led to the agitation of the question as to the transfer to the Court of Chancery of the powers of the Incumbered Estates Court, is the inconvenience which the Bar and the solicitors suffer from that court transacting its business in Henrietta-street, so far from the Four Courts.

The consequence has been, that a very limited number of barristers practise in the Incumbered Estates Court, the greater portion of the Bar in practice being unable to absent themselves from the Superior Courts.

If the Commissioners could arrange with the Government to have accommodation (not, perhaps, for their records or their officers), but for the hearing of motions &c., in the immediate neighbourhood of the Four Courts, so as to open their court to the whole Bar (which, on public grounds, would be desirable), nothing more would, I believe, be heard of the transfer of the jurisdiction to the Court of Chancery. It is idle to say that the judges of the Court of Chancery, with their various other duties, would exercise the powers of the Incumbered Estates Court as accurately or satisfactorily as they have been exercised by the Commissioners.

T. B. CURACK SMITH.

PAPER No. 10.—QUESTIONS ADDRESSED TO THE COMMISSIONERS OF THE COURT OF BANKRUPTCY AND INSOLVENCY.

1. Would it, in your opinion, be expedient to confer on the Bankrupt Court a power of giving to purchasers under that court indefeasible titles?

2. Or, where a sale is necessary, would it be expedient to direct the real estate of the bankrupt to be sold in the Incumbered Estates Court?

ANSWERS OF JOHN MACAN, ESQ., Q. C., SENIOR COMMISSIONER OF THE COURT OF BANKRUPTCY, TO QUESTIONS IN PAPER No. 10.

1. Would it, in your opinion, be expedient to confer on the Bankrupt Court a power of giving to purchasers under that court indefeasible titles?

In my opinion it would not be expedient to confer on the Bankrupt Court a power of giving to purchasers under that court indefeasible titles; because, even in those cases (not the most numerous class) in which the title of the bankrupt is really free from objection, the Court of Bankruptcy has neither officers nor machinery of any kind, much less authority to protect third parties, having or claiming to have legal or equitable rights upon the estate sold, or to transfer those rights from the land sold, and attach them to and upon the purchase-money. This the Incumbered Estates Court can do, and, therefore, may be safely, and to the great advantage of the public, intrusted with the power to give to the purchaser an indefeasible title, a power which, in my apprehension, ought to be conferred on the Court of Chancery, but not on the Court of Bankruptcy.

2. Or, where a sale is necessary, would it be expedient to direct the real estate of the bankrupt to be sold in the Incumbered Estates Court?

In my opinion it would not be expedient, as a general rule, to direct the real estate of the bankrupt to be sold in the Incumbered Estates Court, because many cases must occur in which such a course would occasion increased expense and delay, and therefore injury to creditors. But, in my apprehension, it would be highly expedient to confer on the Court of Bankruptcy the power to order that the real, freehold, and leasehold estates and property of the bankrupt should be sold in the Incumbered Estates Court, whenever the Commissioner of Bankrupt presiding considered such a course desirable.

JOHN MACAN.

ANSWERS OF THE RIGHT HONOURABLE JOHN HATCHELL, COMMISSIONER OF THE COURT OF INSOLVENCY, TO QUESTIONS IN PAPER NO. 10.

1. Would it, in your opinion, be expedient to confer upon the Insolvent Court a power of giving to purchasers under that court indefeasible titles?

I think it would not be expedient to confer upon the Insolvent Court a power of giving to purchasers under that court indefeasible titles; that court does not, by its officer (the assignee), represent, nor does it exercise any jurisdiction over, the interests of incumbrancers who have special liens upon the lands.

2. Or, where a sale is necessary, would it be expedient to direct the real estate of the insolvent to be sold in the Incumbered Estates Court?

But that court might be enabled, in a proper case, if it should think fit, to direct the assignee to prefer a petition in the Incumbered Estates Court; the assignee being entitled to his costs as the first charge on the fund. In some cases a sale in the Incumbered Estates Court would, no doubt, result in a surplus fund for the simple contract creditors, in many cases in which that fund is exhausted by litigation, which the Insolvent Court cannot restrain for want of jurisdiction over judgment creditors and parties having special liens on the lands.

JOHN HATCHELL.

PAPER NO. 11.—QUESTIONS ADDRESSED TO THE TAXING MASTERS OF THE COURT OF CHANCERY.

1. Is there any arrear of business at present remaining undisposed of in your office; and if so, what is the amount of such arrear?

2. Is there any delay at present in your office in obtaining the taxation of a bill of costs, by reason of the pressure of business there?

3. Have you taxed bill of costs of proceedings to a sale under the 15th section of the Chancery Regulation Act; if so, can you state the amount to which such costs tax between party and party in an average case.

(To be continued.)

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DUBLIN, AUGUST 25, 1855.

SOME of the leading public journals have recently written with great approbation of the new Colonial policy, evidenced by the appointment by Sir Wm. Molesworth of Mr. Hincks, a Canadian Colonist, to the post of Governor of Barbadoes. They hence infer that a change has come over the councils in Downing-street, as regards the relation which colonies are in future to bear to the mother country, and that the inhabitants of these dependencies are to rank, not as colonists, but as Englishmen. We, for our part, have no desire to quarrel with acts of administrative generosity; but, however commendable may be the conduct of the executive in this particular instance, we would respectfully remind them of the trite but pithy adage, that "Clarity begins at home." If admission to the privileges of Englishmen are to be accorded to the inhabitants of British North America, *a fortiori*, should Irishmen be put upon an equally favored footing. Indeed it is difficult to say why any sensible line of demarcation should be retained as between the English and the Irish. It is true that the sea rolls between the two islands; but in all other respects these lands are essentially one. The original types of

the races are, no doubt, distinct; but upon the respective parent stocks, similar races, Norman and Dane, have been grafted, and, moreover, from a comparatively early period in our history, Ireland has received from time to time large accessions of English settlers, and she in turn, more especially in our days, has repaid the loan with compound interest. Besides this, the annihilations of time and space which modern science has devised, have broken and are breaking down many of the barriers of local prejudice, and we trust that the gradual assimilation of laws will render the union closer and closer. Ireland has, withal, much to complain of in consequence of the mode in which her claims to a share in the civil administration have been postponed. It is true that Irishmen are not so generally informed, that they need not apply, as was once the case; but civil preferment is still awarded to her with a very niggard hand. If, for example, we hear of an Irishman being appointed to the post of Governor of a Colony, it will probably prove to be to that of some African dependency or some inferior West India Island. Again, the Colonial legal appointments offered to Irishmen are not only "few and far between," but those few are usually of a very second-rate character. It would surely not be too much to ask, that the legal appointments thus bestowed, should be

apportioned between England and Ireland in proportion to the numbers practising at each Bar. We would have Scotland included herein, but for the fact that the pertinacious adherence of the lawyers of that country to their antiquated system of jurisprudence unfits them for the discharge of ministerial or judicial functions of a legal nature, in colonies which are almost universally subject to the Common Law of England. But much as we have cause to complain of the slight which we thus receive at the hands of our elder sister, it is bearable in comparison with the indignity of having Englishmen put over our heads in the public official departments of this country, at least without the equivalent of Irishmen being similarly elevated in England. Of this alone, the Poor Law Board furnishes an example. No doubt, when that fertile source of demoralization, an Irish Poor Law, was forced upon us by a patronage-loving Government, it probably might have been necessary to employ a few foreign hands to instruct us in the mysteries of a foreign and uncongenial system; but we are not such inept scholars as not, in nineteen years, to have learned its machinery sufficiently to be able to work it ourselves without further external aid. However, though Ireland has not yet attained the position in the administration of public affairs to which she is entitled, there are progressive symptoms of improvement, and we hope that the time is not very distant when considerations of fitness for office will entirely supersede those of birthplace.

INCUMBERED ESTATES INQUIRY COMMISSION.

(Continued from page 268.)

ANSWERS OF THE TAXING MASTERS OF THE COURT OF CHANCERY TO QUESTIONS IN PAPER No. 11.

ANSWERS OF JOHN O'DWYER, Esq.

1. Is there any arrear of business at present remaining undisposed of in your office; and if so, what is the amount of such arrear?

There is a very considerable arrear of business at present remaining undisposed of in my office, but from the circumstances hereinafter mentioned, I am unable to state the amount of such arrear.

Of the cases remaining undisposed of, a considerable number remain uncertified, though taxed, waiting for the production of some few vouchers or documents. In these cases the delay is the fault of solicitors themselves. In other cases some progress, more or less, has been made in the taxation, but the cases have been adjourned for some reason or other, and the taxation would be concluded in a short time if the solicitors applied to have them re-

entered in my list; but there remain a considerable number in which no progress has been made in the taxation of these, in all probability (judging from past experience) a considerable number, for one reason or another, will not be brought forward at all, but there will still remain a large number to be taxed, which properly may be considered as the real arrear of my office.

2. Is there any delay at present in your office in obtaining the taxation of a bill of costs, by reason of the pressure of business there?

There is certainly a considerable delay at present in my office in obtaining the taxation of a bill of costs by reason of the pressure of business, which is unavoidable.

With respect to the general arrear of business in "the Taxing Office," I beg leave to refer to a separate paper signed by me and my two colleagues, sent herewith.

3. Have you taxed bills of costs of proceedings to a sale under the 15th section of the Chancery Regulation Act; if so, can you state the amount to which such costs tax between party and party in an average case?

I have been unable to find any bill of costs of proceedings to a sale under the 15th section of the Chancery Regulation Act, taxed by me, save one, namely, the case of *Murphy and others, petitioners; Mesedyth and others, respondents*, and that was the case of a sale of a rent-charge arising out of lands, and not a sale of the lands themselves.

In that case the amount of the bill, as certified, was £105 11s. 11d.

	£	s.	d.
The Chancery Fund Stamps,	.	7	5 6
Office Fees,	.	18	5 5

£25 10 11

JOHN O'DWYER.

ANSWERS OF EDWARD TANDY, Esq.

1. Is there any arrear of business at present remaining undisposed of in your office; and if so, what is the amount of such arrear?

There is no arrear in my office in short causes, such as bills containing not more than about 200 items; there is an arrear in long causes, but it is not by any means considerable, where parties have issued summonses and are ready to proceed.

2. Is there any delay at present in your office of obtaining the taxation of a bill of costs by reason of the pressure of business there?

There certainly is a delay, to a certain extent, in procuring the taxation of bills of costs, occasioned by the pressure of business in the office, and in many cases the delay is occasioned by the neglect of the solicitors in not attending, and frequently not being prepared to proceed effectually when they do attend, and thus much time is wasted; but as to the general arrear in the office, and the causes which have produced it, I beg leave to refer to a separate statement signed by myself and my two colleagues, and which is forwarded by the senior Taxing Master.

3. Have you taxed bills of costs of proceedings to a sale under the 15th section of the Chancery Regulation Act; if so, can you state the amount to

which such costs tax between party and party in an average case?

I find, on searching carefully through the books from the commencement of the year 1853, that I only taxed one bill of costs of proceedings to a sale under the 15th section of the Chancery Regulation Act, and which was in the cause of *Hatchell v. Chancellor*. This bill was taxed as between party and party, to the sum of £348 5s. 4d. Very few cases appear in our books in which sales were had under the 15th section, and I do not think any cases of the kind would appear in our books anterior to the year 1853.

In this case, which was thus taxed by me, peculiar circumstances occurred which made the costs much heavier than they would be in an ordinary case, and which I think it right to mention. The cause was originally set down under the 15th section, but the respondent appeared at the first hearing, and insisted on his right to be heard, and the cause was then directed to be set down as a general cause petition, which led to two additional hearings and an examination of witnesses, and there was also a motion and appointment of a receiver; all this led to an increased expense of upwards of £80; and at the last hearing, before the Lord Chancellor, the respondent did not appear, and the case was sent to the Master's office to be disposed of as under the 15th section. Then when the property came to be sold, the sale was adjourned twice for want of bidders. Those two adjournments, including advertisements, increased the costs to the extent of about £55.

The proportions of the foregoing bill, which consisted of Chancery Fund Stamps and office fees, is as follows:—

	£	s.	d.
Chancery Fund Stamps,	21	0	6
Office Fees,	22	0	11

EDWARD TANDY.

ANSWERS OF THOMAS RIELLY, ESQ.

1. Is there any arrear of business at present remaining undisposed of in your office; and if so, what is the amount of such arrear?

2. Is there any delay at present in your office in obtaining the taxation of a bill of costs by reason of the pressure of business there?

For an answer to these questions I refer to the document sent herewith, and signed by the three Taxing Masters of the court.

3. Have you taxed bills of costs of proceedings to a sale under the 15th section of the Chancery Regulation Act; if so, can you state the amount to which such costs tax between party and party in an average case?

I find I have taxed four bills of costs of proceedings, towards, and for, a sale of lands, under the 15th sec. of the Chancery Regulation Act, since the beginning of the year 1853, the amount and other particulars of each of which I have stated in a schedule annexed.

There is a large number of bills of costs lying in the office uncertified, all of which I believe I have

read and noted, and taxed in primary manner, and they await only to be brought by the solicitors into my day-list. There must be naturally some pressure by individuals ready and desirous to obtain a taxation of their costs, but I do not think that the arrear is of an inordinate character. The arrear in my short-list (that is, cases containing 200 items or thereabouts) is, I believe, very light. There is, occasionally, a delay in the business of the office, the principal cause of which, as to that portion of the costs remaining untaxed, and which the parties may be desirous to have taxed, is owing to the non-attendance of the solicitors and clerks whose costs are in the list, and their unpreparedness when they do attend; every day I am obliged to strike out or postpone cases from these causes. If due diligence and attention were exercised by the solicitors before coming in to tax, and proper attendance given on the taxation, a great deal more business would be done, and the arrear, if any, would be very trifling.

SCHEDULE referred to in the foregoing answers.

Leonard v. Hartwell—PETITIONER'S COSTS, Comprising Application by Petition and Order thereon, proceeding in the Master's office, by charge and discharge, and sale.

	£	s.	d.
Costs of the petition and application to the court,	8	2	0
" of the proceedings in the Master's office up to the order for a sale,	22	15	0
" of the sale, including order for sale, and evidencing title to the purchaser,	35	14	0
" of taxation of the petitioner's costs in this matter,	5	7	0

Amounts certified for, . . . £71 18 0

Amount of Chancery Fund Stamps and Office Fees charged in said Bill, and allowed on taxation, viz:—

	Chancery Fund Stamps.	Office Fees.
	£ s. d.	£ s. d.
In the costs of the application,	0 2 6	0 13 6
In the Master's office up to the order for sale,	2 1 6	0 12 6
In same, on the sale,	4 12 6	1 7 10
On taxation of this bill of costs,	2 10 6	0 8 6
Totals,	£9 7 0	£2 17 4

Exclusive of the above stamps and fees, a sum of £1 was paid by the petitioner for a search in the General Registration Office for making out title, and allowed on taxation, and included in general amount.

Blakeney v. Doyle—PETITIONER'S COSTS.

Costs of the petition and application to the court, 13 7 4
N.B.—This class includes the costs of an order to substitute service.

Costs in the Master's office up to the order for sale,	31 19 9½
" of the sale, and evidencing title to the purchaser,	56 18 5
" of taxation,	6 7 9

Net amount certified for, . . . £108 13 3½

Amount of Chancery Fund Stamps and Office

Fees charged in said Bill, and allowed on taxation, viz. :—

	Chancery Fund Stamps.	Office Fees.
	£ s. d.	£ s. d.
In the costs of the application,	0 5 0	2 1 5
In the Master's office up to sale,	0 15 6	0 16 5½
In same, on the sale,	2 16 0	2 6 11
On taxation of this bill of costs,	2 16 10	0 7 6
	£6 13 4	£5 12 3½

Geoghegan v. Raily—PETITIONER'S COSTS.

In this case no sale was actually had; the proceedings were carried up to and including postings for a sale; the additional costs (in an ordinary case) would be the attendance at the sale; copy abstract of title for the purchaser, evidencing the title, and procuring execution of the deed of conveyance.

	£ s. d.
Costs of petition and application to the Court,	11 15 4
„ of proceedings in the Master's office up to the order for sale,	27 6 4
N.B.—This class includes the costs of the appointment of a receiver.	
„ of the proceedings towards a sale, (including order for sale,)	61 5 8
„ of taxation of this bill of costs,	5 9 10
	£105 17 2

Amount of Chancery Fund Stamps and Office Fees charged in said Bill, and allowed on taxation, viz. :

	Chancery Fund Stamps.	Office Fees.
	£ s. d.	£ s. d.
In costs of the application,	0 2 6	1 3 9
In the Master's office up to the order for a sale,	2 9 6	2 19 0
In same, on the sale,	3 3 0	2 15 2
Of taxation,	2 16 0	0 4 6
	£8 11 0	£7 2 5½

Cole v. Garde—PETITIONER'S COSTS.

In this case no sale was actually had; the proceedings were carried up to and including postings for a sale; the additional costs (in an ordinary case) would be the attendance at the sale; copy abstract of title for the purchaser; evidencing the title, and procuring execution of the deed of conveyance.

	£ s. d.
Costs of petition and application to the court,	19 6 10
„ of proceedings in the Master's office up to the order for sale,	45 14 11
N.B.—This class includes the costs of the appointment of a receiver.	
Costs of proceedings towards a sale, (including costs of order for sale,)	27 14 10
„ of taxation of this bill of costs,	5 12 4
	£98 8 11

Amount of Chancery Fund Stamps and Office Fees charged in said Bill, and allowed on taxation, viz. :—

	Chancery Fund Stamps.	Office Fees.
	£ s. d.	£ s. d.
In costs of the application,	0 2 6	1 6 10
In the Master's office up to the order for a sale,	1 0 6	2 0 6
In same on the sale,	2 7 0	0 13 0
Of taxation,	2 16 6	0 4 6
	£6 6 6	£3 18 10

THOMAS REILLY.

(To be continued.)

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INCUMBERED ESTATES INQUIRY COMMISSION.

(Concluded from page 372.)

MEMORANDA annexed to the answers of the three Taxing Masters of the Court of Chancery in Ireland, to Questions 1 and 2, in Paper No. 11.

With respect to the general arrear of the office, and the pressure of business therein, such has been caused by the following circumstances:—

When the office was first formed, in 1845, there were upwards of 1,000 untaxed bills of costs, amounting to about £150,000, handed over by the four Masters in Ordinary, and when the Taxing Office opened, there was a very great influx of business into it, and at that time, commencing with such a heavy arrear, there was only one Taxing Master, with one assistant.

Then, in 1850, the equity jurisdiction of the Court of Exchequer was abolished, and the business transferred to the Court of Chancery, when a great number of untaxed bills of costs were handed over to this office; and with those and the other bills of Exchequer costs, lodged in the office, from August, 1850, to 1st January, 1851, the number of untaxed bills thus lodged was about 100, amounting to £11,500; and bills of costs for business done in that court previous to 1850, have since been lodged in this office, of which there have been taxed 529 bills, amounting to £65,231 11s. 7d.; and similar bills continued to come into the office, as suits are finally decided by the Lord Chancellor, and which were instituted in the Court of Exchequer many years since.

In addition to this, the operations in the Incumbered Estates Court have considerably augmented the pressure of business in this office; a vast number of suits, both in Chancery and Exchequer, were stopped by the proceedings of that court, the costs of which were required to be taxed at once, but which, in the ordinary course, would only come in from time to time, as decrees should be pronounced in the respective suits by the Court of Chancery.

This has, for the last three years, caused a great increase of business and pressure in the office, having thus to tax at once, what otherwise would be the business of future years.

Still, notwithstanding this great pressure, we have

been enabled, by persevering exertion, and by working at home, as well as during office hours, to tax each year's costs nearly to the same amount as that which was lodged for taxation during the years.

The following return will show the amount of costs lodged in each year for the last four years, and the amount taxed for the same period:—

STATEMENT OF BILLS LODGED AND TAXED IN 1851, 1852, 1853, 1854.

	Bills.	Amount.		
		£	s.	d.
1851, . . .	2,697	246,314	18	2
1852, . . .	2,349	183,219	11	10
1853, . . .	2,070	202,910	18	8
1854, . . .	2,008	161,582	18	1
	9,124	794,026	6	9
Deduct amount taxed as below, . . .	8,140	738,501	19	8
Arrears in bills for these four years, the particulars of which are as follows, . . .	984	55,526	7	1
Arrears in Bills, . . . 1851	551	59,977	5	2
„ . . . 1852	350			
„ . . . 1853	31	26,739	2	3
„ . . . 1854	52			
	984	86,716	7	5
	Bills.	Amount.		
		£	s.	d.
1851, . . .	2,146	186,337	13	0
1852, . . .	1,999	201,291	11	7
1853, . . .	2,039	176,171	18	5
1854, . . .	1,956	174,700	18	8
	8,140	738,501	18	8
Amount taxed more than lodged for the year, . . .		18,071	19	9
Like, . . .		16,118	0	7
Total excess taxed over amount lodged, . . .		34,190	0	4

The arrear which would appear in this return cannot be considered as a fair return of the actual arrears in the office, as we can only include in this return the amount of costs appearing by our books to have been certified; but it frequently happens, that after a bill of costs is taxed, and ready to be certified, (with, perhaps, in some instances only, some few queries to be discharged,) the parties ar-

range the amount, and the costs are settled; or the party finds there are no funds to reach or meet his demand, and for many other causes costs are lodged, but before any summons issues, the costs are settled; and frequently after summons has issued, and before any taxation takes place, the costs are either settled or abandoned, and the bills remain in this office as untaxed bills; and thus costs to a very considerable amount remain in this state in the office, and which of course do not properly form any portion of the real arrear in the office, but the amount of costs thus circumstanced it would not be possible for us at present to supply, but we may safely infer, that for the last three years, we have disposed of business to the full extent of the business brought into the office for the same period, if not more, but of course a portion of the business thus done was applicable to the previous arrear in the office.

JOHN O'DWYER.
EDWARD TANDY.
THOMAS REILLY.

STATUTES PASSED IN THE 18TH AND 19TH VICTORIA.—1854-5.

CAP. I.

An Act to enable Her Majesty to accept the Services of the Militia out of the United Kingdom, for the vigorous Prosecution of the War.
[23rd December, 1854.]

CAP. II.

An Act to permit Foreigners to be enlisted and to serve as Officers and Soldiers in her Majesty's Forces.
[23rd December, 1854.]

CAP. III.

An Act to carry into effect a treaty between her Majesty and the United States of America.
[19th February, 1855.]

CAP. IV.

An Act to amend the Act for limiting the Time of Service in the Army.
[27th February, 1855.]

CAP. V.

An Act to apply the sum of three millions three hundred thousand pounds out of the Consolidated Fund to the Service of the year ending the 31st day of March, 1855.
[5th March, 1855.]

CAP. VI.

An Act to apply the sum of twenty millions out of the Consolidated Fund to the service of the year 1855.
[5th March, 1855.]

CAP. VII.

An Act to extend to *Ireland* the Provisions of the eighteenth section of the Common Law Procedure Act, 1854.
[16th March, 1855.]

"WHEREAS it is expedient to extend to *Ireland* the provisions contained in the eighteenth section of the Common Law Procedure Act, 1854;" be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

I. That from and after the passing of this Act, whenever any cause shall be tried in any court of civil jurisdiction in *Ireland* by any jury, the addresses to the jury shall be regulated as follows: that is to say, the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time at the close of such case for the purpose of summing up the evidence, and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence, if any, and the right to reply shall be the same as at present.

CAP. VIII.

An Act for raising the sum of seventeen millions one hundred and eighty-three thousand pounds by Exchequer Bills for the service of the year 1855.
[16th March, 1855.]

CAP. IX.

An Act to suspend the decline of the Customs Duties on Tea from and after the 5th day of April, 1855.
[16th March, 1855.]

CAP. X.

An Act to enable a third Principal Secretary and a third Under-Secretary of State to sit in the House of Commons.
[16th March, 1855.]

CAP. XI.

An Act for punishing Mutiny and Desertion, and for the better payment of the Army and their quarters.
[16th March, 1855.]

CAP. XII.

An Act for the regulation of her Majesty's Royal Marine Forces while on shore.
[16th March, 1855.]

CAP. XIII.

An Act to explain and amend the Lunacy Regulation Act, 1853.
[26th April, 1855.]

"WHEREAS by the section numbered CXXIX. of an Act passed in the sixteenth and seventeenth years of the reign of her present Majesty, intituled *An Act for the Regulation of Proceedings under*

Commissions of Lunacy, and the Consolidation and Amendment of the Acts respecting Lunatics so found by inquisition, and their estates; it was enacted, that where a lunatic is seised or possessed of or entitled to land in fee or in tail, or to leasehold land for an absolute interest, and it appears to the Lord Chancellor, intrusted as in the said Act mentioned, to be for his benefit that a lease or underlease should be made thereof for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or otherwise improving the same, or for farming or other purposes, the committee of the estate may, in the name and on behalf of the lunatic, under order of the Lord Chancellor, intrusted as aforesaid, make such leases of the land or any part thereof, according to the lunatic's estate and interest therein, and to the nature of the tenure thereof, for such term or terms of years, and subject to such rents and covenants, as the Lord Chancellor, intrusted as aforesaid, shall order: and whereas it has been considered that the Lord Chancellor, intrusted as aforesaid, cannot by force of the said enactment empower the committee of a lunatic tenant in tail to grant leases as extensively as was intended by the said enactment, which will bind his issue in tail and the remaindermen: and whereas it is expedient to explain and enlarge the power of the Lord Chancellor, intrusted as aforesaid, in the matter aforesaid; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. Where a lunatic is seised of or entitled to land in tail, and it appears to the Lord Chancellor intrusted as aforesaid, to be for his benefit, the committee of the estate may in the name and on behalf of the lunatic, under order of the Lord Chancellor, intrusted as aforesaid, make any such leases of the land or any part thereof as in the said section of the said Act are mentioned, and every such lease shall be good and effectual in law against the lunatic and his heirs, and all persons claiming the lands entailed by force of any estate tail which shall be vested in such lunatic, and also against all persons, including the Queen's most excellent Majesty, her heirs and successors, whose estates are to take effect after the determination of or in remainder or reversion expectant upon such estate tail, according to such estate as is comprised and specified in every such lease, in like manner as the same would have been good and effectual in law if the lunatic at the time of the making of such leases had been lawfully seised of the said lands comprised in such lease of a pure estate in fee simple to his own use, and had been of sound mind, and not the subject of a commission of lunacy, and had himself granted such lease; and every person to whom from time to time the reversion expectant upon the lease shall belong after the death of the lunatic shall and may have such and the like remedies and advantages, to all intents and purposes, against the lessee, his executors, administrators, and assigns, as the lunatic or his committee would or might have had against him or

them: and the powers given by Sections numbered CXXX. and CXXXI. of the said recited Act shall and are to operate as extensively as the power given by the said Section CXXIX. of the said Act as explained and enlarged by this Act.

II. Where any of the expressions in this Act are used in the said recited Act they shall receive the same interpretation in this Act as by the said recited Act is imposed upon them.

CAP. XIV.

An Act to authorise the inclosure of certain lands in pursuance of a report of the Inclosure Commissioners for *England and Wales*.

[26th April, 1855.]

CAP. XV.

An Act for the better Protection of Purchasers against Judgments, Crown Debts, Cases of Lis pendens, and Life Annuities or Rent-charges.

[25th April, 1855.]

CAP. XVI.

An Act to authorize the letting Parts of the Royal Forests of *Dean and Woolmer*, and certain other Parts of the Hereditary Possessions of the Crown.

[26th April, 1855.]

CAP. XVII.

An Act to carry into effect a Convention between her Majesty and the King of *Sardinia*.

[26th April, 1855.]

CAP. XVIII.

An Act for raising the Sum of Sixteen Millions by way of Annuities.

[5th May, 1855.]

CAP. XIX.

An Act to remove Doubts as to the Commissions of Officers of Militia in *Ireland* who have omitted to deliver unto the Clerk of the Peace Descriptions of their Qualifications, and to indemnify them against the Consequences of such Omission, and to amend the Law relating to the Militia in *Ireland*.

[25th May, 1855.]

CAP. XX.

An Act for granting to her Majesty an increased Rate of Duty on Profits arising from Property, Professions, Trades, and Offices.

[25th May, 1855.]

Most Gracious Sovereign,

WE, your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of *Great Britain and Ireland* in Parliament assembled, towards raising the supplies to defray the expenses of the just and necessary war in which your Majesty is engaged, have freely and volun-

tarily resolved to give and grant unto your Majesty the rate and duty herein-after mentioned; and do therefore most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the fifth day of April, one thousand eight hundred and fifty-five, there shall be charged, raised, levied, collected, and paid yearly unto and for the use of her Majesty, her heirs and successors, in addition to the rates and duties chargeable under the Act passed in the last session of Parliament, chapter twenty-four, for and in respect of all property, profits, and gains chargeable under the several Acts in force relating to the income tax, either by assessment or under any contract of composition or otherwise, the additional rate and duty of twopence for every twenty shillings of the annual value or amount of all such property, profits, and gains respectively.

II. Provided always, that where under the said several Acts in force any less rate or duty than one shilling and twopence for every twenty shillings of the annual value or amount of any property, profits, or gains is now chargeable, or any relief, or abatement, or deduction is directed to be given, made, or allowed after any rate in such Act or Acts specified, then and in every such case such rate of duty, relief, abatement, and deduction to be charged, given, made, and allowed respectively under this Act and the several Acts aforesaid shall bear the same proportion to one shilling and fourpence for every twenty shillings as the rate of duty, relief, abatement, and deduction respectively now chargeable or directed to be given, made, or allowed as aforesaid, in the like cases respectively bears to one shilling and twopence for every twenty shillings: provided nevertheless, that any person entitled to relief under the said Acts and this Act, on the ground that his total income, although amounting to one hundred pounds or upwards, is less than one hundred and fifty pounds a year, shall be relieved from so much of the duties assessed upon or paid by him under or by virtue of the said several Acts and this Act as shall exceed the rate of elevenpence halfpenny for every twenty shillings of his profits or gains.

III. The said duty hereby granted shall be assessed, raised, levied, and collected under the regulations and provisions of the several Acts now in force relating to the income tax; and all powers, authorities, rules, regulations, directions, penalties, clauses, matters, and things contained in or enacted by the said several Acts, and in force with respect to the duties granted by the said first mentioned Act, shall (so far as the same are or may be applicable consistently with the express provisions of this Act) respectively be duly observed, applied, and put in execution for assessing, raising, levying, collecting, receiving, accounting for, and securing the said duty hereby granted, and otherwise relating thereto, as if the same were particularly repeated and re-enacted, *mutatis mutandis*, in the

body of this Act with reference to the said rate and duty hereby granted.

IV. The duties by this Act, and the said Act of the last session of Parliament respectively granted shall continue in force during the present war and until the sixth day of April, which shall first happen after the expiration of one year from the ratification of a definitive treaty of peace, and no longer: provided always, that if the period limited by this Act for the continuance of the said duties shall expire before the fifth day of April, one thousand eight hundred and sixty, then, on and from and after the expiration of the said period, the several rates and duties granted by the Act passed in the session of Parliament holden in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, shall expire, and be payable during so much of the respective terms limited by the said last-mentioned Act as shall be then unexpired.

V. Provided always, that the said rates and duties shall not cease at the time herein-before appointed in that behalf with respect to any assessment which ought before then to have been made, but which shall not have been made and completed, nor with respect to any duty which shall have been assessed, and shall then remain unpaid, nor with respect to any penalty before then incurred, nor with respect to any deduction of the said duty or any portion thereof authorised by law to be made out of any rent, interest, or other annual payment, nor with respect to any penalty for not having paid low any such deduction, although the said time be after the time appointed as aforesaid, and with respect to the assessment of the interest on such quarter bills becoming due in the month of January next after the time appointed for the ceasing of the said duty, but all the powers and provisions of the said Act, and of the several Acts herein mentioned or referred to, shall continue in force for making and completing all such assessments as aforesaid, and for levying and recovering the duties so assessed, or to be assessed, and all arrears of such duties, and also for re-assessing the same in default of payment, and for making and allowing such deduction as aforesaid, and for the suing for, recovering, and recovering any penalty which shall have been or may be incurred.

CAP. XXI.

An Act for granting certain Duties of Customs on Tea, Coffee, Sugar, and other Articles.

CAP. XXII.

An Act for granting certain additional Rates and Duties of Excise.

CAP. XXIII.

An Act to alter in certain respects the Law of Intestate Moveable Succession in Scotland.

CAP. XXIV.

An Act to amend an Act of the Second and Third Years of King *William* the Fourth, for amending the Representation of the People of *Scotland*, in so far as relates to the Procedure in County Elections in that Country. [25th May, 1855.]

CAP. XXV.

An Act to allow Affirmations or Declarations to be made instead of Oaths in certain Cases in *Scotland*. [25th May, 1855.]

CAP. XXVI.

An Act to continue an Act of the Thirteenth and Fourteenth Years of her present Majesty, for enabling the Judges of the Courts of Common Law at *Westminster* to alter the Forms of Pleading. [25th May, 1855.]

CAP. XXVII.

An Act to amend the Laws relating to the Stamp Duties on Newspapers, and to provide for the Transmission by Post of printed periodical Publications. [15th June, 1855.]

"WHEREAS it is expedient to amend the laws relating to the stamp duties on newspapers, and to provide for the transmission by post of printed periodical publications;" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after fourteen days after the passing of this Act it shall not be compulsory (except for the purpose of free transmission by the post) to print any newspaper on paper stamped for denoting the duties imposed by law on newspapers, and no person shall be subject or liable to any penalty on forfeiture for printing, publishing, selling, or having in his possession any unstamped newspaper, and every periodical publication herein after mentioned which shall be printed within the United Kingdom on paper stamped for denoting the rate of duty now imposed by law on newspapers shall be entitled to the like privileges of transmission and transmission by the post between places in the United Kingdom, either postage-free or otherwise, on the same terms and conditions and under and subject to the like rules and regulations as newspapers duly stamped are now entitled and subject to under any Act or Acts in force, but under and subject nevertheless to the terms and conditions in this Act contained.

II. Every periodical publication to be entitled to any such privilege as aforesaid shall be printed and published at intervals not exceeding thirty-one days between any two consecutive parts or numbers of such publication, and shall be subject to the same limitations and restrictions with respect to the number of sheets or pieces of paper where-

on the same shall be printed, and with respect to the superficies or dimensions of the letter-press thereof, as by any Act or Acts now in force are enacted or imposed with respect to newspapers and supplements thereto; and every such periodical publication shall be entitled to such privilege only on the terms and conditions following: (that is to say,) one of the sheets or pieces of paper on which the same shall be printed shall be stamped with an appropriated die, denoting the stamp duty imposed by law on a newspaper printed on the like number of sheets or pieces of paper and of the like dimensions with respect to the superficies of the letter-press thereof; and on the top of every page of such publication there shall be printed the title thereof, and the date of publishing the same; and such periodical publication at the time when the same shall be posted shall be folded in such manner that the whole of the stamp denoting the said duty shall be exposed to view, and be distinctly visible on the outside thereof; also such periodical publication shall not be printed on pasteboard, or cardboard, or on two or more pieces or thicknesses of paper pasted together, nor shall any pasteboard, cardboard, or such pasted paper be transmitted by post with any such periodical publication either as a back or cover thereto, or otherwise.

IV. It shall be lawful for the proprietor or printer of any such periodical publication to send to the Commissioners of Inland Revenue, or to such officer as they shall appoint or direct in that behalf, any quantity of paper stamped with an appropriated die, to be provided in the manner directed by the third section of the Act passed in the session of Parliament holden in the sixth and seventh years of the reign of his late Majesty King *William* the Fourth, chapter seventy-six, for denoting the rate of stamp duty chargeable on newspapers; and upon payment to the proper officer of the full amount of the stamps required to be impressed on such paper, the said Commissioners, or their proper officer shall cause the same to be stamped accordingly: provided, always, that there shall be allowed in *Ireland*, in respect of such appropriated stamps as aforesaid for any periodical publication, which shall be printed and published only in *Ireland*, the same rate of discount as by the said last-mentioned Act is directed to be allowed on the purchase of stamps for the printing of newspapers in *Ireland*.

V. Every periodical publication, posted in the United Kingdom, to be entitled to the privilege of transmission by the post between places in the United Kingdom, under the provisions of this Act, shall be put into a post office within fifteen days next after the day on which the same shall be published; the day of publication to be determined by the date of such publication.

VI. In all cases in which a question shall arise whether a printed paper is entitled to the privilege of a periodical publication, so far as respects the transmission thereof by the post under the provisions of this Act, the question shall be referred to the determination of the Postmaster General, whose decision, with the consent of the Commissioners of her Majesty's Treasury, shall be final.

VII. "And whereas certain treaties and arrangements have been made and entered into, and other treaties and arrangements may hereafter be entered into, by and between her Majesty's Government and certain Foreign and Colonial Governments, for regulating the transmission of *British* newspapers abroad; and it is expedient to make provision for enabling her Majesty's Postmaster General to secure for such newspapers respectively the privileges and advantages of such treaties and arrangements;" be it therefore enacted, that, upon the Postmaster General being satisfied that any printed publication is a newspaper, or entitled to the privileges of a newspaper, within the meaning of such treaties and arrangements as aforesaid, it shall be lawful for the proprietor or printer of such newspaper or publication, if he shall think fit, to register the same at the General Post Office in *London*, in such form and with such particulars relating to the same, and subject to the payment of such fees, not exceeding five shillings respectively, as well on registration as afterwards periodically for being continued on the register, as the Postmaster General, with consent of the Commissioners of the Treasury, shall from time to time direct or require in that behalf; and thereupon such newspaper or publication, being printed on paper duly stamped with an appropriated die under the provisions of this Act, shall be entitled to all the privileges and advantages secured to newspapers by any such treaties and arrangements as aforesaid.

VIII. It shall be lawful for the Commissioners of her Majesty's treasury, by warrant under their hands, to allow any printed newspaper (*British*, colonial or foreign) to be transmitted by the post between places in the United Kingdom and her Majesty's colonies or foreign countries, or between any ports or places beyond the sea (whether through the United Kingdom or not), either free of postage or subject to such rates of postage not exceeding twopence for each newspaper, irrespective of any foreign or colonial postage, as the Commissioners of the Treasury, or the Postmaster General with their consent, shall from time to time think fit; and as a condition to any *British* newspaper being transmitted by the post to any place out of the United Kingdom, the same shall be printed on paper duly stamped with an appropriated die under the provisions of this Act, and the said last-mentioned Commissioners or the Postmaster General may require such newspaper to be registered at the General Post Office in *London* in such form and with such particulars and subject to the payment of such fees as in the last preceding section mentioned.

IX. It shall be lawful for her Majesty's Postmaster General, with the consent of the Commissioners of her Majesty's Treasury, at any time or times hereafter to make and issue such orders, regulations, conditions, and restrictions as he shall deem to be necessary or expedient for the purpose of regulating the receipt, transmission, and delivery by post of periodical publications under the provisions of this Act, or for preventing or detecting frauds or abuses in relation thereto, and for giving effect to the purposes of this Act; and it shall also be lawful for the said Postmaster General, with the

like consent, from time to time to rescind or revoke all or any such orders, regulations, conditions, and restrictions, and to make and issue any new ones in lieu thereof.

X. All periodical publications sent by post otherwise than in conformity with the terms, conditions, and regulations established by or under the authority of this Act may be detained by the Postmaster General, and any officer of the Post Office, and after being opened, the same shall be either returned to the senders thereof or forwarded to the place of their destination charged with the like rate of postage as if the same were letters transmitted by the post: provided always, that it shall be lawful for the Commissioners of her Majesty's Treasury, by warrant under their hands, to authorize her Majesty's Postmaster General to charge in any such case any such less rate of postage as to him shall seem fit.

XI. Any printed copy of the *London Gazette* in which any warrant or order issued or made under or by virtue of this Act, or purporting to be, shall be published, shall be admitted as evidence by all courts, judges, justices, and others, of such warrant or order, and of the due making and issuing thereof, and of the contents thereof, without any further or other proof of such warrant or order, or of the matters therein contained.

XII. The term "periodical publication" used in this Act shall be construed to mean and include a newspaper as defined by the Acts in force relating to the stamp duties on newspapers, and every printed literary work or paper, printed and published periodically, or in parts or numbers, at intervals not exceeding thirty-one days between any two consecutive papers, parts, or numbers of such literary work or paper; and for all the purposes of this Act the Islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, and the *Isle of Man* shall respectively be deemed to be part of the United Kingdom.

CAP. XXVIII.

An Act to provide that the Property or Income Tax payable in respect of the Income from Ecclesiastical Property in *Ireland* shall be a Deduction in estimating the Value of such Property for the Purpose of Taxation by the Ecclesiastical Commissioners. [15th June 1855.]

"WHEREAS by an Act passed in the session of Parliament holden in the third and fourth years of the reign of his late Majesty King *William the Fourth*, intituled *An Act to alter and amend the Laws relating to the Temporalities of the Church in Ireland*, the Ecclesiastical Commissioners therein directed to be appointed were authorized and empowered to make a valuation of all ecclesiastical property, subject to the deductions therein set forth, and to take, levy and receive therefrom a yearly tax, rate, or assessment, computed and imposed upon such valuation according to a scale, and for the purposes recited in the said Act: and whereas by an Act passed in the session of Parliament holden in the sixteenth and seventeenth years of her present Majesty's reign, intituled *An Act for granting to her Majesty Duties*

on Profits arising from Property, Professions, Grades, and Offices, and by two other Acts passed in the seventeenth year of her present Majesty's reign, chapter ten and chapter twenty-four, for granting to her Majesty additional and increased duties on such profits, ecclesiastical property, together with the other property in Ireland theretofore exempt, was rendered liable to the duties therein enacted; and whereas it is expedient and just that the amount payable as property or income tax under the said Act should be allowed as a deduction by the said Ecclesiastical Commissioners, together with the deductions authorized to be made under the said Act of the third and fourth years of the reign of his Majesty King William the Fourth, chapter thirty-seven, in forming their valuations for the tax, rate, or assessment therein directed to be levied: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful to and for the said Ecclesiastical Commissioners, in and from the valuation made or to be made of any ecclesiastical property for the purpose of imposing the rate, tax, or assessment required by the said Act, in addition to the charges specified as deductions in the said Act, to deduct also such amount or sum as the said Commissioners shall ascertain as proper to be deducted from such valuation for or on account of any property or income tax paid or payable or deducted in respect of such ecclesiastical property.

CAP. XXIX.

An Act to make further provision for the Registration of Births, Deaths, and Marriages in Scotland.
[15th June, 1855.]

CAP. XXX.

An Act to empower the Commissioners of Sewers to expend on House Drainage a certain Sum out of the Monies borrowed by them on the Security of the Rates, and also to give to the said Commissioners certain other Powers for the same Purpose.
[15th June, 1855.]

CAP. XXXI.

An Act to confirm the Incorporation of the Borough of Brighton.
[15th June, 1855.]

CAP. XXXII.

An Act to amend and extend the Jurisdiction of the Stannary Court.
[15th June, 1855.]

CAP. XXXIII.

An Act to prevent Doubts as to the Validity of certain Proceedings in the House of Commons.
[15th June, 1855.]

CAP. XXXIV.

An Act to provide for the Education of Children in the Receipt of Out-door Relief.
[26th June, 1855.]

CAP. XXXV.

An Act to continue the Act for extending for a limited Time the Provision for Abatement of Income Tax in respect of Insurance on Lives.
[26th June, 1855.]

"WHEREAS by an Act passed in the session of Parliament holden in the sixteenth and seventeenth years of the reign of her present Majesty, intituled *An Act to extend for a limited Time the Provision for Abatement of Income Tax in respect of Insurance on Lives*, which Act was limited to continue in force until the fifth day of July one thousand eight hundred and fifty-four: and whereas by an Act passed in the last session of Parliament the said first-mentioned Act was continued until the fifth day of July one thousand eight hundred and fifty-five: and whereas it is expedient to extend the benefit of the recited provisions to persons insuring or contracting with such friendly societies as herein-after mentioned, and to continue the said first-recited Act for such period as herein-after mentioned: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. Any person or persons who shall have made any such insurance or contracted for any such deferred annuity as in the said recited Acts mentioned, in or with any friendly society legally established under any Act of Parliament relating to friendly societies, shall be entitled to all the benefits and advantages conferred by the said recited Acts; provided that the premiums payable in respect of such insurances shall not be made for shorter periods than three months.

II. The said Act shall continue in force until the fifth day of July one thousand eight hundred and fifty-six, and shall be applicable, with respect to the rate of duty of one shilling and twopence for every twenty shillings granted by the Act of the last session of Parliament, chapter twenty-four, and to the additional rate of duty of twopence for every twenty shillings granted by the Act of the present session of Parliament, chapter twenty, in like manner as to the rate or duty of sevenpence for every twenty shillings granted by the Act passed in the session of Parliament holden in the sixteenth and seventeenth years of the reign of her present Majesty, chapter thirty-four.

CAP. XXXVI.

An Act to repeal the Stamp Duties payable on Matriculation and Degrees in the University of Oxford.
[26th June, 1855.]

CAP. XXXVII.

An Act to apply the Sum of Ten Millions out of the Consolidated Fund to the Service of the Year One thousand eight hundred and fifty-five. [26th June, 1855.]

CAP. XXXVIII.

An Act to allow Spirits of Wine to be used Duty free in the Arts and Manufactures of the United Kingdom. [26th June, 1855.]

CAP. XXXIX.

An Act to facilitate Grants of Lands and Tenements for the Purpose of Religious Worship and other Purposes connected therewith. [26th June, 1855.]

"WHEREAS many congregations of persons not belonging to the Established Church in Ireland have been and are in many cases prevented from erecting suitable buildings for religious worship, and for the residence of their clergymen, ministers, and pastors, and school-houses for the education of their children, and from providing suitable burial grounds, by the difficulty of obtaining leases of land of sufficient duration for such purposes, and in many cases have been obliged to use for the purposes aforesaid lands granted or demised for terms of short or uncertain duration, and it is expedient that tenants for life and other persons having limited interests in lands should be enabled for the purposes aforesaid to make grants or leases for any period not exceeding the estate or interest out of which such limited interest is created, and to accept surrenders of and convert into leases for such extended period any leases of short or uncertain duration already made for such purposes or any of them;" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. In the construction of this Act the words "grantor" or "lessor" shall extend to a body politic, corporate, or collegiate, making grants or leases:

The word "lessee" shall include the personal representatives of any lessee and his lawful assigns:

The word "person" shall include any body politic, corporate, or collegiate:

The expression "perpetual interest" shall comprehend, in addition to any greater interest, any estate for one or more than one life, with or without a term for years, or for years, whether absolute or determinable on one or more than one life, with a covenant or agreement by a party competent thereto for perpetual renewal:

The expression "successors in estate" shall extend to and include the persons entitled for the time being after the lessor to the actual receipt of the rents and profits of the lands comprised in the lease, under the same title, settlement, or will with the lessor, or under

the exercise of any power affecting such title or continued in such settlement or will, and who but for the making of the said lease would be entitled to possession of the lands, or to the possession subject to any other existing lease or tenancy:

The word "entitled" shall mean entitled either legally or equitably:

The word "settlement" shall include every assurance or connected set or series of assurances, whether by deed, will, private Act of Parliament, or otherwise, by which lands are or shall be limited in a course of settlement, or agreed so to be.

(To be continued.)

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STATUTES PASSED IN THE 18TH AND 19TH VICTORIA.—1854-5.

(Continued from page 280.)

II. In citing this Act in any instrument, document, proceeding, or Act of Parliament, it shall be sufficient designation to use the expression "The Leasing Powers Act for Religious Worship in (Ireland), 1855."

With respect to the persons hereby empowered to make leases:

III. Every person herein-after described entitled in possession to any estate or interest herein-after named in lands in *Ireland*, or to the receipt of any rents and profits thereof, whether or not such estate shall be subject to any mortgage or other incumbrance, (provided the incumbrancer shall not be in possession,) shall have power to make leases of any part of the said lands, (other than the mansion house and demesne lands or parks, plantations, gardens, orchards, or pleasure grounds and appurtenances belonging to or usually occupied with such mansion house,) and not exceeding in the whole five acres, for the purposes and periods of time, and subject to the rents, rights of apportionment of rent, covenants, and conditions herein stated; (that is to say,)

- (1.) Her Majesty the Queen and her successors; the Commissioners of her Majesty's Woods and Forests in respect of lands situate in the kingdom of *Ireland*;
- (2.) Tenants in fee simple or fee farm, or seised of any other perpetual estate subject to any mortgage or incumbrance;
- (3.) Tenants in tail or quasi entail of an estate of inheritance or perpetual interest;
- (4.) Tenants for the term of their own lives, not being jointresses, or for the life or lives of any other person or persons, or for so many years as they may live, or any partial owner, for an unexpired term of years not being less than sixty years in its inception, and whether absolute or determinable on a life created out of an estate of inheritance or perpetual interest by any settlement, and not in consideration of or subject to any rent reserved thereby;

(5.) Married women entitled to any estate specified in Numbers (2.), (3.), or (4.), for their separate use, and whether restrained or not from anticipation;

(6.) Tenants by the courtesy of *England*;

(7.) Husbands seised in right of their wives, or by curtesy with their wives, provided that the wife is entitled to any such estate as is specified in Number (2.), but whether subject to any incumbrance or not, or in Numbers (2.) or (4.), and shall be a consenting and executing party to the lease, not being under age;

(8.) Corporations lay, eleemosynary, and collegiate, whether aggregate or sole: provided, that no lease made by any municipal corporation or board of guardians of the poor shall be valid without the licence in writing in the case of a municipal corporation of the Commissioners of her Majesty's Treasury, and in the case of such board of guardians of the poor of the Poor Law Commissioners for *Ireland*, such licence to be written on or annexed to the said lease;

(10.) Trustees and feoffees of charitable uses of a public nature, and seised or possessed of an estate in fee simple, fee farm, or other perpetual interest;

(11.) Trustees under any will or settlement entitled in fee simple or for a perpetual interest or to any estate specified in Number (4.), and having a power to sell the same: provided, however, that when such power is to be exercised with the consent of any person no such lease shall be valid without such consent.

And with respect to cases of disability of parties otherwise entitled to make leases:

IV. In case any person (not being a trustee or feoffee of charitable uses of a public nature) who would be entitled to make leases under this Act or otherwise shall happen to be under any of the following disabilities or incapacities, the power shall be exercised in his or her name, and on his or her behalf in the following manner: if under the age of twenty-one years, by his or her guardian appointed by will or settlement, or by the Court of Chancery; and if such person have no guardian, it shall be lawful for the Court of Chancery in *Ireland*, on petition in

a summary way, to appoint a guardian of such person under age, for the purpose of executing any lease under this Act, in the manner aforesaid, and to change him from time to time, and the power shall be executed by the guardian so appointed: if lunatic or idiot, or *non compos mentis*, by the committee of the estate; and if there shall be no committee of the estate, or no inquisition finding such person idiot or lunatic, it shall be lawful for the Court of Chancery in *Ireland*, by petition in a summary way, to appoint a guardian of such person, for the purpose of executing any lease under this Act, and to change such guardian from time to time, and the power shall be executed as aforesaid by the guardian so appointed: provided always, that no lease made under this Act of the estate of any person under age or of unsound mind or *non compos mentis* shall be valid without the consent of the Court of Chancery, to be obtained in a summary manner by petition to the said Court of Chancery by any party interested thereon.

The purposes and periods of time for which leases may be made under this Act shall be as follows:

V. A lease made by a person empowered by this Act may be made of any quantity of land, not exceeding in the whole five acres, for a site for a place of worship for such congregation, and for the residence of their clergymen, ministers, or pastors, and for the erection of a school or schools and school accommodation in connection therewith, and for a burial ground for the interment of its deceased members, or for any one or more of such purposes, and such leases may be made in fee farm, or for any term not exceeding nine hundred and ninety-nine years.

VI. Where any lease or grant shall have been made before the passing of this Act for any of the purposes aforesaid, and for a period less than the term for which a lease may be made under this Act, it shall be lawful for the person enabled to make a lease of such land under this Act to accept a surrender of such existing lease or grant, and make a new lease under this Act of the same land, or of the same land and any other land in conjunction therewith, provided that the entire quantity comprised in such new lease shall not exceed five acres.

VII. The rent reserved in any lease made under this Act shall be the best improved rent that at the time of making such lease can be obtained or reasonably expected from a solvent tenant without fine or consideration of any kind: provided always, that in the case of the surrender of an existing lease, and the grant of a new lease, of the same land, under section six, the value of any buildings, erections, or improvements on said lands theretofore made for any of the purposes aforesaid shall not be taken into account in estimating the rent to be reserved in such new lease.

VIII. Every lease made under this Act shall specify the purposes for which it shall be made, and shall imply the following covenants, conditions, and agreements on the part of the lessee, his heirs, executors, and administrators, with the lessor, his executors, administrators, and succe-

sors in estate, and the same shall be as effectual and binding as if they were expressly inserted in such lease:

That the lessee shall pay, when due, the rent reserved, and all taxes and impositions payable by the tenant:

That the lessee shall repair, maintain, and keep the demised premises during the term in good and substantial repair, with all buildings, fixtures, and improvements:

That the demised premises shall be applied for no other purposes than those expressed in the lease, or of the like nature, and in default thereof it shall be lawful for the lessor and his successors in estate to re-enter:

That in case the said lands shall not be used for any of the purposes expressed in said lease for a period of three years, it shall be lawful for the lessor and his successors in estate to re-enter:

That it shall be lawful for the landlord and his agent at all reasonable times to enter on and inspect the premises:

Also to re-enter in case of any unlawful assignment or sub-letting.

IX. The rents reserved and the covenants and conditions contained or implied in any lease made under this Act shall enure to the persons who, for the time being, would, if such lease had not been made, be entitled to the actual possession of the lands comprised in the said lease, or to the receipt of the rents and profits thereof, according to their estates and interests therein.

X. Every lease made under this Act shall be by indenture sealed and delivered by or on behalf of the lessor in the presence of one or more than one witness, and a counterpart of every such lease shall be executed by the lessee thereof.

And with respect to the force and efficacy of leases to be made pursuant to this Act, be it enacted as follows:

XI. Every lease made pursuant to the provisions of this Act shall be valid and effectual to bind the lessor, his heirs, executors, administrators, assigns, and successors in estate, and all persons whomsoever deriving under the same title or settlement as that under which the lessor derives, and notwithstanding any entail, law or custom to the contrary, and whether there be any leasing power annexed or belonging to the estate of such lessor; but so as not to prejudice or interfere with any other power of leasing to him belonging.

XII. Where any lease made in the intended exercise of any supposed leasing power conferred by this or any other Act of Parliament, or by any settlement, shall be invalid by reason of the lessor not having at the time power to make such lease, and the estate of such lessor in the lands comprised in such lease shall have continued or shall have accrued and continued until after such lease might have been lawfully granted, such lease shall take effect out of such estate, and be as valid as if it had been granted at such last-mentioned time, provided such lease had not been then already surrendered or relinquished.

XIII. Where any lease shall be made by a lessor having a power of leasing the lands comprised

in such lease, and such lease cannot take effect or have continuance independently of such leasing power, every such lease shall take effect and be as valid as if the same were intended and had been expressed to have been granted in exercise of the said power, although such power be not referred to.

CAP. XL.

An Act for further promoting the Establishment of Free Public Libraries and Museums in *Ireland*.
[26th June, 1855.]

“WHEREAS it is expedient to amend the Act of the sixteenth and seventeenth years of her present Majesty, chapter one hundred and one, and to give greater facilities for the establishment in *Ireland* of free public libraries and museums or schools of science and art;” be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. The said Act of the sixteenth and seventeenth years of her present Majesty, chapter one hundred and one, and section ninety-nine of the Towns Improvement Act (*Ireland*), 1854, are hereby repealed; but such repeal shall not invalidate or affect anything already done in pursuance of either of such Acts; and all public libraries and museums established in *Ireland* under either of those Acts shall be considered as having been established under this Act.

II. In citing this Act for any purpose whatever it shall be sufficient to use the expression, “The Public Libraries Act (*Ireland*), 1855.”

III. In the construction and for the purposes of this Act (if not inconsistent with the context or subject matter) the following terms shall have the respective meanings herein-after assigned to them; that is to say, “town” shall mean and include any city, borough, town, or place in which commissioners, trustees, or other persons have been or shall be elected or appointed under the Act of the ninth year of King George the Fourth, chapter eighty-two, of the “Towns Improvement Act (*Ireland*), 1854,” or any local or other Act or Acts for paving, flagging, lighting, watching, cleansing, or otherwise improving any city, borough, town, or place, for the execution of any such Act or Acts, or superintending the execution thereof, and in which there shall not be a town council or other such body elected under the Act of the third and fourth years of her present Majesty, chapter one hundred and eight, or any other charter granted in pursuance of such Act, or any Act passed for the amendment thereof; “town commissioners” shall mean the commissioners, trustees, or other persons for the time being elected or appointed under any such first-mentioned Acts as aforesaid; “town fund” shall mean the town fund, or the rates of property vested in and under the control and direction of any town commissioners, and applicable to the purposes of any such Acts; “town rate”

shall mean the rate or rates authorized to be levied by any such town commissioners; “mayor” shall include lord mayor; “clerk” shall mean, as regards an incorporated borough, the town clerk of such borough, and as regards a town in which there shall be town commissioners the clerk appointed by the town commissioners; “householder” shall mean a male occupier of a dwelling house, or of any lands, tenements, or hereditaments within any town or incorporated borough, and entitled for the time being to vote at elections of commissioners, aldermen, or councillors in such town or borough.

IV. The council or board of municipal commissioners of any incorporated borough in *Ireland* regulated under the said Act of the third and fourth years of her present Majesty, chapter one hundred and eight, or any charter granted in pursuance of such Act, or any Act passed for the amendment thereof, the population of which, according to the then last census thereof, shall exceed five thousand persons, or the town commissioners of any town in *Ireland* having such a population as aforesaid, may, if they think fit, appoint a time for a public meeting of the householders of the borough or town, as the case may be, in order to determine whether this Act shall be adopted for the borough or town, and ten days’ notice at least of the time, place, and object of the meeting shall be given by affixing the same on or near the door of every church and chapel within the borough or town, and also by advertising the same in one or more of the newspapers published or circulated within the borough or town seven days at least before the day appointed for the meeting; and if at such meeting two-thirds of such persons as aforesaid then present shall determine that this Act ought to be adopted for the borough or town, the same shall thenceforth take effect and come into operation in such borough or town, as the case may be, and shall be carried into execution, in accordance with the laws for the time being in force relating to the municipal corporation of such borough, or relating to such town.

V. The expense incurred in calling and holding the meeting, whether this Act shall be adopted or not, and the expenses of carrying this Act into execution in such borough, shall be paid out of the borough fund, and in such town out of the town fund; and the council, or board of municipal commissioners, or town commissioners, may levy as part of the borough rate or town rate, as the case may be, or by a separate rate to be assessed and recovered in like manner as the borough rate or town rate, all monies from time to time necessary for defraying such expenses; and distinct accounts shall be kept of the receipts, payments, and liabilities of the council with reference to the execution of this Act.

VI. Such accounts shall be audited in the same way as all other accounts of such borough or town respectively are audited, and the said council or board or town commissioners shall, within one month after the same shall have been audited, transmit to the Lord Lieutenant or other Chief Governor or Governors of *Ireland* for the time being a true and correct copy of such accounts; and shall also within the time aforesaid cause a

copy of such accounts to be deposited in the office of the clerk; and the said accounts shall be open to the inspection of all householders of such borough or town respectively, and copies thereof shall be delivered to any such householder applying for the same, upon payment of a reasonable charge for the same, to be fixed by the council or board or town commissioners, as the case may be.

VII. The town commissioners of every town adopting this Act shall for the purposes thereof be a body corporate, with perpetual succession, by the name of "The Commissioners for Public Libraries and Museums for the town of _____, in the county of _____," and by that name may sue and be sued, and hold and dispose of lands, and use a common seal.

VIII. The amount of the rate to be levied in any borough or town in any one year for the purposes of this Act shall not exceed the sum of one penny in the pound, and in any such borough shall be assessed, raised, collected, and levied in the same manner as the borough rate, and in any such town shall be assessed, raised, collected, and levied in the same manner as the town rate.

IX. The council or board of any borough and the town commissioners of any town respectively may from time to time, with the approval of her Majesty's Treasury, appropriate for the purposes of this Act any lands vested, as the case may be, in a borough in the mayor, aldermen, and burgesses, and in a town in the town commissioners, and may also, with such approval, purchase or rent any lands or any suitable buildings, and the council or board and town commissioners respectively may, upon any lands so appropriated, purchased, or rented respectively, erect any buildings suitable for public libraries or museums or schools of science and art, or both, and may apply, take down, alter, and extend any buildings for such purposes, and rebuild, repair, and improve the same respectively, and fit up, furnish, and supply the same respectively with all requisite furniture, fittings, and conveniences.

X. "The Lands Clauses Consolidation Act, 1845," shall be incorporated with this Act; but the council or board, and commissioners respectively shall not purchase or take any lands otherwise than by agreement.

XI. The council or board and commissioners aforesaid respectively may, with the like approval as is required for the purchase of lands, sell any lands vested in the mayor, aldermen and burgesses, or board, or town commissioners respectively, for the purposes of this Act, on exchange the same for any lands better adapted for the purposes; and the monies to arise from such sale, or to be received for equality of exchange, or a sufficient part thereof, shall be applied in or towards the purchase of other lands better adapted for such purposes.

XII. The general management, regulation, and control of such libraries and museums or schools of science and art shall be, as to any borough, vested in and exercised by the council or board, and as to any town, in and by the town commissioners, or such committee as they respectively may from time to time appoint, who may from time to

time purchase and provide the necessary fuel, lighting, and other similar matters; books, newspapers, maps, and specimens of art and science, for the use of the library or museums; and cause the same to be bound or repaired, when necessary, and appoint salaried officers and servants, and dismiss the same, and make rules and regulations for the safety and use of the libraries and museums or schools of science and art, and for the admission of visitors.

XIII. The lands and buildings so to be appropriated, purchased, or rented, as aforesaid, and all other real and personal property, whatever presented to or purchased for any library or museum or school of science and art established under this Act, shall be vested, in the case of a borough, in the mayor, aldermen, and burgesses, and in the case of a town in the town commissioners.

XIV. If any meeting called as aforesaid before provided to consider as to the adoption of this Act for any borough or town, shall determine against such adoption, no meeting for a similar purpose shall be held for the space of one year at least from the time of holding the previous meeting.

XV. The admission to all libraries and museums established under this Act shall be open to the public free of all charge.

XVI. Upon the coming into operation of this Act in any borough it shall, as regards such borough, be incorporated with the said Act of the third and fourth Victoria, chapter one hundred and eight, and upon the coming into operation of this Act in any town it shall, as regards such town, be incorporated with the Act or Acts in force therein relating to the powers and duties of the town commissioners.

CAP. XLI.

An Act for abolishing the Jurisdiction of the Ecclesiastical Courts of England and Wales in Suits for Defamation. [26th June, 1855.]

Enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Car. XLII. To enable British Diplomatic and Consular Agents Abroad to administer Oaths and do Notarial Acts. [2nd July, 1855.]

Whereas by an Act of the sixth year of King George the Fourth, chapter eighty-seven, powers are given to British consuls general and consuls to administer oaths and do notarial acts in the foreign places to which they are appointed; and it is expedient that the like powers should be given to ambassadors and other diplomatic agents and to vice-consuls and consular agents abroad; be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. From and after the passing of this Act it shall and may be lawful for every British ambassador, envoy, minister, chargé d'affaires, or secretary of

embassy or of legation exercising his functions in any foreign country, and for every British vice-consul, acting consular, pro-consul, or consular agent (as well as every consul general or consul) exercising his functions in any foreign place, whenever he shall be thereto required, and whenever he shall see necessary to administer in such foreign country or place any oath and take any affidavit or affirmation from any person whomsoever, and also to do and perform in such foreign country or place all and every notarial acts or acts which any notary public could or might be required and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, vice-consul, acting consul, pro-consul, or consular agent, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if such oath, affidavit, or affirmation, or notarial act, respectively, had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public in any part of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature.

II. Affidavits and affirmations so taken as aforesaid under the said Act of King George the Fourth or this Act shall and may be received, read, and made use of in and before any court of law or equity or other judicature whatever in any part of the United Kingdom, and the judges and officers thereof, in or in relation to any action, suit, cause, matter, or proceeding in or before any such court or judicature, in like manner, and shall be of the same force and effect, as affidavits and affirmations taken in or before such court or judicature, or by any person duly commissioned or authorized by such court or judicature to take such affidavits or affirmations, and shall be filed and dealt with accordingly.

III. Any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any British ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, consul general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any such oath, affidavit, affirmation, or act having been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence, without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person.

IV. Any person knowingly and wilfully making any false oath, affidavit, or affirmation before any person having authority to administer such oath or take such affidavit or affirmation under the said Act of King George the Fourth or this Act, shall be deemed guilty of perjury, and such offender may be charged, proceeded against, tried, and dealt with in any court or place in the United Kingdom in the same manner in all respects as if the offence had been committed in such court or place.

V. If any person shall forge any such seal or signature as aforesaid, or shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of four years, or to be imprisoned, with or without hard labour, for any term not exceeding three years nor less than one year; and whenever any such document has been admitted in evidence by virtue of this Act, the court or the person who has admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period, and subject to such conditions, as to the said court or person shall seem meet; and every person charged with committing any felony under this Act may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed in the county, district, or place in which he may be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed in any county, district, or place in which the principal offender may be tried.

CAP. XLIII.

An Act to enable Infants, with the approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage.
[2nd July, 1855.]

WHEREAS great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property: for remedy whereof be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the passing of this Act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said court, for the purpose of giving effect to such settlement shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years; provided always, that this enactment shall not extend to powers of which it is expressly de-

clared that they shall not be exercised by an infant.

II. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

III. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition presented by the infant or his or her guardian, in a summary way, without the institution of a suit; and if there by no guardian, the court may require a guardian to be appointed or not, as it shall think fit; and the court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

IV. Provided always, that nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years.

CAP. XLIV.

An Act to amend an Act of last Session, to provide for the Establishment of a National Gallery of Paintings, Sculpture, and the Fine Arts, for the Care of a Public Library, and the Erection of a Public Museum, in *Dublin*. [2nd July, 1855.]

WHEREAS an Act was passed in the last session of Parliament, to provide, amongst other things, for the establishment of a National Gallery of Paintings, Sculpture, and the Fine Arts in *Ireland*, and it is expedient to amend the said Act as herein-after mentioned: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. So much of the twelfth section of the said recited Act as enables persons who shall have made a donation to the Governors and Guardians of the National Gallery of *Ireland*, for the purposes of their trust, of not less than two guineas in money, to vote at the election and nomination of persons to fill vacancies in such Governors and Guardians, shall be and the same is hereby repealed; and the privilege of voting at such election and nomination shall extend and apply only to every donor of money to the said Governors and Guardians of a sum not less than ten pounds in money: provided always, that the provisions of the said Act for the election and nomination of Governors and Guardians of the said Gallery shall not hereby be affected, (except as herein-after mentioned), further or otherwise than by substituting donors of not less than ten pounds in money for donors of not less than two guineas in money, as aforesaid.

II. Every person who shall have been a subscriber of a sum not less than ten pounds in money to

any fund raised by public subscription, and appropriated for the purposes of the said National Gallery by the subscribers to such fund or the trustees thereof (by and with the consent of the Governors and Guardians of the said Gallery, or of the Building Trustees created by the said Act of last session for the purposes of their trusts respectively,) shall be deemed a donor of the like sum to the Governors and Guardians of the National Gallery of *Ireland*, and shall be entitled to vote and take part at such elections of Governors and Guardians to the said Gallery as in the said Act and herein-before mentioned.

III. In every case where a subscription exceeding ten pounds in money to the said Governors and Guardians, or to any fund appropriated as aforesaid, shall have been or shall hereafter be made jointly by two or more donors, each of such joint donors shall be entitled to vote at such elections of Governors and Guardians, as herein-before mentioned, in case the amount of such joint subscription when divided by the number of such joint donors shall give a net subscription of ten pounds or upwards for each of such donors, but not otherwise.

IV. At all meetings of the body corporate of the Governors and Guardians of the said National Gallery five shall be a quorum for the transaction of business: provided nevertheless, that no painting, statue, or other work of art shall be purchased for the said gallery, or out of the funds of the said body corporate, unless such purchase shall be authorized by a resolution of the said Governors and Guardians passed at a meeting at which at least nine members of the said body corporate shall be present.

V. It shall be lawful for the governors, directors, or trustees of every public institution, and for the governing body of every corporation, having or which shall have or be possessed, in trust or otherwise, of any statue, painting, or other work of art, and they and every of them are hereby empowered, by and with the consent of the said Governors and Guardians of the National Gallery of *Ireland*, from time to time to deposit the same in the custody and charge of the last-mentioned governors and guardians, for exhibition, for and during such time and times, and subject to such conditions for securing the proper care and preservation of such works of art, as may be agreed upon; and it shall be lawful for the said Governors and Guardians of the National Gallery of *Ireland*, out of the funds of the said body corporate, from time to time to expend such sums of money as they may think proper in defraying the expense of the transmission to and from their gallery and of the insurance of any works of art as may from time to time be lent to or deposited with the said governors and guardians by any public bodies, trustees, or private individuals.

VI. The eleventh section of the said Act of last session shall be and the same is hereby repealed; and each of the Governors and Guardians of the National Gallery of *Ireland*, save and except the first five of them mentioned in the seventh section of the said Act, shall continue to hold office, subject to the provisions of the said Act, for the term of five years at a time from the time of his becoming

ing such governor and guardian, and not longer, but at the expiration of such five years he shall be eligible to be re-appointed or re-elected as such governor and guardian.

VII: This Act shall be construed with the said Act of last session as one Act; and in all acts, deeds, documents, proceedings, suits and prosecutions this Act and the said Act of last session may be cited and described by the name of "The National Gallery of Ireland Acts, 1854-55."

CAP. XLV.

An Act for further assimilating the Practice in the County Palatine of *Lancaster* to that of other Counties with respect to the Trial of Issues from the Superior Courts at *Westminster*.

[16th July, 1855.]

CAP. XLVI.

An Act for disafforesting the Forest of *Woolmer*.

[16th July, 1855.]

CAP. XLVII.

An Act to continue an Act of the Eighteenth Year of Her present Majesty, for charging the Maintenance of certain poor Persons in Unions in *England* and *Wales* upon the Common Fund.

[16th July, 1855.]

CAP. XLVIII.

An Act for the better Administration of Justice in the Cinque Ports.

[16th July, 1855.]

CAP. XLIX.

An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and to extend the Time limited for those purposes respectively.

[16th July, 1855.]

CAP. L.

An Act to amend the Provisions of the Court of Exchequer (*Ireland*) Act, 1850.

[16th July, 1855.]

"WHEREAS by an Act passed in the thirteenth and fourteenth years of the reign of her present Majesty, intitled *An Act for the Transfer of the Equitable Jurisdiction of the Court of Exchequer to the Court of Chancery in Ireland*, it is amongst other things enacted, that on the first day of *August* one thousand eight hundred and fifty the power, authority, and jurisdiction of the Court of Exchequer in *Ireland* as a Court of Equity should be transferred to the Court of Chancery in *Ireland*: and whereas

doubts have arisen as to the powers of the said Court of Chancery with respect to monies since directed by Parliament to be paid into the Bank of *Ireland* as compensation to the credit of the Accountant General of the Court of Exchequer in *Ireland*, and it is expedient to remove such doubts:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same,

I. That where by any Act heretofore passed, whether public, general, or local and personal, any amount or sum of money is authorized or required to be paid into the bank in the name and with the privity of the Accountant General of the Court of Exchequer in *Ireland*, as compensation, under any such Act or any Act incorporated therewith, it shall be lawful to pay such money into the Bank of *Ireland* in the name and with the privity of the Accountant General of the Court of Chancery in *Ireland*, to be placed to his account there, and to be dealt with in like manner as authorized by the recited Act with respect to accounts transferred thereunder from the Court of Exchequer in *Ireland* to the Court of Chancery, and as fully and in all respects, and with the like powers in relation thereto, as if the said Court of Chancery had in any such public, general, or local and personal Act as aforesaid been named therein instead of the Court of Exchequer in *Ireland*.

II. Where any amount or sum of money so authorized or required to be paid into the bank in the name and with the privity of the Accountant General of the Court of Exchequer in *Ireland*, as compensation, under any such Act, has already been paid into the bank in the name and with the privity of the Accountant General of the Court of Chancery in *Ireland*, such payment shall be deemed to have been a good payment, and shall be deemed to have had and shall have the same effect, and the Court of Chancery shall have the like powers in relation thereto, as if the said Court of Chancery had been named in such Act instead of the Court of Exchequer, and as well with respect to any right, interest, or claim of her Majesty, her heirs and successors, as of all other bodies and persons whatsoever.

CAP. LI.

An Act to continue the Exemption of Inhabitants from Liability to be rated as such in respect of Stock in Trade or other Property to the Relief of the Poor.

[16th July, 1855.]

CAP. LII.

An Act to continue appointments under the Act for consolidating the Copyhold and Inclosure Commissions, and for completing Proceedings under the Tithe Commutation Acts.

[16th July, 1855.]

CAP. LIII.

An Act to relieve the *East India* Company from the obligation to maintain the College at *Haileybury*.
[16th July, 1855.]

CAP. LIV.

An Act to enable her Majesty to assent to a Bill, as amended, of the Legislature of *New South Wales*, "to confer a Constitution on *New South Wales*, and to grant a Civil List to her Majesty."
[16th July, 1855.]

CAP. LV.

An Act to enable her Majesty to assent to a Bill, as amended, of the Legislature of *Victoria*, to establish a Constitution in and for the Colony of *Victoria*.
[16th July, 1855.]

CAP. LVI.

An Act to repeal the Acts of Parliament now in force respecting the disposal of the Waste Lands of the Crown in her Majesty's *Australian Colonies*, and to make other provision in lieu thereof.
[16th July, 1855.]

CAP. LVII.

An Act further to amend the Laws relating to the Militia in *England*.
[16th July, 1855.]

CAP. LVIII.

An Act to better enable the Chancellor and Council of the Duchy of *Lancaster* to sell and purchase Land on behalf of her Majesty, her Heirs and Successors, in right of the said Duchy of *Lancaster*.
[16th July, 1855.]

CAP. LIX.

An Act to facilitate Inquiries of Commissioners of Endowed Schools in *Ireland*.
[23rd July, 1855.]

"WHEREAS her Majesty has been graciously pleased, on the address of the Commons in Parliament assembled, to issue her Majesty's Commission, dated the fourteenth day of *November*, in the eighteenth year of her Majesty's reign, to *Charles William Fitzgerald*, Esquire, (commonly called Marquis of *Kildare*), *Charles Graves*, Doctor of Divinity, *Robert Andrews*, Doctor of Laws, one of her Majesty's Counsel learned in the law, *Henry George Hughes*, Esquire, one of her Majesty's Counsel learned in the law, and *Archibald John Stephens*, Esquire, Barrister-at-Law, and thereby authorized and appointed them her Majesty's Commissioners to inquire into the endowments, funds, and actual condition of all schools endowed for the purposes of education in *Ireland*, and the nature and extent of the instruction given in such schools, and to report their opinions thereon; and for the assistance of the said Commissioners, *William Neilson Handcock*, Esquire, was appointed Secretary to the said Commission: and whereas difficulties have been encountered in the prosecution of the said inquiries,

and it is expedient that the said Commissioners should have authority conferred upon them, as herein-after expressed, to carry out the objects of the said Commission, and that one or more Assistant Commissioners should be appointed to act under the said Commissioners and in their aid:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

I. In the construction of this Act the following words and expressions shall, if not inconsistent with the context, have the meaning hereinafter assigned to them; (that is to say.)

The word "Commissioners" shall mean the said Commissioners named in the said Commission, or any three of them;

"Endowed schools" or "schools" shall mean and include all schools of royal foundation in *Ireland*, the schools on the foundation of *Erasmus Smith*, the charter schools and diocesan schools, and all schools endowed on charitable or public foundations in *Ireland*;

"Endowments" shall mean and include the estates, lands, funds, and annual or other income given, granted, or applied for the establishment or support of such schools, or for the purposes of education therein;

And "Lord Lieutenant" shall mean the Chief Governor or Chief Governors of *Ireland* for the time being.

(To be continued.)

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All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

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STATUTES PASSED IN THE 18TH AND 19TH VICTORIA.—1854-5.

(Continued from page 288.)

II. The Commissioners, so soon as conveniently may be, shall meet from time to time at some convenient place, and examine and inquire into the state, condition, and management of all endowed schools in Ireland, and the nature and extent of the instructions given therein, and also into the nature, amount, and annual or other value of the endowments of such schools respectively, and the annual income derived from such endowments, and how the same has been applied, and into such other matters connected with such schools, and the system of education pursued therein, as to the Commissioners shall seem expedient.

III. The Commissioners, or any one or more of them, may repair to any school or to any other place, and there to summon and examine, on oath or otherwise, all and every person or persons touching any matters which they are empowered or directed by this Act to examine or inquire into, and to call for vouchers, books, deeds, evidences, maps, and all other documents, and to examine and inquire into all matters which to the Commissioners shall seem necessary and proper; and the Commissioners are hereby respectively empowered to administer an oath to any person who shall be so examined by or before them.

IV. If any person having charge of any document relating to any of the aforesaid endowed schools, or holding any situation in connection therewith, or having the disposition, control, or management of any money, lands, or other property, for the establishment or support of any such schools, or the purposes of education therein, shall be summoned to appear before the Commissioners or any one or more of them, for the purpose of being examined, or to produce any documents before them, shall refuse to appear or to be examined by the Commissioners or any three of them, or shall refuse to answer such questions as shall be propounded by the Commissioners, or any of them, touching any matter or thing which they are empowered or directed by this Act to examine into,

or shall refuse or neglect to attend before such Commissioners from day to day, when required so to do, or to produce such records, deeds, parchments, books, papers, or writings, or any of them, without good and sufficient cause, to be allowed by the Commissioners, every such person shall forfeit the sum of twenty pounds for every such refusal, neglect, or omission, to be recovered by action in any of her Majesty's Courts of Record, or by civil bill in the Court of any Assistant Barrister, by any person who shall sue for the same.

V. The Commissioners may from time to time, as often as they shall think proper, and as often as they shall be required so to do by the Lord Lieutenant, make a report in writing under their hands and seals, or the hands and seals of any three of them, to her Majesty of all matters arising upon such examinations and inquiries which shall appear to the Commissioners necessary or proper so to be reported, and shall in like manner report and suggest to her Majesty such plans for the improvement of education in such schools and the better management of their endowments, and for the better regulating, managing, and governing such schools, and for the general promotion, in connexion with said schools, of academical education in Ireland, as shall appear to the Commissioners to be expedient and practicable.

VI. The Lord Lieutenant may, on the requisition of the Commissioners, appoint one or more but not exceeding four assistants to the Commissioners, to be called Assistant Commissioners; and the Commissioners may from time to time remove such Assistant Commissioners, and the Lord Lieutenant may, on the requisition of the Commissioners, appoint others in their place; and the remuneration to be paid to such Assistant Commissioners, in addition to their travelling expenses, shall be such sum as the Commissioners of her Majesty's Treasury shall appoint, not exceeding the sum of two hundred pounds for each Assistant Commissioner to be paid out of such aids or supplies as may be from time to time provided and appropriated by Parliament for the purpose.

VII. It shall be the duty of the Assistant Commissioners to act in aid of the Commissioners, and under their directions, in execution of the objects

of this Act, and for that purpose to visit and inspect such of the endowed schools in *Ireland* as the Commissioners shall direct, and to examine into the endowments and state and condition of such schools, and to report thereon to the Commissioners; and such Assistant Commissioners shall have and enjoy the same rights and powers as the Commissioners or any of them might or would have had if they had visited the schools in person.

VIII. Nothing herein contained shall be deemed to abridge, lessen, or affect the powers of the Commissioners under and by virtue of her Majesty's said Commission.

CAP. LX.

An Act for excepting Gold Wedding Rings from the Operation of the Act of the last Session relating to the Standard of Gold and Silver Wares, and from the Exemptions contained in other Acts relating to Gold Wares. [23rd July, 1855.]

CAP. LXI.

An Act to authorize the Inclosure of certain Lands in pursuance of a Special Report of the Inclosure Commissioners for *England* and *Wales*. [23rd July, 1855.]

CAP. LXII.

An Act to amend an Act of the Eighteenth Year of her Majesty, to amend the Laws for the better Prevention of the Sale of Spirits by unlicensed Persons and for the Suppression of illicit Distillation in *Ireland*. [23rd July, 1855.]

"WHEREAS an Act was passed in the session of Parliament holden in the seventeenth and eighteenth years of her Majesty, chapter eighty-nine, entitled *An Act to amend the Laws for the better prevention of the Sale of Spirits by unlicensed Persons and for the Suppression of illicit Distillation in Ireland*, and it is expedient to amend the same:" be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. If any person shall apply for and be refused the certificate in the said Act mentioned, to entitle such person to obtain a renewal of a licence to sell beer, cider, or spirituous liquors in *Ireland*, the justices at petty sessions, or the divisional justices, as the case may be, shall, in the event of thereupon refusing such application, make an order accordingly, and cause an entry thereof to be made by the clerk, together with the grounds of refusal, in like manner as the justices assembled at Quarter Sessions are required to do by an Act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled *An Act to amend the Laws relating to the Sale of Wine, Spirits, Beer, and Cider by Retail in Ireland*.

II. In case any person shall feel aggrieved by

such order of refusal it shall be lawful for such person to appeal against the same to the Quarter Sessions of the division within which such person shall reside, or if in the *Dublin* metropolitan police district to the recorder of the city of *Dublin* at the next Quarter Sessions after such order, but in case there shall not be fifteen clear days between the making of the order and such next Quarter Sessions, then to the Quarter Sessions next following in such division or city, as the case may be; and in such appeal the party opposing such application shall be respondent, and no other ground for refusing such certificate shall be entered upon except such as shall be stated in such order of refusal; and such appeal shall be subject to the like incidents and be heard and dealt with by the Court of Quarter Sessions or recorder in like manner as an appeal from an order of the justices at Petty Sessions under the "*Petty Sessions, Ireland, Act, 1851*," save that the recognizance to be entered into shall be in the form to this Act annexed: provided always, that upon such person having lodged such appeal, and entered into the recognizance, as directed by this Act, the licence affected by such order shall remain in full force and effect, unless and until such Court of Quarter Sessions or Recorder shall confirm the said order of refusal; and such appeal shall not be dismissed upon any point of form: provided, that, notwithstanding anything herein contained, any licence may be withdrawn or annulled under the provisions of any Act or Acts now in force, other than the said first-mentioned Act.

FORM OF RECOGNIZANCE.

A B Appellant. } Petty Sessions District of
C D Respondent. } County of
or Dublin Metropolitan Police District of

WHEREAS the justices [*or, if in the City of Dublin, A B, divisional justice,*] on the day of 18 made an order refusing to grant to the appellant a certificate to entitle him [*her*] to obtain a renewal of a licence to sell beer, cider, or spirituous liquors (*as the case may be,*) upon the grounds that [*state grounds mentioned in the order*]:

The undersigned principal party to this recognizance hereby binds himself [*herself*] to perform the following obligation, that is to say, to prosecute his [*her*] appeal at the Quarter Sessions to be held at and to pay such costs as the Assistant Barrister (Chairman or Recorder,) shall order or direct; and the said principal party, together with the undersigned sureties, hereby severally acknowledge themselves bound to forfeit to the Crown the sums following, that is to say, the said principal party five pounds, and the undersigned sureties the sum of fifty shillings each, in case the principal party fails to perform his [*her*] obligation.

(Signed) A B. (Principal Party.)
E F } (Sureties.)
G H }

Taken before me, this day of 18 at

(Signed) Y Z, (Justice or Divisional Justice.)

CAP. LXIII.

An Act to consolidate and amend the Law relating to Friendly Societies. [23rd July, 1855.]

“WHEREAS it would conduce to the improvement of the law relating to friendly societies if the several statutes relating thereto were consolidated, and certain additions and alterations were made therein: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

I. That there shall be hereby repealed the several Acts or parts of Acts set forth in the first schedule hereto, save and except as to any offences committed, or penalties or liabilities incurred, or bond or security given, or proceedings taken, under the same before the commencement of this Act.

II. Provided nevertheless, that, notwithstanding the repeal of the said several statutes, every friendly society now subsisting, which heretofore had been formed and established under the said Acts or any of them, shall still be deemed to be and shall continue to be a subsisting society, as fully as if this Act had not been made, unless and until such society shall be dissolved, or united with some other society as herein-after mentioned.

III. Provided also, that the rules of every such subsisting society hitherto formed and established, which have been hitherto confirmed, registered, or certified under the said Acts or any of them, shall be deemed valid and in force until the same shall be altered or rescinded as herein-after mentioned; and all transcripts of any of such rules which are now filed with the rolls of the sessions of the peace of any county, riding or division, city or borough, liberty or place, shall be taken off the file, and shall be transmitted, on or before the first day of November, one thousand eight hundred and fifty-five, to the registrar under this Act, to be by him kept in such manner as shall be directed from time to time by one of her Majesty's Secretaries of State in that behalf.

IV. Provided also, that all contracts and engagements by or with any of the said societies now valid and in force, and all bonds and securities heretofore given by any trustee, treasurer, or other officer of any such society, shall continue and be valid and in force notwithstanding the repeal of the said Acts.

V. All such subsisting societies, whose rules have heretofore been confirmed, registered, or certified under the said Acts or any of them, shall, so long as they shall not hereafter effect an assurance to any member thereof, or other person, of any sum exceeding two hundred pounds, or of any annuity exceeding thirty pounds *per annum*, enjoy all the exemptions and privileges by this Act conferred on societies to be established under the provisions of this Act, as fully as if they had been registered and certified under this Act as herein-after mentioned.

VI. For the purposes of this Act, there shall be three registrars of friendly societies, one for *England*, one for *Scotland*, and one for *Ireland*, who shall hold their respective offices during the pleasure of the Commissioners for the Reduction of the

National Debt; and upon the death, resignation, or removal of any one of them, the said Commissioners shall appoint another, being a barrister in *England* or *Ireland*, and in *Scotland* an advocate, of not less than seven years standing, to the said office.

VII. It shall be lawful for the Commissioners of her Majesty's Treasury to pay to the present registrar for *England* a salary equal to that which has been paid to him yearly in each of the three last years, not exceeding one thousand pounds *per annum*, and to pay to any registrar hereafter to be appointed for *England* a salary not exceeding eight hundred pounds a year, and to pay to the registrars for *Scotland* and *Ireland* respectively a salary such as the said Commissioners shall direct not exceeding one hundred and fifty pounds a year, every such salary to be paid by four equal quarterly payments; and any of the said registrars who shall be appointed, or who shall die, resign, or be removed from his office, in the interval between two quarterly days of payment, shall be entitled to a proportionate part of his salary, and such salaries and proportionate parts of salaries shall be paid out of such monies as shall be provided by Parliament for that purpose.

VIII. The said Commissioners of her Majesty's Treasury shall, out of such monies as may be provided by Parliament for the purpose, pay to the said registrars respectively such sum as will defray the expenses allowed by the said Commissioners from time to time for office rent, salaries of clerks, stationery, computation of tables, and for such other expenses as may be incurred by them respectively.

IX. It shall be lawful for any number of persons to form and establish a friendly society, under the provisions of this Act, for the purpose of raising by voluntary subscriptions of the members thereof, with or without the aid of donations, a fund for any of the following objects; (that is to say,)

1. For insuring a sum of money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the wife or child of a member;
2. For the relief or maintenance of the members, their husbands, wives, children, brothers, or sisters, nephews or nieces, in old age, sickness, or widowhood, or the endowment of members or nominees of members at any age;
3. For any purpose which shall be authorized by one of her Majesty's principal Secretaries of State, or in *Scotland* by the Lord Advocate, as a purpose to which the powers and facilities of this Act ought to be extended:

Provided, that no member shall subscribe or contract for an annuity exceeding thirty pounds *per annum*, or a sum payable on death, or on any other contingency, exceeding two hundred pounds:

And if such persons so intending to form and establish such society shall transmit rules for the government, guidance, and regulation of the same, to the registrar aforesaid, and shall obtain his certificate that the same are in conformity with law as hereinafter mentioned, then the said society shall be deemed to be fully formed and established from the date of the said certificate.

X. In any society in which a sum of money may be insured payable on the death of a child under ten years of age, it shall not be lawful to pay any sum for the funeral expenses of such child, except upon production of a copy of the entry in the register of deaths, signed by the registrar of the district in which the child shall have died; and if such entry shall not state that the cause of death has been certified by a qualified medical practitioner, or by a coroner, a certificate signed by a qualified medical practitioner, stating the probable cause of death, shall be required, and it shall not be lawful in that case to pay any sum without such certificate; and no trustee or officer of any society, upon an insurance of a sum payable for the funeral expenses of any such child, made after the passing of this Act, shall knowingly pay a sum which shall raise the whole amount receivable from one or more than one society for the funeral expenses of a child under the age of five years, to a sum exceeding six pounds, or of a child between five and ten years to a sum exceeding ten pounds; and any such trustee or officer who shall make any such payment otherwise than as aforesaid, or who shall pay any such sum without endorsing the amount which he shall pay on the back or at the foot of the copy of entry signed by the said registrar, shall be liable to a penalty not exceeding five pounds for every such offence, upon conviction thereof before two justices of the county or borough in which such death shall have taken place: the said registrar shall be entitled to receive, upon delivery of such copy of entry, for the purpose of receiving money from a friendly society, a fee of one shilling, and it shall not be lawful for him to deliver more than one such copy for such purpose, except by the order of a justice of the peace.

XI. "And whereas many provident, benevolent, and charitable institutions and societies are formed and may be formed for the purpose of relieving the physical wants and necessities of persons in poor circumstances, or for improving the dwellings of the labouring classes, or for granting pensions, or for providing habitations for the members or other persons elected by them, and it is expedient to afford protection to the funds thereof:" be it enacted, that if two copies of the rules of any such institution or society, and from time to time the like copies of any alterations or amendments made in the same, signed by three members and the secretary thereof, shall be transmitted to the registrar aforesaid, such registrar shall, if he shall find that the same are not repugnant to law, give a certificate to that effect; and thereupon the following sections of this Act, that is to say, the seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second, fortieth, forty-first, forty-second, and forty-third, shall extend and be applicable to the said institution and society, as fully as if the same were a society established under this Act.

XII. The Act of the thirty-ninth of *George* the Third, chapter seventy-nine, and the Act of the fifty-seventh of *George* the Third, chapter nineteen, and also the Act of the fourteenth and fifteenth of her present Majesty, chapter forty-eight, relating to unlawful oaths in *Ireland*, shall not extend to any society established under this Act or any of the

Acts hereby repealed, or to any meeting of the members or officers thereof in which society or at which meeting no business whatever is transacted other than that which directly and immediately relates to the objects of the society as declared in the rules thereof, and set forth in the certified copy thereof: provided, that the trustees or other officers of the society, when required under the hands of two of her Majesty's Justices of the Peace, shall give full information to such justices of the nature, objects, proceedings, and practices of such society, and in default thereof the provisions of the Acts herein recited shall be in force in respect of such society.

XIII. It shall be lawful for the members of any society heretofore formed and established, or hereafter to be formed and established, at some meeting thereof to be specially called in that behalf, to dissolve or determine the same by consent: provided that no society established under this or any Act relating to friendly societies shall be dissolved or determined without obtaining the votes of consent of five-sixths in value of the then existing members thereof, including the honorary members, if any, to be ascertained in manner herein-after mentioned, nor without the consent of all persons, if any, then receiving or then entitled to receive any relief, annuity, or other benefit from the funds thereof, to be testified under their hands individually and respectively, unless the claim of every such person be first duly satisfied, or adequate provision made for satisfying such claim; and for the purpose of ascertaining the votes of such five-sixths in value of the members as aforesaid, every member shall be entitled to one vote, and an additional vote for every five years that he may have been a member, but no one member shall have more than five votes in the whole, and the intended appropriation or division of the funds or other property shall be fairly and distinctly stated in the agreement for dissolution prior to such consent being given; and the agreement for such dissolution duly signed as aforesaid, accompanied with a statutory declaration by one of the trustees, or by three members and the secretary, taken before a Justice of the Peace, that the provisions of this Act have been complied with, shall be forthwith transmitted to the registrar, to be by him deposited with the rules of the society, and such agreement shall thereupon be an effectual discharge at law and in equity to the trustees, treasurers, and other officers of such society, and shall operate as a release from all the members of the society to such trustees, treasurers, and other officers; and it shall not be lawful in any society to direct a division or appropriation of any part of the stock thereof, except for the purpose of carrying into effect the general interests and objects declared in the rules as originally certified, unless the claim of every member is first duly satisfied, or adequate provision be made for satisfying such claims; and in case any member of such society shall be dissatisfied with such provision, it shall be lawful for him or her to apply to the judge of the county court of the district within which the usual place of business of the society is situated for relief or other order; and the said judge shall have the same powers to entertain

such application, and to make such order or direction in relation thereto, as he may think the justice of the case may require, as herein-after is enacted in regard to the settlement of disputes; and in the event of the dissolution or determination of any society, or the division or appropriation of the funds thereof, except in the way herein-before provided, any trustee or other officer or person aiding or abetting therein shall, on conviction thereof by two justices, be committed to the common gaol or house of correction, there to be kept to hard labour for any term not exceeding three calendar months, as to such justices shall seem meet.

XIV. It shall be lawful for any two or more societies established under this or any of the Acts hereby repealed to unite and become incorporated in one society, with or without any dissolution or division of the funds of such societies or either of them; or a society formed and established under this Act or any of the said repealed Acts may be allowed to transfer its engagements to any other friendly society, if any other such society shall undertake to fulfil the engagements of such society, upon such terms as shall be agreed upon by the major part of the trustees, and also of the committee of management of both societies, or the majority of the members of each of such societies at a general meeting convened for the purpose.

XV. A person under the age of twenty-one may be elected or admitted as a member of any society established under this Act or any of the Acts hereby repealed, the rules of which do not prohibit such election, and may and he is hereby empowered to execute all necessary instruments, and to give all necessary acquittances: provided always, that during his nonage he shall not be competent to hold any office of director, trustee, treasurer, or manager of such society.

XVI. It shall be lawful for the trustee or trustees for the time being of any friendly society formed and established under this Act or under any of the Acts hereby repealed, with the consent of a majority of the members thereof present at a special or general meeting of the society, to purchase, build, hire, or take upon lease any building for the purpose of holding such meetings, and to adapt and furnish the same, and to purchase or hold upon lease any land not exceeding one acre for the said purpose of erecting thereon a building for holding the meetings of the society, and such trustee or trustees shall thereupon hold the same in trust for the use of such society; and, with the like consent as aforesaid, such trustee or trustees may mortgage, sell, exchange, or let such building or any part thereof; and the receipt in writing of such trustee, or one of such trustees for the time being, shall be a legal discharge for the money arising from such mortgage, sale, exchange, or letting; and no mortgagee, purchaser, tenant, or assignee shall be bound to inquire into or ascertain or prove the consent aforesaid, to verify his title: provided always, that any building purchased or appropriated for the purpose aforesaid already belonging to or in the possession of any friendly society heretofore formed and established under the said repealed Acts or any of them may be holden and dealt with as if it had

been acquired under this Act; and the land or buildings which may be vested in the treasurer, trustee, or other officer thereof for the time being shall thereupon vest in the trustee or trustees for the time being of such society, for the same estate and interest as the said treasurer, trustee, or other officer may have therein, without any conveyance or assignment whatever: provided nevertheless, that all money spent in purchasing, building, hiring or taking upon lease any building for the purpose of holding such meetings, and in adapting and furnishing the same, be raised according to the rules of the society on such behalf inserted; and this section shall apply to any society registered under the industrial and Provident Societies Act, 1852, and to any building or land to be purchased, built, hired, or taken on lease, for the purposes of the labour, trade, or handicraft of such society, in all respects as hereby enacted with regard to any building or land for the holding the meetings of any friendly society.

XVII. Every friendly society established under this Act shall, at some meeting of its members, and by a resolution of a majority of the members then present, nominate and appoint one or more person or persons to be trustee or trustees for the said society, and the like in the case of any vacancy in the said office; and a copy of the resolution so appointing such person or persons to the office of trustee, and signed by such trustee or trustees and by the secretary of the said society, shall be sent to the registrar, to be by him deposited with the rules of the said society in his custody: provided always, that where no trustee shall have been appointed in any society established under any one of the Acts hereby repealed, the treasurer thereof, or other person who has custody of the monies of such society, shall be taken to be a trustee within the meaning of this Act.

XVIII. All real and personal estate whatsoever belonging to any such society established under this Act or any of the Acts hereby repealed shall be vested in such trustee or trustees for the time being, for the use and benefit of such society and the members thereof, and the real or personal estate of any branch of a society shall be vested in the trustees of such branch, and be under the control of such trustee or trustees, their respective executors or administrators, according to their respective claims and interest, and upon the death or removal of any such trustee or trustees the same shall vest in the succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of *Great Britain and Ireland*, which shall be transferred into the name or names of such new trustee or trustees; and in all actions or suits or indictments, or summary proceedings before magistrates, touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee, in his or their proper name or names, as trustees of such society, without any further description.

XIX. The trustee or trustees of any such society are hereby authorized to bring or defend, or cause to be brought or defended, any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right, or claim to property of the society for which he or they are such trustee or trustees as aforesaid: and such trustee or trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded, in any court of law or equity, in his or their proper name or names as trustee or trustees of such society, without other description; and no such action, suit, or prosecution shall be discontinued or shall abate by the death of such person, or his removal from the office of trustee, but the same shall and may be proceeded in by or against the succeeding trustee or trustees as if such death or removal had not taken place; and such succeeding trustee or trustees shall pay or receive the like costs as if the action or suit or prosecution had been commenced in his or their name or names, for the benefit of or to be reimbursed from the funds of such society.

XX. Provided nevertheless, that no trustee or trustees of any such society shall be liable to make good any deficiency which may arise or happen in the funds of such society, but shall be liable only for the monies which shall be actually received by him on account of such society.

XXI. The treasurer of every such society, and every treasurer hereafter appointed in any society established under any of the repealed Acts, or any other officer who is required by the rules to give security, shall, before he take upon himself the execution of his office, become bound, with one sufficient surety, in a bond according to the form set forth in the third schedule to this Act, or give the security of a guarantee society established in *London*, in such penal sum as the society or the committee of management shall direct and appoint, conditioned for his just and faithful execution of his said office of treasurer, and for rendering a just and true account of all monies received or paid by him on account of the said society at such times as the rules of the said society shall direct and appoint, and at such times as he shall be required so to do by the trustee or trustees of the said society, or by a majority of the said committee of management, or by a majority of the members present at any meeting of such society; and every such bond shall be given to the trustee or trustees of the said society for the time being; and if the same shall at any time become forfeited, it shall be lawful for such trustee or trustees for the time being to sue upon such bond for the use of such society; and in *Scotland* such bond shall have the same force and effect as a bond there in use duly attested and completed, and containing a clause of registration for execution as well as for preservation in the books of council and session and other judges books competent, and shall be registered in such books accordingly, with a view to diligence.

XXII. Every such treasurer or other officer, whether appointed before or after the passing of this Act, at such times as by the rules of such so-

ciety he should render such account as aforesaid, or upon being required so to do by the trustee or trustees of such society, or by a majority of the said committee of management, or by a majority of the members present at a meeting of the said society as aforesaid, within seven days after such requisition shall render to the trustee or trustees of the society, or to the said committee of management, or to the members of such society at a meeting of the society, a just and true account of all monies received and paid by him since he last rendered the like account, and of the balance then remaining in his hands, and of all bonds or securities of such society, which account the said trustee or trustees or committee of management shall cause to be audited by some fit and proper person or persons by them to be appointed; and such treasurer, if thereunto required, upon the said account being audited, shall forthwith hand over to the said trustee or trustees the balance which on such audit shall appear to be due from him, and shall also, if required, hand over to such trustee or trustees all securities and effects, books, papers, and property of the said society in his hands or custody; and if he fail to do so, the trustee or trustees of the said society may sue upon the bond aforesaid, or may sue such treasurer in the county court of the district, or in any of the Superior Courts of Common Law, or in any other court having jurisdiction, for the balance appearing to have been due from him upon the account last rendered by him, and for all the monies since received by him an account of the said society, and for the securities and effects, books, papers, and property in his hands or custody, leaving him to set off in such action the sums, if any, which he may have since paid on account of the said society; and in such action the said trustee or trustees shall be entitled to recover their full costs of suit, to be taxed as between attorney and client.

XXIII. If any person already appointed or employed or hereafter to be appointed or employed to or in any office in any friendly society established under this Act or under any of the Acts hereby repealed, whether such appointment or employment was before or after the legal establishment of such society, and having in his hands or possession, by virtue of his office, any monies or property whatsoever of such society, or any deeds or securities belonging to such society, shall die, or become bankrupt or insolvent, or have any execution or attachment or other process issued against him or any part of his property, or shall have any action or diligence raised against his lands, goods, chattels, or effects, or property or other estate, heritable or moveable, or shall make any assignment, disposition, assignation, or other conveyance for the benefit of his creditors, the heirs, executors, administrators, or assignees of every such officer, and every other person having or claiming right to the property of such officer, and the sheriff or other person executing such process, and the party using such action or diligence respectively, shall, upon demand in writing made by the treasurer or by the trustee or any two of the trustees of such society, or any person appointed at some meeting of the society to make such demand, deliver and pay over

all such monies, property, deeds, and securities belonging to such society to such person as such treasurer or trustees shall appoint, and shall pay, out of the estate, assets, or effects, heritable or moveable, of such officer, all sums of money due which such officer shall have received, before any other of his debts are paid, and before any other claims upon him shall be satisfied, and before the money directed to be levied by such process aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence; and all such assets, lands, goods, chattels, property, estates, and effects shall be bound to the payment, discharge, and satisfaction of such claims.

XXIV. If any officer, member, or other person, being or representing himself to be a member of such society, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition, shall obtain possession of any monies, securities, books, papers, or other effects of such society, or having the same in his possession shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such society, or any part thereof, it shall be lawful in *England* for any Justice of the Peace acting in the county or borough in which the place of business of such society shall be situated, upon complaint made by any person on behalf of such society, to summon the person against whom such complaint is made to appear at a time and place to be named in such summons; and any two justices present at the time and place mentioned in such summons shall proceed to hear and determine the said complaint, in manner directed by the Act passed in the eleventh and twelfth years of her present Majesty, chapter forty-three; and in *Scotland* every such offence may be prosecuted by summary complaint at the instance of the procurator fiscal of the county, or of the society, with his concurrence, before the sheriff; and if the said justices or sheriffs respectively shall determine the said complaint to be proved against such person, they shall adjudge and order him to deliver up all such monies, securities, books, papers, or other effects to the society, or to repay the amount of money applied improperly, and to pay, if they think fit, a further sum of money not exceeding twenty pounds, together with costs not exceeding twenty shillings; and, in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid, the said justices or sheriffs may order the said person so convicted to be imprisoned in the common gaol or house of correction, with or without hard labour, for any time not exceeding three months: provided, that nothing herein contained shall prevent the said society, or in *Scotland* her Majesty's advocate, from proceeding by indictment against the said party: provided also, that no person shall be proceeded against by indictment if a conviction shall have been previously obtained for the same offence under the provisions of this Act.

XXV. Before any friendly society shall be established under this Act, the persons intending to es-

tablish the same shall agree upon and frame a set of rules for the regulation, government, and management of such society; and in such rules they may, amongst other things, make provision for appointing a general committee of management of such society, and delegating to such committee all or any of the powers given by this Act to the members of friendly societies formed or established under or by virtue of the same; and such rules shall set forth,

1. The name of the society and place of meeting for the business of the society:
2. The whole of the objects for which the society is to be established, the purposes for which the funds thereof shall be applicable, and the conditions under which any member may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any member of such society:
3. The manner of making, altering, amending, and rescinding rules:
4. A provision for the appointment and removal of a general committee of management, of a trustee or trustees, treasurer, and other officers:
5. A provision for the investment of the funds, and for an annual or periodical audit of accounts:
6. The manner in which disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled:

And the rules of every such society shall provide that all monies received or paid on account of each and every particular fund or benefit assured to the members thereof, their husbands, wives, children, fathers, mothers, brothers or sisters, nephews or nieces, for which a separate table of contributions payable shall have been adopted, shall be entered in a separate account, distinct from the monies received and paid on account of any other benefit or fund, and also that a contribution shall be made to defray the necessary expenses of management, and a separate account shall be kept of such contributions and expenses.

XXVI. Two printed or written copies of such rules, signed by three of the intended members and the secretary or other officer, shall be transmitted to the registrar aforesaid, and the said registrar shall advise with the secretary or other officer, if required, for the purpose of ascertaining whether the said rules are calculated to carry into effect the intentions and object of the persons who desire to form such society, and if the registrar shall find that such rules are in conformity with law and with the provisions of this Act, he shall give a certificate in the form set forth in the second schedule to this Act, and shall return one of the said copies to the said society, and shall keep the other in such manner as shall from time to time be directed by one of her Majesty's principal Secretaries of State, and for which certificate no fee shall be payable to the said registrar; and all rules, when so certified as aforesaid, shall be binding on the several members of the said society: provided always, that it shall not be lawful for the said registrar to grant any

such certificate to a society assuring to any member thereof a certain annuity or certain superannuation, deferred or immediate, unless the tables of contributions payable for such kind of assurance shall have been certified under the hand of the actuary to the Commissioners for Reduction of the National Debt, or by an actuary of some life assurance company established in *London, Edinburgh, or Dublin*, who shall have exercised the profession of actuary for at least five years, and such certificate be transmitted to the registrar, together with the copies of the rules aforesaid.

XXVII. After the rules of a friendly society shall have been so certified by the registrar as aforesaid, it shall be lawful for such society, by resolution at a meeting specially called for that purpose, to alter, amend, or rescind the same or any of them, or to make new rules; and it shall be lawful for any friendly society formed and established under any of the Acts hereby repealed to alter, amend, or rescind the rules by which their society is governed, regulated, or managed, or to make new rules: provided always, that two copies of the proposed alterations or amendments, and of such new rules, signed by three members of such society, and the secretary or other officer, shall be transmitted to the said registrar, to one of which shall be attached a declaration by the secretary or one of the officers of such society, that in making the same the rules of such society respecting the making, altering, amending, and rescinding rules, or the directions of the Act under which such society was established, have been duly complied with; and if the said registrar shall find that such alterations, amendments, or new rules are in conformity with law, he shall give to the society a certificate in the form set forth in the schedule to this Act, and return one of the copies to the society, and shall keep the other, with the rules of such society, in his custody, and for which certificate no fee shall be payable to the said registrar, and as against such member or person such certificate shall be conclusive of the validity thereof; and all rules, alterations, and amendments, when so certified as aforesaid, shall be binding on the several members of the said society, and all persons claiming on account of a member or under the said rules; but unless and until the same shall be so certified as aforesaid, such rules, alterations, and amendments shall have no force or validity whatsoever.

XXVIII. Whenever any friendly society established under this Act or under any of the Acts hereby repealed shall change its place of business, notice of such change, under the hands of two of the trustees or three members and secretary or other officer, shall, within fourteen days thereafter, be sent to the said registrar.

XXIX. If any person shall give to any member of a friendly society established under this Act or under any of the said repealed Acts, or to any person intending or applying to become a member of such society, a copy of any rules, or of any alterations or amendments of the same, other than those respectively which have been enrolled with any clerk of the peace or certified by the registrar, with a copy

of his certificate appended thereto, under colour that the same are binding upon the members of such society, or shall make any alterations in or addition to any of the rules or tables of such society after they shall have been respectively enrolled or certified by the registrar, and shall circulate the same, purporting that they have been duly enrolled or certified under this or any of the said repealed Acts, when they have not been so duly enrolled or certified, every person so offending shall be deemed guilty of a misdemeanor.

XXX. All rules and tables of any society established under this Act or any of the said repealed Acts, and all alterations and amendments thereof, and all copies thereof or extracts therefrom, and all writings and documents relating to a friendly society, and purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary be received in all courts of law and equity, and elsewhere, without proof of the signature thereto.

(To be continued.)

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STATUTES PASSED IN THE 18TH AND 19TH VICTORIA.—1854-5.

(Continued from page 296.)

XXXI. When, on the death of any member of a society established under this Act or any of the said repealed Acts, a sum of money not exceeding fifty pounds shall become payable, the same shall be paid by the trustees of such society to the person directed by the rules thereof, or nominated by the deceased, in writing deposited with the secretary (such person being the husband, wife, father, mother, child, brother or sister, nephew or niece of such member); and in case there shall be no such direction or nomination, or the person so nominated shall have died before the deceased member, or in case the member shall have revoked such nomination, then such sum shall be paid to the person who shall appear to the said trustees to be entitled under the Statute of Distributions to receive the same, without taking out letters of administration in *England* or *Ireland*, and without confirmation in *Scotland*: provided, that wherever the trustee or trustees of any such society, after the decease of any member thereof, shall have paid and divided any such sum of money to or amongst any person or persons who shall at the time of such payment appear to such trustee or trustees to be entitled to the effects of any deceased member who has died intestate, without having appointed any nominee as aforesaid, the payment of any such sum shall be valid and effectual with respect to any demand from any other person or persons as next of kin of such deceased member, or as the lawful representative or representatives of such member, against the funds of such society or against the trustees thereof; but nevertheless such next of kin or representative shall have his or her lawful remedy for such money so paid as aforesaid against the person or persons who shall have received the same.

XXXII. The trustee or trustees of every friendly society established under this Act or any of the said repealed Acts shall from time to time, with the consent of the committee of management of such society, or of a majority of the members of such society present at a general or special meeting

thereof, or in accordance with the rules of such society, invest the funds of such society, or any part thereof, to any amount, in any savings bank, or in the public funds, or with the Commissioners for the Reduction of the National Debt, as herein-after mentioned, or in such other security as the rules of such society may direct, not being the purchase of house or land, (save and except the purchase of buildings wherein to hold the meetings or transact the business of such society, as hereinbefore mentioned,) and not being the purchase of shares in any joint stock company or other company, with or without charter of incorporation, and not being personal security, except in the case of a member of one full year's standing at least, and in respect of a sum not exceeding one half the amount of his assurance on life, such member providing the written security of himself and two satisfactory sureties for repayment, and in case of such member's death before repayment the amount of such advance, with interest, may be deducted from the sum so assured, without prejudice in the meantime to the operation of such security.

XXXIII. Every friendly society established under this Act which does not assure the payment in any event of a sum exceeding two hundred pounds, or an annuity exceeding thirty pounds *per annum*, may pay any sum of money not less than fifty pounds into the bank of *England* or *Ireland*, to the account of the Commissioners for the Reduction of the National Debt, upon the declaration of the trustee or of the trustees, or any two or more of them, that such monies belong exclusively to the said society; and the cashier of the Bank of England is hereby required to receive all such monies, and to place the same to the account raised in the name of the said Commissioners in the book of the bank, named "The Fund for Friendly Societies;" and if such declaration shall not be true, then and in every such case the sum of money so paid in on such declaration shall be forfeited to the said Commissioners, and shall be applied by them in the manner directed by any Act or Acts for the time being in force relating to savings banks with respect to the account of such banks; and the regulation of receipts, certificates, or orders concerning savings banks shall be deemed applicable to monies paid in as aforesaid

under the authority of this Act, as if the same had been herein repeated; and every such society, on paying money directly into the bank as aforesaid, shall be entitled to receive receipts bearing interest at the rate of twopence *per centum per diem*: provided, that every society which shall deposit any part of its funds in any savings bank, or with the Commissioners for Reduction of the National Debt, shall furnish to the said Commissioners from time to time such accounts as they may require in reference to the funds so deposited.

XXXIV. Every society already established under any of the Acts hereby repealed, which shall have heretofore invested any part of its funds with the Commissioners for the Reduction of the National Debt, shall be entitled to pay into the Bank of *England* or *Ireland*, in sums of not less than fifty pounds, money received from members on account of assurances made before the passing of this Act, and to receive receipts for the same bearing interest at such rate or rates as such society has hitherto been entitled to receive on account of such assurances; that is to say, for money invested with the Commissioners by any society legally established before the twenty-eighth day of *July* in the year one thousand eight hundred and twenty-eight, on account of any assurance made before the fifteenth day of *August* in the year one thousand eight hundred and fifty, threepence *per centum per diem*; and on account of any assurance effected after that day, twopence *per centum per diem*; and for money invested with the Commissioners by any society established between the twenty-eighth day of *July* in the year one thousand eight hundred and twenty-eight and the fifteenth day of *August* in the year one thousand eight hundred and fifty, on account of assurances made before the fifteenth day of *August* in the year one thousand eight hundred and fifty, twopence halfpenny *per centum per diem*; and on account of any assurance effected after that day, twopence *per centum per diem*; and for money invested with the Commissioners by any society established since the fifteenth day of *July* one thousand eight hundred and fifty, the sum of twopence *per centum per diem*: provided that the trustees of every society which shall have invested or shall invest any part of its funds with the said Commissioners shall furnish from time to time such accounts and returns as the said Commissioners shall require, and shall satisfy the said Commissioners that they are legally entitled to receive such interest as aforesaid, and to make such further investment.

XXXV. Where any friendly society shall withdraw money invested by them with the Commissioners for the Reduction of the National Debt, such society shall not be entitled to make any further deposit with the said Commissioners without the consent of the said Commissioners, or of the comptroller general or assistant comptroller under them.

XXXVI. Whenever it shall happen that any person, being or having been a trustee of any society established under this Act or any Act hereby repealed, and whether he shall have been appointed before or after the legal establishment thereof, in whose name any part of the several stocks, annuities, and funds belonging to any such society, trans-

ferable at the Bank of *England* or *Ireland*, or in the books of the Governor and Company of the Bank of *England* or *Ireland*, or in any savings bank, is or shall be standing, shall be out of *England* or *Ireland* or *Scotland* respectively, or shall have been removed from his office of trustee, or shall be a bankrupt, insolvent, or lunatic, or it shall be unknown whether such trustee is living or dead, it shall be lawful for the registrar, after receiving an application in writing from the secretary of the society and three members thereof, and upon proof satisfactory to such registrar, to direct the Accountant General or other proper officer for the time being of the said Governor and Company of the Bank of *England* or *Ireland*, or of any savings bank, to transfer in the books of the said company or of the said savings bank such stocks, annuities, or funds, standing as aforesaid, into the name of the trustee who shall be newly appointed, and to pay to him from time to time the dividends thereof; and if one of two or more such trustees shall die, or be removed from his office of trustee, or become bankrupt or insolvent, it shall be lawful for the registrar, on the like application, to direct that the other or others of the trustees shall transfer such stocks, annuities, or funds into the name of such person as may have been appointed in his stead, jointly with the continuing trustee or trustees.

XXXVII. No copy of rules, nor power, warrant, or letter of attorney granted by any person as trustee of any society established under this Act or any of the Acts hereby repealed, for the transfer of any share in the public funds standing in the name of such trustee, nor any order or receipt for money contributed to or received from the funds of any such society, by any person liable or entitled to pay or receive the same by virtue of the rules thereof or of this Act, nor any bond to be given to or on account of any such society, or by the treasurer or any officer thereof, nor any draft or order, nor any form of policy, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other document whatever required or authorized by or in pursuance of this Act or the rules of any society, shall be liable to stamp duty: provided, that no exemption from any of the duties granted by any Act or Acts relating to stamp duties shall be deemed to extend to any society which shall assure the payment of money exceeding two hundred pounds, or which shall assure the payment of any money on the death of a member to any person, except executors, administrators, or assigns of such member, or the husband, wife, father, mother, child, brother, sister, nephew, or niece of such member.

XXXVIII. If any person shall become a member of more than one society, whereby certain benefits shall accrue on account of the same kind of assurance from more than one society, it shall not be lawful for him, or for any person entitled through or under him or by reason of his membership, or for any number of such persons in the aggregate, to receive more than two hundred pounds, or, in the case of annuities, thirty pounds a year from such societies collectively; and in any case where a person shall so as aforesaid be a member of more

than one society, and he, or any other person or persons, shall be entitled to any benefit in gross or by way of annuity from any such society, he, or (as the circumstances may require) every such other person, shall, before he shall receive any such benefit from any of such societies, make and sign a declaration that the total value of all benefits accruing or which shall have accrued in respect of any one kind of assurance does not exceed the value of two hundred pounds, or, in the case of annuities, thirty pounds a year; and it shall be lawful for any society to require any member or any other person who shall be entitled to any such benefit, before he shall receive the same, to make and sign a declaration to the same effect, or that such member was not, when the benefit accrued, a member of any other association; and if any person shall knowingly make any false or fraudulent declaration in any such case he shall be guilty of misdemeanor.

XXXIX. The trustees of any friendly society may, out of the funds thereof, subscribe to any hospital, infirmary, charitable or other provident institution, such annual or other sum as may be agreed upon by the committee of management, or by a majority of the members at a meeting called for that purpose, in consideration of any member of such society, his wife, child, or other person nominated, being eligible to receive the benefits of such hospital or other institution, according to the rules thereof.

XL. Every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal: provided that where the rules of any society established under any of the Acts hereby repealed shall have directed disputes to be referred to justices, such disputes shall, from and after the first day of *August* one thousand eight hundred, and fifty-five, be referred to and decided by the county court as herein-after mentioned.

XLI. In all friendly societies established under this Act or any of the said repealed Acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member or under the rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such applica-

tion, as herein after mentioned, or as may now be given or made by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county court upon and in relation to such application as aforesaid shall not be subject to any appeal: provided always, that in *Scotland* the sheriff within his county, and in *Ireland* the Assistant Barrister within his district, shall have the same jurisdiction as is hereby given to the judge of a county court.

XLII. In all cases where the order of such county court shall be for the payment of money, the same may be enforced in the same manner as the ordinary judgments of such court are enforced; but where the order of the said court shall be for the doing of some act, not being for the payment of money, it shall be lawful for the judge of such county court in his said order to order the party to do such act, or that in default of his doing it he shall pay a certain sum of money; and in case he refuse or neglect to do the act required, upon demand in that behalf, the sum of money or penalty in the said order may then be recovered in the same manner as a judgment for debt or damages in such court; and it shall not be lawful to remove the same by certiorari or other writ or process to any superior court of record.

XLIII. Provided, however, that the Lord Chancellor may make such orders for regulating the proceedings by and before the judges of county courts under this Act as he may think fit; and in *Scotland* the Court of Session shall have the like power by act of sederant as regards proceedings before sheriffs under this Act; and, subject to such orders and acts of sederant respectively, such judges and sheriffs may regulate the proceedings before them respectively so as to render them as summary and inexpensive as conveniently may be.

XLIV. In the case of any friendly society established for any of the purposes mentioned in section IX. of this Act, or for any purpose which is not illegal, having written or printed rules, whose rules have not been certified by the registrar, provided a copy of such rules shall have been deposited with the registrar, every dispute between any member or members of such society, and the trustees, treasurer, or other officer, or the committee of such society, shall be decided in manner herein-before provided with respect to disputes, and the decision thereof, in the case of societies to be established under this Act, and the sections in this Act, provided for such decision, and also the section in this Act which enacts a punishment in case of fraud or imposition by an officer, member, or person, shall be applicable to such uncertified societies: provided always, that nothing herein contained shall be construed to confer on any such society whose rules shall not have been certified by the registrar, or any of the members or officers of such society, any of the powers, exemptions, or facilities of this Act, save and except as in and by this section is expressly provided.

XLV. The trustees of friendly societies established under this Act or under any of the repealed Acts, or the officer thereof appointed to prepare returns, shall, once in every year, in the months of

January, February, or March, transmit to the registrar a general statement of the funds and effects of such society during the past twelve months, or a copy of the last annual report of such society, and shall also, within three months after the expiration of the month of *December* one thousand eight hundred and fifty-five, and so again within three months after the expiration of every five years succeeding, transmit to the said registrar a return of the rate or amount of sickness and mortality experienced by such society within the preceding five years, in such form as shall be prepared by the said registrar, and an abstract of the same shall be laid before Parliament; and the registrar shall also lay before Parliament every year a report of his proceedings, in his office of registrar, and of the principal matters transacted by friendly societies which have come under his cognizance during the past year.

XLVI. "And whereas under the provisions of the Acts hereby repealed, or some of them, certain associations or societies have been formed in *England* and *Ireland* for the provident and charitable purpose of securing annual payments to the nominees of the members thereof, contingent upon the death of such members, and have invested their funds in the manner provided by such Acts, and doubts may arise whether such associations or societies will be entitled to the exemptions and privileges by this Act conferred in the event of such annual payments amounting in the aggregate to more than thirty pounds; and it is expedient to remove such doubts, and to give protection to such associations or societies, and to the funds thereof; be it therefore enacted, that notwithstanding anything in this Act contained to the contrary, all such associations or societies as were founded and subsisting under the provisions of the said Acts previously to the fifteenth day of *August*, one thousand eight hundred and fifty, shall enjoy the exemptions and privileges by this Act conferred on societies to be established under the provisions of this Act as fully as if they had been registered and certified under this Act, and notwithstanding that the contingent annual payments to which the nominees of the present or future members of such associations or societies may become entitled shall exceed in the aggregate the sum of thirty pounds.

XLVII. In any case where the rules of any society already enrolled or certified have provided that a member shall be deprived of any benefit by reason of his enrolment or service in the militia, it shall be lawful for the trustees of such society to require of any member a contribution exceeding the rate of contribution hitherto payable by such member, to an amount not exceeding one tenth of such rate, during the time such member shall be serving out of the United Kingdom, or to suspend all claim of such member to any benefits of such society, and all claim of the society to any contributions payable by such member, during the time he may be serving in the militia out of the United Kingdom, provided that such suspension shall cease so soon as the said member shall return to the United Kingdom, and he shall thereupon be replaced on the same footing as before he went abroad with the regiment to which he belongs.

XLVIII. All the provisions of this Act shall apply to all societies constituted under the Industrial and Provident Societies Act, 1852, in the same manner as the laws in force relating to friendly societies at the date of the passing of the said Industrial and Provident Societies Act, 1852, are by the said last-mentioned Act directed to apply to societies constituted thereunder; and the limitation hereinbefore contained of the amount of annuities and sums payable on the death of any person, or on any other contingency, in the case of societies established under this Act, shall apply to all societies constituted under the said Industrial and Provident Societies Act, 1852.

XLIX. The word "society" shall extend to and include every branch of a society, by whatever name it may be designated.

L. This Act shall extend to *Great Britain* and *Ireland*, and the Channel Isles and the *Isle of Man*.

LI. This Act shall commence and take effect from the first day of *August*, one thousand eight hundred and fifty-five.

SCHEDULES referred to by the foregoing Act.

FIRST SCHEDULE.

NOTE.—The words printed in *Italics* show the extent of repeal.

33 Geo. 3, c. 54.—An Act for the Encouragement and Relief of Friendly Societies.—*The whole Act.*

35 Geo. 3, c. 111.—An Act for more effectually carrying into execution an Act made in the thirty-third year of the reign of his present Majesty, intitled "An Act for the Encouragement and Relief of Friendly Societies," and for extending so much of the powers thereof as relates to the framing Rules and Regulations for the better Management of the Funds of such Societies, and the Appointment of Treasurers to other Institutions of a charitable Nature.—*The whole Act.*

36 Geo. 3, c. 68, (Irish).—An Act for the Encouragement and Relief of Friendly Societies.—*The whole Act.*

43 Geo. 3, chapter 111.—An Act for enabling Friendly Societies intended to be established under an Act passed in the Thirty-third Year of the reign of his present Majesty to rectify mistakes made in the Registry of their Rules.—*The whole Act.*

49 Geo. 3, c. 58.—An Act to explain and render more effectual an Act passed in the Parliament of Ireland, in the Thirty-sixth Year of his present Majesty's Reign, for the Encouragement and Relief of Friendly Societies.—*The whole Act.*

49 Geo. 3, cap. 125.—An Act to amend an Act made in the Thirty-third Year of his present Majesty for the Encouragement and Relief of Friendly Societies.—*The whole Act.*

59 Geo. 3, c. 128.—An Act for further Protection and Encouragement of Friendly Societies, and for preventing Frauds and Abuses therein.—*The whole Act.*

6 Geo. 4, c. 74.—An Act for consolidating and amending the Laws relating to Conveyances and

Transfers of Estates and Funds vested in Trustees who are Infants, Idiots, Lunatics, or Trustees of unsound Mind, or who cannot be compelled or refuse to act: and also the Laws relating to Stocks and Securities belonging to Infants, Idiots, Lunatics, and Persons of unsound Mind.—*So much of Section 11, as relates to Friendly Societies.*

10 Geo. 4, cap. 56.—An Act to consolidate and amend the Laws relating to Friendly Societies.—*The whole Act.*

2 W. 4, cap. 37.—An Act to amend an Act of the Tenth Year of his late Majesty King George the Fourth, by extending the Time within which pre-existing Societies must conform to the provisions of that Act.—*The whole Act.*

4 & 5 W. 4, c. 40.—An Act to amend an Act of the Tenth Year of his late Majesty King George the Fourth, to consolidate and amend the Laws relating to Friendly Societies.—*The whole Act.*

3 & 4 Vict., cap. 73.—An Act to explain and amend the Acts relating to Friendly Societies.—*The whole Act.*

9 & 10 Vict., cap. 27.—An Act to amend the Laws relating to Friendly Societies.—*The whole Act.*

13 & 14 Vict., cap. 115.—An Act to consolidate and amend the Laws relating to Friendly Societies.—*The whole Act.*

15 & 16 Vict., c. 65.—An Act to continue and amend an Act passed in the Fourteenth Year of the Reign of her present Majesty, to consolidate and amend the Laws relating to Friendly Societies.—*The whole Act.*

16 & 17 Vict., cap. 123.—An Act to amend the Laws relating to the Investments of Friendly Societies.—*The whole Act.*

17 & 18 Vict., cap. 50.—An Act to continue an Act of the Twelfth Year of her present Majesty, for amending the Laws relating to Savings Banks in Ireland, and to authorize Friendly Societies to invest the whole of their Funds in Savings Banks.—*Section 2.*

17 & 18 Vict., c. 101.—An Act to continue and amend the Acts now in force relating to Friendly Societies.—*The whole Act.*

SECOND SCHEDULE.

FORM OF REGISTRAR'S CERTIFICATE TO RULES OF FRIENDLY SOCIETIES.

I HEREBY certify, that the foregoing rules [or the alterations or amendments of the rules] of the society at _____ in the county of _____ are in conformity with law, [and in the case of a new society,] and that the society is duly established from the present date, and is subject to the provisions and entitled to the privileges of the Acts relating to friendly societies.

The rates of contributions and payments are stated to have been prepared by A. B., Actuary of _____ or [as the case may be] are not stated to have been prepared by any actuary.

THIRD SCHEDULE.

FORM OF BOND.

KNOW all men by these presents, that we, A. B.

of the _____ Treasurer, &c. [as the case may be] Society, established at _____ and C. D. of _____ (as surety on behalf of the said A. B.) are jointly and severally held and firmly bound to A. B. of _____ C. D. of _____ and E. F. of _____ the trustees of the said society, in the sum of _____ to be paid to the said A. B., C. D., and E. F. as such trustees, or their successors, trustees for the time being, or their certain attorney, for which payment well and truly to be made we jointly and severally bind ourselves, and each of us by himself, our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals. Dated the _____ day of _____ in the year of our Lord _____

Whereas the above-bounden A. B. hath been duly appointed Treasurer, &c. [as the case may be] of the _____ society, established as aforesaid, and he, together with the above-bounden C. D. as his surety, have entered into the above written bond, subject to the condition herein-after contained: Now therefore the condition of the above-written bond is such, that if the said A. B. shall and do justly and faithfully execute his office of Treasurer, &c. [as the case may be] of the said society established as aforesaid, and shall and do render a just and true account of all monies received and paid by him, and shall and do pay over all the monies remaining in his hands, and assign and transfer or deliver all securities and effects, books, papers, and property of or belonging to the said society in his hands or custody, to such person or persons as the said society shall appoint, according to the rules of the said society, together with the proper or legal receipts or vouchers for such payments, and likewise shall and do in all respects well and truly and faithfully perform and fulfil his office of treasurer, &c. [as the case may be] to the said society, according to the rules thereof, then the above-written bond shall be void and of no effect; otherwise shall be and remain in full force and virtue.

CAP. LXIV.

An Act to settle Annuities on Emily Harriet Lady Raglan and Richard Henry Fitzroy Lord Raglan, and the next surviving Heir Male of his Body, in consideration of the eminent Services of the late Field Marshal Lord Raglan.

[23rd July, 1855.]

CAP. LXV.

An Act to amend the Dublin Carriages Act.

[23rd July, 1855.]

“WHEREAS doubts have arisen with respect to the construction of the Dublin Carriage Act, 1853, and the Dublin Amended Carriage Act, 1854, and it is expedient to remove such doubts, and to amend the said Acts:” be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

I. That all the enactments contained in the Dub-

lin Carriage Act, 1853, and the *Dublin* Amended Carriage Act, 1854, save in reference to the sums directed to be paid for licences and as annual rents, in anywise relating to the carriages therein designated as hackney carriages, or to the persons therein designated and referred to as the proprietors or drivers thereof, shall be deemed and taken to apply to and include as well the carriages by the said last-mentioned Act designated as cabriolets, and the proprietors and drivers thereof, as the carriages thereby designated as hackney carriages, and the proprietors and drivers thereof, anything in the said last-mentioned Acts to the contrary notwithstanding.

II. The said Acts and this Act shall be construed together as one Act.

III. In citing this Act in any other Act of Parliament, legal instrument, or proceeding whatever, it shall be sufficient to use the expression, "The *Dublin* Amended Carriage Act, 1855."

CAP. LXVI.

An Act to render valid certain Marriages in *Christ Church* in the Chapelry of *Todmorden* and Parish of *Rochdale*, in the Counties of *Lancaster* and *York*. [23rd July, 1855.]

CAP. LXVII.

An Act to facilitate the Remedies on Bills of Exchange and Promissory Notes by the Prevention of frivolous or fictitious Defences to Actions thereon. [23rd July, 1855.]

X. Nothing in this Act shall extend to *Ireland* or *Scotland*.

CAP. LXVIII.

An Act to amend the Laws concerning the Burial of the Dead in *Scotland*. [23rd July, 1855.]

CAP. LXIX.

An Act to discontinue the taking of Tolls on the Turnpike Roads leading from the City of *Dublin* and on the Turnpike Road from *Kinnegad* to *Athlone*, and to provide for the maintenance of such Roads as public Roads, and for the Discharge of the Debts due thereon, and other Purposes. [16th July, 1855.]

CAP. LXX.

An Act for further promoting the Establishment of Free Public Libraries and Museums in Municipal Towns, and for extending it to Towns governed under Local Improvement Acts, and to Parishes. [30th July, 1855.]

XXVI. This Act shall not extend to *Ireland* or *Scotland*.

CAP. LXXI.

An Act to authorise the Commissioners of the Treasury to make Arrangements concerning certain

Loans advanced by way of Relief to the Islands of *Antigua*, *Nevis*, and *Montserrat*.

[30th July, 1855.]

CAP. LXXII.

An Act for legalizing and preserving the restored Standards of Weights and Measures.

[30th July, 1855.]

"WHEREAS by an Act of the fifth year of the reign of King *George* the Fourth, chapter seventy-four, 'for ascertaining and establishing uniformity of weights and measures,' it was enacted, that from and after the first day of *May* one thousand eight hundred and twenty-five the straight line or distance between the centres of the two points in the gold studs in a certain straight brass rod then in the custody of the Clerk of the House of Commons should be the original and genuine standard of that measure of length or lineal extension called a yard, and that the same straight line or distance between the centres of the said two points in the said gold studs in the said brass rod, the brass being at the temperature of sixty-two degrees by Fahrenheit's thermometer, should be the 'imperial standard yard;' and that from and after the first day of *May* one thousand eight hundred and twenty-five the standard brass weight of one pound troy weight made in the year one thousand seven hundred and fifty-eight, then in the custody of the Clerk of the House of Commons, should be and the same was thereby declared to be the original and genuine standard measure of weight, and that such brass weight should be the 'imperial standard troy pound,' and should be and the same was thereby declared to be the unit or only standard measure of weight from which all other weights should be derived, computed, and ascertained, and that one-twelfth part of the said troy pound should be an ounce, and that one-twentieth part of such ounce should be a pennyweight, and that one twenty-fourth part of such pennyweight should be a grain, so that five thousand seven hundred and sixty such grains should be a troy pound; and that seven thousand such grains should be and they were thereby declared to be a pound avoirdupois: and whereas by the said Act provision was made for restoring the said imperial standard yard and the said imperial standard troy pound respectively, in case of loss, destruction, defacement, or other injury, by reference to the length of a pendulum and to the weight of a cubic inch of water respectively: and whereas the said imperial standard yard and standard pound troy were destroyed in the fire at the Houses of Parliament: and whereas by the researches of scientific men doubts were thrown on the accuracy of the methods provided by the said Act for the restoration of the said standards: and whereas there exist bars and weights which had been accurately compared with the said standard yard and standard pound troy so destroyed as aforesaid, which afforded sufficient means for restoring such original standards: and whereas scientific men acting for that purpose under the direction of the Commissioners of her Majesty's Treasury have constructed a standard of length equivalent to the imperial standard yard so destroyed, and four

accurate copies of the standard so constructed, and it having been deemed expedient that the standard for reference as a measure of weight should be a pound avoirdupois, there has been constructed in like manner a pound weight avoirdupois equivalent to the pound avoirdupois of seven thousand such grains as are mentioned in the said recited Act, and four accurate copies of the said pound avoirdupois so constructed: and whereas the form adopted for the standard of length and for all the copies thereof is that of a solid square bar thirty-eight inches long and one inch square in transverse section, the bar being of bronze or gun metal; near to each end a cylindrical hole is sunk (the distance between the centres of the two holes being thirty-six inches) to the depth of half an inch; at the bottom of this hole is inserted in a smaller hole a gold plug or pin about one-tenth of an inch in diameter, and upon the surface of this pin there are cut three fine lines at intervals of about the one-hundredth part of an inch transverse to the axis of the bar, and two lines at nearly the same interval parallel to the axis of the bar; the measure of length is given by the interval between the middle transversal line at one end, and the middle transversal line at the other end, the part of each line which is employed being the point midway between the longitudinal lines; and the said points are herein referred to as the centres of the said gold plugs or pins: and whereas the standard pound avoirdupois so constructed as aforesaid, and the copies thereof, are of platinum, the form being that of a cylinder nearly 1.35 inch in height and 1.15 inch in diameter, with a groove or channel round it whose middle is about 0.34 inch below the top of the cylinder, for insertion of the points of the ivory fork by which it is to be lifted; the edges are carefully rounded off: and whereas the standard of length so constructed as aforesaid, the bronze bar, being marked 'copper 16 oz., tin 2½, zinc 1. Mr. Baily's Metal. No. 1. Standard Yard at 61° 98 Fahrenheit. Cast in 1845. Troughton & Simms, London,' and the said standard of weight marked P.S. 1844, 1 lb., have respectively been deposited in the office of the exchequer at Westminster, and one of the said copies of the said standard of length, the bronze bar, being marked 'copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 2. Standard Yard at 61° 94 Fahrenheit. Cast in 1845. Troughton & Simms, London,' and one of the said copies of the standard of weight marked No. 1, P.C. 1844, 1 lb., have been deposited at the Royal Mint; and one other of the said copies of the standard of length, the bronze bar, being marked 'copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 3. Standard Yard at 62° 10 Fahrenheit. Cast in 1845. Troughton and Simms, London,' and one other of the said copies of the standard of weight marked No. 2. P.C. 1844, 1 lb., have been delivered to the Royal Society of London; and one other of the said copies of the standard of length, the bronze bar, being marked 'copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 5. Standard Yard at 62° 16 Fahrenheit. Cast in 1845. Troughton & Simms, London,' and one other of the said copies of the standard of weight marked No. 3. P.C. 1844, 1 lb., have been deposited in the Royal

Observatory of Greenwich; and the other of the said copies of the standard of length, the bronze bar, being marked 'copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 4. Standard Yard at 61° 98 Fahrenheit. Cast in 1845. Troughton & Simms, London,' and the other of the said copies of the standard of weight marked No. 4. P.C. 1844, 1 lb., have been immured in the cill of the recess on the east side of the lower Waiting Hall in the New Palace at Westminster: and whereas it is expedient to legalize the standards so constructed and to provide for the preservation thereof: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. So much of the said Act of the fifth year of King George the Fourth as relates to the restoration of the imperial standard yard and of the standard troy pound respectively, in case of loss, destruction, defacement, or other injury, shall be repealed.

II. The straight line or distance between the centres of the two gold plugs or pins in the bronze bar deposited in the office of the exchequer as aforesaid shall be the genuine standard of that measure of length called a yard, and the said straight line or distance between the centres of the said gold plugs or pins in the said bronze bar (the bronze being at the temperature of sixty-two degrees by Fahrenheit's thermometer) shall be and be deemed to be the imperial standard yard.

III. The said weight of platinum marked P. S. 1844, 1 lb., deposited in the office of the exchequer as aforesaid, shall be the legal and genuine standard measure of weight, and shall be and be denominated the imperial standard pound avoirdupois, and shall be deemed to be the only standard measure of weight from which all other weights and other measures having reference to weight shall be derived, computed, and ascertained, and one equal seven thousandth part of such pound avoirdupois shall be a grain, and five thousand seven hundred and sixty such grains shall be and be deemed to be a pound troy.

IV. All the provisions of the said Act of the fifth year of King George the Fourth now in force, and not hereby repealed, and all other enactments now in force in relation to weights and measures, shall continue in force and be applicable to the standards of weight and measure hereby established, as if the same standards had been established by the said Act of King George the Fourth instead of the standard yard and standard pound troy so destroyed as aforesaid, and as if the pound troy of five thousand seven hundred and sixty grains had been established as a derivative standard computed with reference to the pound avoirdupois.

V. All weights and measures, and copies of weights and measures, which have been compared and verified or authenticated according to law as copies of the imperial standard weights and measures, shall remain and be legal weights and measures for the same time, for the same purposes, and in like manner as if this Act had not been passed.

VI. All weights and measures which shall be

hereafter verified and authenticated by comparison with the said imperial standards of weight and measure, in such manner as her Majesty shall by any orders in council from time to time direct and appoint, shall be deemed and taken to be legal secondary weights and measures.

VII. If at any time hereafter the said imperial standard yard and standard pound avoirdupois respectively, or either of them, be lost, or in any manner destroyed, defaced, or otherwise injured, the Commissioners of her Majesty's Treasury may cause the same to be restored by reference to or adoption of any of the copies so deposited as aforesaid, or such of them as may remain available for that purpose.

CAP. LXXIII.

An Act to extend the Period for applying for a Sale under the Acts for facilitating the Sale and Transfer of Incumbered Estates in Ireland.

[30th July, 1855.]

"WHEREAS an Act was passed in the session of Parliament holden in the twelfth and thirteenth years of the reign of her present Majesty, intituled *An Act further to facilitate the Sale and Transfer of Incumbered Estates in Ireland*: and whereas a certain other Act was passed in the session of Parliament holden in the fifteenth and sixteenth years of the reign of her present Majesty, intituled *An Act to continue the powers of applying for a Sale of Lands under the Act for facilitating the Sale and Transfer of Incumbered Estates in Ireland*: and whereas a certain other Act was passed in the session of Parliament holden in the sixteenth and seventeenth years of the reign of her present Majesty, intituled *An Act for continuing and amending the Act for facilitating the Sale and Transfer of Incumbered Estates in Ireland*: and whereas the extended period within which such applications under said Acts as are mentioned in section eleven of said lastly-recited Act might be made was limited to two years from the twenty-eighth day of July one thousand eight hundred and fifty-three: and whereas it is expedient that said period should be further extended:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: all such applications under the said recited Acts, or any of them as are mentioned in section eleven of the said lastly-recited Act, and which are by said section authorized to be made within two years from the twenty-eighth day of July one thousand eight hundred and fifty-three, may be made within three years from the said twenty-eighth day of July one thousand eight hundred and fifty-three; and all orders and proceedings by the said Acts or any of them authorized, and which might be made, had, or taken upon any application made within the said period of two years, may be made, had, and taken within the further period authorized by this Act.

CAP. LXXIV.

An Act to enable Grand Juries of Counties in Ireland to present for payment of Expenses in certain Cases. [30th July, 1855.]

"WHEREAS it is expedient in certain cases to enable grand juries in Ireland to present any necessary and proper expenses which may have been incurred, with the sanction of such respective grand juries, in making any applotment of grand jury cess, for payment of which expenses no provision is now made by law:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. When the treasurer or other officer of any county, with the sanction of the grand jury, or in the County of Dublin with the sanction of the finance committee, shall have incurred or shall incur any necessary and proper expenses in making any applotment of grand jury cess for payment of which no provision is made by law, it shall be lawful for the grand jury of such county, without previous application to presentment sessions, to present to be raised off by such county all such necessary and proper expenses as aforesaid as such grand jury may deem reasonable.

II. This Act shall continue in force for two years from the first day of August, one thousand eight hundred and fifty-five, and to the end of the then next session of Parliament.

(To be continued.)

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STATUTES PASSED IN THE 18TH AND
19TH VICTORIA.—1854-5.

(Continued from page 304.)

CAP. LXXV.

An Act to continue certain temporary Provisions
concerning Ecclesiastical Jurisdiction in Eng-
land. [30th July, 1855.]

CAP. LXXVI.

An Act to continue an Act of the Fifth and Sixth
Years of her present Majesty for amending the
Law relative to Private Lunatic Asylums in Ire-
land. [30th July, 1855.]

"WHEREAS an Act was passed in the session of
Parliament holden in the fifth and sixth years of
the reign of her present Majesty, intituled *An Act
for amending until the First Day of August, one
thousand eight hundred and forty-five, (and until
the end of the then next Session of Parliament,
the Law relating to Private Lunatic Asylums in
Ireland*": and whereas by the fifty-first section of
the said Act it was provided, that the said Act
should be and remain in force until the first day of
August, one thousand eight hundred and forty-five,
and until the end of the then next session of Par-
liament, and no longer: and whereas by an Act of
the ninth and tenth years of her Majesty's reign,
chapter seventy-nine, and an Act of the fourteenth
and fifteenth years of her Majesty's reign, chapter
forty-six, the said first recited Act was further con-
tinued till the thirty-first day of July, one thousand
eight hundred and fifty-five, and until the end of
the then next session of Parliament: and whereas
it is expedient that the said first recited Act should
be further continued:" be it therefore enacted by
the Queen's most excellent Majesty, by and with
the advice and consent of the Lords Spiritual and
Temporal, and Commons, in this present Parlia-
ment assembled, and by the authority of the same,
that the said first recited Act shall be and remain
in force until the first day of August, one thousand
eight hundred and sixty, and until the end of the
then next session of Parliament.

CAP. LXXVII.

An Act to give Effect to a Convention between
her Majesty and the United States of America.
[30th July, 1855.]

CAP. LXXVIII.

An Act to reduce certain Duties payable on Stage
Carriages, and to amend the Laws relating to
Stamp Duties, and to Bonds and Securities to
the Inland Revenue. [30th July, 1855.]

"WHEREAS by an Act passed in the session of
Parliament holden in the fifth and sixth years (f
her Majesty's reign, chapter seventy-nine, certain
duties contained in a schedule to the said Act were
granted and made payable, and amongst others
the following duties on stage carriages in *Great
Britain*, (that is to say,) for and in respect of
every mile which any stage carriage shall be li-
censed to travel the duty of one penny halfpenny,
and for and in respect of every such supplement-
ary licence for a stage carriage as described in the
said schedule the duty of five shillings; and it is
expedient to reduce the said duties, as hereinafter
mentioned; be it therefore enacted by the Queen's
most excellent Majesty, by and with the advice and
consent of the Lords Spiritual and Temporal, and
Commons in this present Parliament assembled,
and by the authority of the same, as follows:

I. From and after the first day of July, one
thousand eight hundred and fifty-five, there shall
be charged and payable to her Majesty, her heirs
and successors, the following reduced duties on
stage carriages in *Great Britain*; (that is to say,)
for and in respect of every mile which any stage
carriage shall be licensed to travel one penny, and
for and in respect of every such supplementary li-
cence as aforesaid the duty of one shilling, in lieu
of the duties granted in the like cases by the said
recited Act: provided always, that nothing herein
contained shall extend to reduce or affect any duty
which shall accrue or be incurred on or before the
said first day of July.

II. The said duties by this Act granted and
made payable shall be raised, levied, collected, and
paid in like manner, and by and under the like

powers and authorities, rules and regulations, as the said duties granted by the said recited Act are now raised, levied, collected, and paid under or by virtue of any Act or Acts in force.

III. From and after the passing of this Act, section twelve of the Act passed in the second and third years of the reign of his late Majesty King *William the Fourth*, chapter one hundred and twenty, whereby the Commissioners are authorized to compound with any person for the duties which may become payable in respect of any stage carriage, shall be and the same is hereby repealed.

IV. "And whereas by certain Acts passed in that behalf the Commissioners of Inland Revenue are directed to provide stamps for denoting the several rates of postage of letters on paper provided by the said Commissioners for the covers or envelopes of letters, and it is expedient to provide for the stamping with such stamps paper which any person may send to the said Commissioners for that purpose:" be it enacted, that it shall be lawful for the Commissioners of Inland Revenue, and they are hereby empowered, under such regulations as the Commissioners of her Majesty's Treasury may from time to time make or sanction in that behalf, to stamp paper which any person may send to the first named Commissioners for the purpose of being stamped for covers or envelopes of letters with stamps provided for denoting the several rates of postage, on payment of the amount of the stamps required to be impressed on such paper, and in cases where such amount shall not exceed ten pounds upon payment in addition thereto of such fee as the said Commissioners of her Majesty's Treasury may direct or authorize to be taken in such cases.

V. "And whereas under and by virtue of two several Acts passed respectively, the one in the second and third years of the reign of his said late Majesty King *William the Fourth*, chapter fifty-three, and the other in the third and fourth years of the said king's reign, chapter twenty-nine, a stamp duty of one shilling is payable upon orders made for the payment of prize money, or bounty money, or money upon grants due to non-commissioned officers and soldiers, and it is expedient in lieu thereof to subject such orders to the stamp duties chargeable on inland bills, drafts, or orders;" be it enacted, that the stamp duty of one shilling payable under the said two last-mentioned Acts on orders made for the payment of prize money, or bounty money, or money upon grants due to non-commissioned officers and soldiers, shall cease, and in lieu thereof all such orders shall be subject and liable to the like stamp duties as inland bills, drafts, or orders for the payment of money of the same amount and of the like tenor or effect are now by law subject and liable to.

VI. And as to bonds and other securities relating to the inland revenue, all the powers, provisions, and regulations concerning bonds and other securities relating to the customs contained in sections CXCIV., CXCVI., and CXCVII. of the Act passed in the session of Parliament holden in the sixteenth and seventeenth years of her Majesty's reign, chapter one hundred and seven, shall, *mutatis mutandis*, be deemed to extend and shall be applied to all bonds and other securities entered into or given, or to be entered into or given, by any person or persons under the provisions of any Act relating to the duties of excise, or to any other of the duties or matters under the control or management of the Commissioners of Inland Revenue, or otherwise in relation or incident thereto: provided always, that in any case in which, under the provisions of the said sections, any certificate is required to be signed, or any other matter is authorized to be done, by Commissioners of Customs, or any number of them, any such certificate or matter in relation to any bond or security concerning or incident to the Inland Revenue shall respectively be signed and done by the Commissioners of Inland Revenue, or the like number of them.

CAP. LXXIX.

An Act to amend the Laws regarding the Burial of poor Persons by Guardians and Overseers of the Poor. [30th July, 1855.]

CAP. LXXX.

An Act to ratify conditional Agreements entered into by the Commissioners of her Majesty's Works and Public Buildings; and to vest in the said Commissioners certain Property situate near the College of *Edinburgh* in the City of *Edinburgh*, together with the General Register House in the said City, and all Lands held therewith; and to enable the said Commissioners to acquire certain Property near the Palace of *Holyrood*. [30th July, 1855.]

CAP. LXXXI.

An Act to amend the Law concerning the certifying and registering of Places of Religious Worship in *England*. [30th July, 1855.]

CAP. LXXXII.

An Act to abolish certain Payments charged on the Consolidated Fund in favour of the Provoost and Fellows of *Trinity College, Dublin*, and of certain Professors in the said College; and to repeal the Stamp Duties payable on Matriculations and Degrees in the University of *Dublin*. [14th August, 1855.]

"WHEREAS by an Act passed in the forty-first year of his late Majesty King *George the Third*, chapter thirty-two, 'for granting to his Majesty several Sums of Money for defraying the Charge of certain permanent Services in that Part of the United Kingdom called *Ireland*,' it was enacted, that it should be lawful for the Lord High Treasurer and Under Treasurer of the Exchequer or the Commissioners of his Majesty's Treasury of that part of the United Kingdom called *Ireland*, then or for the time being, or any three or more of them, by warrant under their hands, to order and direct that any sum or sums of money not exceeding in one year the sums therein after mentioned should be paid for the purpose therein-after

expressed; among which sums were the following; that is to say, 'to the Provost and Fellows of *Trinity College, Dublin*, £358 16s. 11d. *English currency*,' 'to the said Provost and Fellows,' for the Professor of the *French and German languages* in the said college, £92 6s. 2d. like currency; and 'to the said Provost and Fellows, for the Professor of the *Spanish and Italian languages* in the said college, £92 6s. 2d. like currency;' which several sums are also by the said Act made payable out of and are charged on the Consolidated Fund of *Ireland*, and are now charged on the Consolidated Fund of the United Kingdom: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. That all the said sums of money by the said Act made payable to the said Provost and Fellows of *Trinity College, Dublin*, shall from and after the passing of this Act cease to be payable.

II. All stamp duties payable under the Act of the session holden in the fifth and sixth years of her Majesty, chapter eighty-two, and the Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, or under any other Act of Parliament, on the admission or matriculation of any person in the University of *Dublin*, and on the admission of any person to any degree in the said university (whether conferred in the ordinary course of the university or otherwise), or for the registry or entry, testimonial or certificate, of any such admission, shall from and after the passing of this Act likewise cease to be payable.

CAP. LXXXIII.

An Act to continue certain Acts for regulating Turnpike Roads in *Ireland*.

[14th August, 1855.]

CAP. LXXXIV.

An Act to provide for the Performance of certain Duties of the Speaker during his temporary Absence from the House of Commons.

[14th August, 1855.]

"WHEREAS the House of Commons have provided by their standing orders for the temporary performance of certain duties of the Speaker, during his unavoidable absence, by a Deputy Speaker: and whereas her Majesty had previously signified her consent that the House might do therein as they should think fit: and whereas certain matters concerning the office of Speaker are regulated by statute, and the validity of acts done or proceedings taken during the absence of the Speaker may hereafter be questioned: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. If at any time during a session of Parliament the Speaker shall be temporarily absent from the

House, and a Deputy Speaker shall thereupon perform the duties and exercise the authority of Speaker, pursuant to the standing orders or other order or resolution of that House, every act done and proceeding taken in or by the House, pursuant to any statute, shall be as valid and effectual as if the Speaker himself were in the chair; and every act done, and warrant, order, certificate, notice, or other document issued, signed, or published, in relation to any proceedings of the House of Commons, by such Deputy Speaker, shall have the same effect and validity as if the same had been done, issued, signed, or published by the Speaker for the time being.

II. Provided, that such Deputy Speaker shall not have power to appoint to any office, except for such time as he shall continue to be Deputy Speaker.

III. Provided also, that nothing herein contained shall effect the election of a Speaker, or the forms thereof, or any prerogative of her Majesty concerned therein, or otherwise relating to the office of Speaker.

CAP. LXXXV.

An Act for carrying into effect the Engagements between her Majesty and certain Chiefs of the *Shirho* Country near *Sierra Leone* in *Africa*, for the more effectual Suppression of the Slave Trade.

[14th August, 1855.]

CAP. LXXXVI.

An Act for securing the Liberty of Religious Worship.

[14th August, 1855.]

"WHEREAS it is expedient that the laws affecting assemblies for religious worship should be amended: and whereas by an Act passed in the first year of King William and Queen Mary, intituled *An Act for exempting their Majesties Protestant Subjects dissenting from the Church of England from the Penalties of certain Laws*, it is enacted, that no congregation or assembly for religious worship shall be permitted or allowed until the place of such meeting shall be certified and registered or recorded as described in such Act; and whereas by an Act passed in the fifty-second year of King George the Third, chapter one hundred and fifty-five, intituled *An Act to repeal certain Acts, and to amend other Acts relating to Religious Worship and Assemblies, and Persons teaching or preaching therein*, it is enacted that no congregation or assembly for religious worship of Protestants (at which there shall be present more than twenty persons, besides the immediate family and servants of the person in whose house or upon whose premises such meeting, congregation, or assembly shall be had,) shall be permitted or allowed unless the place of such meeting is certified as described in such Act, and that every person who shall knowingly permit or suffer any such congregation or assembly as aforesaid to meet in any place occupied by him, until the same shall have been so certified shall forfeit for every time any such congregation or assembly shall meet a sum not exceeding twenty pounds nor less than twenty shillings, at the discretion of the justices

who shall convict for such offence: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the passing of this Act, nothing contained in the above-mentioned Acts or in an Act passed in the fifteenth and sixteenth years of the reign of her Majesty, chapter thirty-six, shall apply to the congregations or assemblies hereinafter mentioned or any of them; that is to say:

- (1.) To any congregation or assembly for religious worship held in any parish or any ecclesiastical district, and conducted by the incumbent, or in case the incumbent is not resident, by the curate of such parish or district, or by any person authorized by them respectively;
 - (2.) To any congregation or assembly for religious worship meeting in a private dwelling house or on the premises belonging thereto;
 - (3.) To any congregation or assembly for religious worship meeting occasionally in any building or buildings not usually appropriated to the purposes of religious worship.
- And no person permitting any such congregation to meet as herein mentioned in any place occupied by him shall be liable to any penalty for so doing.
- II. So much of an Act passed in the second and third years of King William the Fourth, chapter one hundred and fifteen, as enacts that her Majesty's subjects professing the Roman Catholic religion, in respect to their places for religious worship, shall be subject to the same laws as the Protestant dissenters are subject to; and so much of an Act passed in the ninth and tenth year of her present Majesty, chapter fifty-nine, as enacts that her Majesty's subjects professing the Jewish religion, in respect to their places for religious worship, shall be subject to the same laws as Protestant dissenters are subject to, shall be respectively read as applicable to the laws to which Protestant dissenters in England are subject for the time being after the passing of this Act.

CAP. LXXXVII.

An Act to amend the Act for the better Care and Reformation of Youthful Offenders, and the Act to render Reformatory and Industrial Schools in Scotland more available for the benefit of Vagrant Children. [14th August, 1855.]

CAP. LXXXVIII.

An Act to facilitate the Erection of Dwelling Houses for the Working Classes in Scotland. [14th August, 1855.]

CAP. LXXXIX.

An Act to amend the Provisions of the Huddersfield Burial Ground Act, 1852. [14th August, 1855.]

CAP. XC.

An Act for the Payment of Costs in Proceedings instituted on behalf of the Crown in Matters relating to the Revenue, and for the Amendment of the Procedure and Practice in Crown Suits in the Court of Exchequer. [14th August, 1855.]

“Whereas in the proceedings instituted by or on behalf of the Crown against the Queen's subjects in respect of matters relating to the revenue no costs are recovered by the Crown except in certain cases, and no costs are paid by the Crown to the subjects, and whereas it is expedient to assimilate the law as to the recovery of costs in such proceedings by or on behalf of the Crown to that in force as to proceedings between subject and subject: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. In all informations, actions, suits, and other legal proceedings to be hereafter instituted before any court or tribunal whatever in the United Kingdom of Great Britain and Ireland, by or on behalf of the Crown against the corporations, officers, or persons, in respect of any lands, tenements, or hereditaments, or of any goods or chattels, belonging or appertaining to the Crown, the parties concerned, or the suits or profits of which lands, tenements, or hereditaments, by any law or laws in force or hereafter to be passed are or become or shall be Consolidated Funds of Great Britain and Ireland, or in respect of any annuities or sums of money due and owing to her Majesty by virtue of any law or laws in force for the service of the Government, or of any Act of Parliament relating to the public revenue, her Majesty's Attorney General, or in Scotland the Lord Advocate, shall be entitled to recover costs for and on behalf of her Majesty, where judgment shall be given for the Crown, in the same manner, and under the same rules, regulations, and provisions, as are or may be in force touching the payment or receipt of costs in proceedings between subject and subject, and such costs shall be paid into the exchequer, and shall become part of the Consolidated Fund.

II. If in any such information, action, suit, or other proceeding judgment shall be given against the Crown, the defendants or defendants shall be entitled to recover costs, in like manner, and subject to the same rules and provisions, as though such proceeding had been had between subject and subject, and it shall be lawful for the Commissioners of her Majesty's Treasury, and they are hereby required to pay such costs out of any moneys which may be hereafter voted by Parliament for that purpose.

III. And whereas the procedure and practice in informations, suits, and other proceedings instituted by or on behalf of the Crown in her Majesty's Court of Exchequer is dilatory, and requires amendment, and it is desirable that the same should be assimilated as nearly as may be to the course of practice and procedure now in force in actions and suits between subject and subject: be it enacted,

that it shall be lawful for the Barons of her Majesty's Court of Exchequer in *England*, or any three of them, and also for the Barons of her Majesty's Court of Exchequer in *Ireland*, or any three of them, in their respective courts, to make all such general rules and orders for the regulation of the pleading and practice in such informations, suits, and other proceedings, and to frame such writs and forms of proceedings, as to them may seem expedient for the purpose aforesaid, and all such rules, orders, or regulations shall be laid before both Houses of Parliament, if Parliament be then sitting, immediately upon the making of the same, or if Parliament be not sitting, then within five days after the next meeting thereof; and no such rule, order, or regulation shall have effect until three months after the same shall have been so laid before both Houses of Parliament; and any rule, order, or regulation so made shall, from and after such time aforesaid, be binding and obligatory on the said court, and on all Courts of Error into which any judgment of the said court shall be carried by any writ of error; and be of the like force and effect, as if the provisions contained therein had been expressly enacted by Parliament: provided always, that it shall be lawful for the Queen's most excellent Majesty, by any proclamation, inserted in the *London Gazette*, or for either of the Houses of Parliament, by any resolution passed at any time within three months next after such rules, orders, and regulations shall have been laid before Parliament, to suspend the whole, or any part of such rules, orders, or regulations; and in such case the whole, or such part thereof, as shall be so suspended, shall not be binding and obligatory on the said court, or on any other Court of Common Law or Court of Error.

CAP. XCI.

An Act to facilitate the Erection and Maintenance of Colonial Lighthouses, and otherwise to amend the Merchant Shipping Act, 1854.

[14th August, 1855.]
 "Whereas it is expedient to make provisions for facilitating the erection and maintenance of lighthouses in the British possessions abroad; and otherwise to amend the Merchant Shipping Act, 1854: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled; and by the authority of the same, as follows:—

I. This Act may be cited as "The Merchant Shipping Act Amendment Act, 1855," and shall be taken to be part of the Merchant Shipping Act, 1854, and shall be construed accordingly.

II. In any case in which any lighthouse, buoy, or beacon has been or hereafter ordered or placed on or near the shores of any British possession, or with the consent of the legislative authority of such possession, her Majesty may, by order in council, fix such dues in respect thereof, to be paid by the owner or master of every ship which passes the same or derives benefit therefrom, as her Majesty may deem reasonable, and may in like manner

from time to time increase, diminish, or repeal such dues, and from the time specified in such order for the commencement of the dues thereby fixed, increased, or diminished, the same shall be leviable throughout her Majesty's dominions, in manner hereinafter mentioned.

III. No such dues as aforesaid shall be levied in any colony, unless and until the legislative authority in such colony has, either by address to the Crown, or by an act or ordinance duly passed, signified its opinion that the same ought to be levied in such colony.

IV. The said dues shall in the United Kingdom be collected by the same persons by whom, and by the same means, in the same manner, and subject to the same conditions, so far as circumstances permit, by, in, and subject to which the light dues leviable under the Merchant Shipping Act, 1854, are collected, and shall in each British possession abroad be collected by such persons as the governor of such possession abroad may appoint for the purpose, and shall be collected by the same means, in the same manner, and subject to the same conditions, so far as circumstances permit, by, in, and subject to which the light dues leviable under the Merchant Shipping Act, 1854, are paid and collected, or by such other means, in such other manner, and subject to such other conditions as the legislative authority in such possession may direct.

V. All dues levied under this Act shall be paid over to her Majesty's Paymaster-General at such times and in such manner as the Board of Trade may direct; and shall be applied, paid, and dealt with by him, for the purposes hereinafter mentioned, in such manner as such board may direct.

VI. The dues levied under the authority of this Act in respect of any such lighthouse, buoy, or beacon as aforesaid shall, after deducting any expenses incurred in collecting the same, be applied for the purpose of paying the expenses incurred in erecting and maintaining such lighthouse, buoy, or beacon; and for no other purposes whatever.

VII. For the purpose of constructing or repairing any such lighthouse, buoy, or beacon as aforesaid, the Board of Trade may raise, upon the security of the dues to be levied in respect thereof, such sums of money as they may deem fit; and the Commissioners of her Majesty's Treasury, out of any monies which may be provided by Parliament, the Public Works Loan Commissioners, or any other person or body of persons, may advance the same accordingly, such advances to be made in the same manner, with the same powers, and subject to the same provisions, so far as circumstances permit, in, with, and subject to which, under the Merchant Shipping Act, 1854, advances may be made upon the security of the Merchant Marine Fund for the construction and repair of Lighthouses in the United Kingdom.

VIII. Accounts shall be kept of all sums expended in the construction, repair, or maintenance of every lighthouse, buoy, or beacon in the British possessions abroad for which dues are levied under the authority of this Act, and of the dues received in respect thereof, in such manner as the Board of Trade may direct, and shall be laid before Parlia-

ment annually; and the said accounts shall be audited in such manner as her Majesty may by order in council direct.

IX. Any person who, in any declaration made in the presence of or produced to any Registrar of Shipping, in pursuance of the second part of the Merchant Shipping Act, 1854, or in any documents or other evidence produced to such Registrar, wilfully makes, or assists in making or procures to be made, any false statement concerning the title to or the ownership of or the interests existing in any ship, or any share or shares in any ship, or who utters, produces, or makes use of any declaration or document containing any such false statement, knowing the same to be false, shall be guilty of a misdemeanour.

X. Shares in ships registered under the said Merchant Shipping Act, 1854, shall be deemed to be included in the word "stock," as defined by the Trustee Act, 1850, and the provisions of such last mentioned Act shall be applicable to such shares accordingly.

XI. In any case in which any bill of sale, mortgage, or other instrument for the disposal or transfer of any ship or any share or shares therein or of any interest therein is made in any form or contains any particulars other than the form and particulars prescribed and approved for the purpose by or in pursuance of the Merchant Shipping Act, 1854, no registrar shall be required to record the same without the express direction of the Commissioners of her Majesty's Customs.

XII. Upon the transfer of the registry of a ship from one port to another, the certificate of registry required by the nineteenth section of the Merchant Shipping Act, 1854, to be delivered up for that purpose, may be delivered up to the registrar of either of such ports.

XIII. The Commissioners of Customs may, with the consent of the Board of Trade, exempt any pleasure yacht from the provision contained in the thirty-fourth section of the Merchant Shipping Act, 1854, which requires the name of every ship and the port to which she belongs to be painted on her stern.

XIV. The owner of any ship which is measured under Rule II. contained in the twenty-second section of the Merchant Shipping Act, 1854, may at any subsequent period apply to the Commissioners of Customs to have the said ship remeasured under Rule I. contained in the twenty-first section of the same Act, and the said Commissioners may thereupon, and upon payment of such fee not exceeding seven shillings and sixpence for each transverse section as they may authorize, direct the said ship to be remeasured accordingly, and the number denoting the register tonnage shall be altered accordingly.

XV. The copy or transcript of the register of any *British* ship which is kept by the chief registrar of shipping at the Custom House in London, or by the registrar general of seamen, under the direction of her Majesty's Commissioners of Customs or of the Board of Trade, shall have the same effect to all intents and purposes as the original register of which the same is a copy or transcript.

XVI. The Board of Trade may issue instructions concerning the relief to be administered to distressed seamen and apprentices in pursuance of the two hundred and eleventh and two hundred and twelfth sections of the Merchant Shipping Act, 1854, and may by such instructions determine in what cases and under what circumstances and conditions such relief is to be administered; and all powers of recovering expenses incurred with respect to distressed seamen and apprentices, which by the two hundred and thirteenth section of the said Act are given to the Board of Trade, shall extend to all expenses incurred by any foreign government for the purposes aforesaid, and repaid to such government by her Majesty's Government, and shall likewise extend to any expenses incurred by the conveying home such seamen or apprentices in foreign as well as *British* ships; and all provisions concerning the relief of distressed seamen and apprentices, being subjects of her Majesty, which are contained in the said sections of the said Act, and in this section, shall extend to such seamen and apprentices, not being subjects of her Majesty, as are reduced to distress for foreign parts by reason of their having been shipwrecked, discharged, or left behind from any *British* ship; subject nevertheless to such modifications and directions concerning the cases in which relief is to be given to such foreigners, and the country to which they are to be sent, as the Board of Trade may, under the circumstances, think fit to make and issue.

XVII. The enactment of the Merchant Shipping Act, 1854, relating to savings banks shall apply to all seamen, and to their wives and families, whether such seamen belong to the royal navy or to the merchant service, or to any other sea service.

XVIII. Any naval court summoned, under the provisions of the Merchant Shipping Act, 1854, to hear any complaint touching the conduct of the master or any of the crew of any ship, shall, in addition to the powers given to it by the said Act, have power to try the said master or any of the said crew for any offences against the Merchant Shipping Act, 1854, in respect of which two justices would, if the case were tried in the United Kingdom, have power to convict summarily, and by order duly made to inflict the same punishments for such offences which two justices might in the case aforesaid inflict upon summary conviction; provided, that in cases where an offender is sentenced to imprisonment the sentence shall be confirmed in writing by the senior naval or consular officer present at the place where the court is held, and the place of imprisonment, whether on land or on board ship, shall be approved by him as a proper place for the purpose, and copies of all sentences made by any naval court summoned to hear any such complaint as aforesaid shall be sent to the commander-in-chief or senior naval officer of the station.

XIX. Whenever any articles belonging to or forming part of any foreign ship which has been wrecked on or near the coasts of the United Kingdom, or belonging to or forming part of the cargo thereof, are found on or near such coasts, or are brought into any port in the United Kingdom, the consul general of the country to which such ship,

or, in the case of cargo, to which the owners of such cargo, may have belonged, or any consular officer of such country authorized in that behalf by any treaty or agreement with such country, shall, in the absence of the owner of such ship or articles, and of the master or other agent of the owner, be deemed to be the agent of the owner, so far as relates to the custody and disposal of such articles.

XX. In cases where services are rendered by officers or men of the coast guard service in watching or protecting shipwrecked property, then, unless it can be shown that such services have been declined by the owner of such property or his agent at the time they were rendered, or that salvage has been claimed and awarded for such services, the owner of the shipwrecked property shall pay in respect of the said services remuneration according to a scale to be fixed by the Board of Trade, so, however, that such scale shall not exceed any scale by which payment to officers and men of the coast guard for extra duties in the ordinary service of the Commissioners of Customs is for the time being regulated; and such remuneration shall be recoverable by the same means and shall be paid to the same persons and accounted for and applied in the same manner as fees received by receivers appointed under the Merchant Shipping Act, 1854.

XXI. If any person, being a British subject, charged with having committed any crime or offence on board any British ship, on the high seas or in any foreign port or harbour, or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits; provided, that nothing contained in this section shall be construed to alter or interfere with the Act of the thirteenth year of her present Majesty, chapter ninety-six.

XXII. It shall be the duty of the *East India* Company to take charge of and send home or otherwise provide for all persons, being lascars or other natives of the territories under the government of the said company, who are found destitute in the United Kingdom; and if any such person is relieved and maintained by any guardians, overseers, or other persons administering the relief of the poor, such overseers, guardians, or other persons may, by letter sent through the post or otherwise, give notice thereof in writing to the Secretary of the Court of Directors of the *East India* Company, specifying, so far as is practicable, the following particulars:—

1. The name of the person so relieved or maintained;
2. The presidency or district or part of the territories of the *East India* Company of which he professes to be a native;
3. The name of the ship in which he was brought to the United Kingdom;
4. The port or place abroad from which such

ship sailed, and the port or place in the United Kingdom at which such ship arrived, when he was so brought to the United Kingdom, and the time of such arrival.

And the said *East India* Company shall repay to the said overseers, guardians, or other persons, out of the revenues of the said company, all moneys duly expended by them in relieving or maintaining such destitute person, after the time at which such notice aforesaid is sent or otherwise given.

XXIII. It shall be lawful for any master or owner of a ship or his agent to enter into agreements with lascars or natives of the territories of the *East India* Company, binding them to proceed to any port or ports in the United Kingdom, either as seamen or as passengers, and there to enter into a further agreement to serve as seamen in any ship which may happen to be there, and to be bound to any port in the territories of the *East India* Company: provided, that every such original agreement shall be made in such form, and shall contain such provisions, and shall be executed in such manner, and under such conditions for securing the return of such lascars or natives to their own country, and for other purposes, as the governor general of India in council or the governors of the respective presidencies in which the original agreement is made, in council may direct; and if any lascar or other person who has bound himself by any such original agreement is, on arriving in the United Kingdom, required to enter into a further agreement to serve as a seaman in any ship bound to any port in the territories of the *East India* Company, and if it is certified by some officer appointed for that purpose by the *East India* Company that such further agreement is a proper agreement in all respects for such lascar or other person to enter into, and is in accordance with the original agreement, and that the ship to which such further agreement relates is in all respects a proper ship for such lascar or other person to serve in, and that there is not, in the opinion of such officer, any objection to the full performance of the said original agreement, such lascar or other person shall be deemed to be engaged under such further agreement, and to serve as a seaman in the ship to which it relates, and shall thereupon be deemed to be for all purposes, one of the crew of the ship; and for every lascar or other person in respect of whom such certificate is applied for, the person applying for the same shall pay to such officer as aforesaid such fee as the *East India* Company may appoint, not exceeding 300 shillings.

XXIV. Nothing herein contained shall be deemed to repeal or affect any provisions contained in the twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, or thirty-fourth sections of the Act of the fourth year of King George the Fourth, chapter eighty, or in the sixteenth section of the Act of the eighteenth year of her present Majesty, chapter one hundred and twenty.

CAP. XCII.

An Act for appropriating the Corps of the Prebend or Pension of *Netherhall Ledbury* in the Diocese and County of *Hereford*, and for con-

stituting the Living of *Leadbury* a Rectory with Cure of Souls, and for augmenting the Endowments thereof. [14th August, 1855.]

CAP. XCIII.

An Act to amend certain Acts relating to the Court of Judicature of *Prince of Wales Island, Singapore, and Malacca*, and to the Supreme Courts of Judicature in *India*. [14th August, 1855.]

CAP. XCIV.

An Act to impose increased Rates of Duty of Excise on Spirits distilled in the United Kingdom; to allow Malt, Sugar, and Molasses to be used Duty-free in the distilling of Spirits, in lieu of Allowances and Drawbacks on such Spirits, Sugar, and Molasses respectively; and to amend the Laws relating to the Duties of Excise. [14th August, 1855.]

CAP. XCV.

An Act to enable the Commissioners of her Majesty's Works and Public Buildings to provide additional Offices for the Public Service in or near *Downing Street, Westminster*. [14th August, 1855.]

CAP. XCVI.

An Act to consolidate certain Acts, and otherwise amend the Laws of the Customs, and an Act to regulate the Office of the Receipts of her Majesty's Exchequer at *Westminster*. [14th August, 1855.]

Be It enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:

I. All customs duties and other public moneys payable to the exchequer account at the Bank of *England* shall be received to the credit of such account by the Governor and Company of the said bank, under such regulations and directions as the Commissioners of her Majesty's Treasury shall from time to time prescribe; and the specifications or statements of particulars required by an Act passed in the fourth year of the reign of his late Majesty King *William the Fourth*, intituled, *An Act to regulate the Office of the Receipts of his Majesty's Exchequer at Westminster*, to be delivered to the cashier or other officer of the Bank of *England* by the person paying in any such money, shall be required only in such cases, and shall be signed and issued by such person as the said Commissioners shall from time to time direct; and the acquittances for all payments made to the account of the exchequer at the Bank of *England* shall be made out in such form and under such regulations as shall be prescribed by the said Commissioners;

and such acquittances shall have in all respects the same force and validity in law as the acquittances heretofore given by the comptroller of the exchequer by virtue of the ninth section of the said recited Act of the fourth year of the reign of King *William the Fourth*, chapter fifteen; and the several orders, rules, and regulations which may be issued under the authority of this Act by the said Commissioners of her Majesty's Treasury, as relating to such specifications and acquittances as aforesaid, shall be laid before both Houses of Parliament within six weeks after the issue of such orders, rules, and regulations, if Parliament shall be sitting, or if not sitting, then within six weeks next immediately after the re-assembling of Parliament.

II. Tobacco, cigars, and snuff are hereby prohibited to be imported into the United Kingdom, unless in whole and complete packages, each containing not less than eighty pounds net weight of such tobacco, cigars, or snuff, and unless in ships of not less than one hundred and twenty tons burden, and unless into such ports as are or may be approved by the Commissioners of Customs for the importation and warehousing of tobacco; and any tobacco, cigars, or snuff imported into the United Kingdom contrary hereto shall be subject to the provisions contained in the forty-fourth section of "The Customs Consolidation Act, 1853," in the same manner as if this prohibition had been originally enacted in the table of prohibitions and restrictions in the said section, of which it is hereby declared to form a part.

(To be continued.)

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(Continued from page 312.)

III. Goods not duly reported may be detained by any officer or officers of customs until the same are so reported, and the cause of the omission explained to the satisfaction of the Commissioners of Customs, who may thereupon restore the same on such terms as they may deem proper; and such goods may in the meantime, should the said Commissioners deem necessary, be removed to the Queen's warehouse.

IV. The time prescribed by the sixty-fourth section of "The Customs Consolidation Act, 1853," for perfecting entries by bill of lading, may be extended at the discretion of the Commissioners of Customs.

V. The Commissioners of Customs may permit the entries of goods in such form and manner and on such conditions as they may direct to meet the exigencies of any case to which the general laws and regulations may not be strictly applicable.

VI. All goods not being of a perishable nature deposited in the Queen's warehouse, and not cleared within three months, and all goods of a perishable nature so deposited and not cleared forthwith, may, in case the same cannot be sold for a sum sufficient to pay the duties and charges if offered for sale for home consumption, or the charges if offered for sale for exportation, be destroyed by direction of the Commissioners of Customs.

VII. No goods of a combustible or inflammable nature shall be brought into or deposited in the Queen's warehouse, unless with the sanction of the Commissioners of Customs; and if any such goods shall be landed by the officers of customs under the seventy-fourth section of "The Customs Consolidation Act, 1853," the same may be deposited in any place that such officers may deem fit, and whilst so deposited the same shall be deemed to be in the Queen's warehouse, and be liable to be dealt with, at the expiration of fourteen days, in the same manner as goods of a perishable nature actually deposited in the Queen's warehouse, unless duly cleared or warehoused in some approved

warehouse in the meantime; and such goods shall be chargeable with such expenses for securing, watching, and guarding the same until sold, cleared, or warehoused as aforesaid, as the Commissioners shall see fit, and neither the said Commissioners nor their officers shall be liable to make good any damage which such goods may sustain by reason or during the time of their being so deposited and dealt with as aforesaid.

VIII. On the re-warehousing in the name of the proprietor of goods, either by himself or by the warehouse-keeper, after the expiration of five years from the last preceding warehousing or re-warehousing thereof under sections one hundred and three and one hundred and four of "The Customs Consolidation Act, 1853," the Commissioners of Customs may (first being satisfied that the same are in the warehouse, that the packages are entire, and that there is no ground to suspect that there is any undue deficiency therein) dispense with the re-weighing, re-gauging, or re-measuring, and strict examination thereof, if they be such as are liable on delivery to the payment of duty according to the landing weight, measure, or quantity thereof, and also at the request of the warehouse-keeper or proprietor of the warehouse may (first being satisfied as aforesaid) dispense with the re-weighing, re-gauging, re-measuring, or strict examination on such re-warehousing as aforesaid of goods being wines or other goods the duties whereon are payable at the delivery, weight, measure, or quantity, and which may be liable to injury by such re-weighing, re-gauging, re-measuring, or strict examination; but in either of these cases the warehouse-keeper or proprietor of such warehouse shall be liable at the time of delivery of such goods to pay the duties due on any deficiency therein not allowed by law which may then be found to exist, instead of being called upon to make good any deficiencies which might have been found to exist had such re-weighing, re-gauging, re-measuring, or examination been resorted to at the time of such re-warehousing.

IX. No goods shall be shipped, put off, or water-borne to be shipped for exportation from any port or place in the United Kingdom, except on days not being *Sundays* or holidays, nor from any

place except some legal quay, wharf, or other place duly appointed for such purpose, nor without the presence or authority of the proper officer of customs, nor before due entry outwards of such ship and due entry of such goods, nor before such goods shall have been duly cleared for shipment; and any goods shipped, put off, or water-borne to be shipped contrary hereto shall be forfeited; and it shall be lawful for the searcher to open or cause to be opened and to examine all goods shipped or brought for shipment at any place in the United Kingdom, and the opening for that purpose of packages containing goods upon which any drawback of customs or inland revenue is claimed, and the weighing, re-packing, landing (when water-borne), and the shipping thereof shall be done by or at the expense of the exporter.

X. Any exporter of goods who shall fail, either by himself or his agent, to deliver to the searcher a shipping bill, with duplicates thereof, of the goods exported by him as prescribed by the one hundred and twenty-fifth section of "The Customs Consolidation Act, 1853," shall forfeit the sum of twenty pounds.

XI. If any ship having cargo on board shall depart from any port without being duly cleared, the master shall forfeit the sum of one hundred pounds.

XII. *British* or *Irish* spirits may be exported from *Great Britain* or *Ireland* to parts beyond the seas or be removed to the *Isle of Man* in casks of the content of ten gallons each at the least, but no *British* or *Irish* spirits shall be removed or exported from the *Isle of Man* to any other part of the United Kingdom, under pain of forfeiture thereof.

XIII. Every foreign ship employed in carrying goods or passengers coastwise from one part of the United Kingdom to another, or from the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man* to the United Kingdom, or from the United Kingdom to any of the said islands, or from any of the said islands to any other of them, or from any part of any one of the said islands to any other part of the same, shall be subject, as to stores for the use of the crew and in all other respects to the same laws, rules, and regulations to which *British* ships when so employed are now subject.

XIV. No foreign ship employed in the coasting trade as aforesaid, nor any goods carried in any such ship, shall, during the time such ship is so employed, be subject to any higher or other rate of dock, pier, harbour, light, pilotage, tonnage, or other dues, duties, tolls, rates, or other charges whatsoever, or to any other rules as to the employment of pilots, or any other rules or restrictions whatsoever, than *British* ships employed in like manner or goods carried in such ships, any law, charter, special privilege, or grant to the contrary notwithstanding; nor shall any body corporate or person having or claiming any right or title to any such higher or other rates, dues, duties, tolls, or other charges as aforesaid be entitled to any compensation in respect thereof under any law or statute relating thereto, or otherwise howsoever.

XV. It shall be lawful for her Majesty to exercise in respect of foreign ships employed in the

coasting trade as aforesaid, and of goods carried coastwise in such ships, such or the like powers as are conferred on her Majesty by the three hundred and twenty-fourth, three hundred and twenty-fifth, and three hundred and twenty-sixth sections of the said Customs Consolidation Act, 1853, in respect of foreign ships employed in the over-sea trade, and of goods exported or imported in such ships.

XVI. The powers and authorities now vested in the Commissioners of Customs with regard to any act or thing relating to the customs or to trade or navigation in any of the *British* possessions abroad shall, from and after the passing of this Act, be vested in the governor, lieutenant governor, or other person administering the government in any such possession, and every act required by any law to be done by or with any particular officer or at any particular place, if done by or with any such officer or at any place appointed or nominated by such governor, lieutenant governor, or other person so administering such government, shall be deemed to have been done by or with such particular officer or at such particular place, as the case may be, and as required by law; and all commissions, deputations, and appointments granted to any officers of customs in force at the commencement of this Act shall have the same force and effect to all intents and purposes as if the same had been granted or made in the first instance by such governor, lieutenant governor, or person so administering the government of any such possession; and all bonds or other securities which shall have been given by or for any such officers and their respective securities for good conduct or otherwise shall remain in force, and shall and may be enforced and put in suit at the instance of or by directions of any such governor, lieutenant governor, or person administering the government of any such possession.

XVII. The islands in the *Bay of Honduras* called the *Bay Islands* shall be deemed and taken to be excepted or excluded from the operation of the one hundred and fifty-ninth section of the "Customs Consolidation Act, 1853," to the same extent as the *Bahamas* or *Bermuda* islands are thereby excepted or excluded.

XVIII. No tobacco, cigars, or snuff shall be imported into the channel islands, nor be carried from any one of the said islands to another of them, or from one part of any of the said islands to another part of the same, unless in ships of not less burden than fifty tons, except from the United Kingdom in ships of not less than forty tons burden regularly trading from thence to those islands, nor unless in packages each containing not less than eighty pounds net weight of such tobacco, cigars, or snuff, nor unless the provisions in and under which the like sort of goods may be legally imported into the United Kingdom are complied with; and all tobacco, cigars, or snuff imported into the said island or carried, shipped, or removed contrary hereto, or which shall be found or discovered to have been on board any ship or boat within one league of the coasts thereof, shall be forfeited, together with the ship or boat.

XIX. No spirits (except rum of the *British* plantation) shall be imported into or exported from the channel islands or any of them, or be removed from any one to any other of the said islands, or be carried coastwise from any one part to any other part of any one of the said islands, or shall be shipped in order to be so removed or carried in any ship of less burden than fifty tons, or in any cask or other vessel capable of containing liquids not being of the size or content of twenty gallons at the least; and all spirits imported, exported, removed, carried, shipped, or waterborne to be so shipped, removed, or carried contrary hereto shall be forfeited, together with the ship and any boat importing, exporting, removing, or carrying the same: provided always, that nothing herein contained shall extend to any spirits imported in any such ship in glass bottles as part of the cargo, nor to any spirits being really intended for the consumption of the seamen and passengers of such ship during their voyage, and not being more in quantity than is necessary for that purpose; nor to any warehoused goods exported from the United Kingdom in ships of not less than forty tons burden being regular traders to those islands; nor to any boat of less burden than ten tons, for having on board at any one time any foreign spirits of the quantity of ten gallons or under, such boat having a licence from the proper officer of customs at either of the islands of *Guernsey* or *Jersey* for the purpose of being employed in carrying commodities for the supply of the island of *Nork*, which licence such officer of customs is hereby required to grant without fee or reward; but if any such boat shall have on board at any one time any greater quantity of spirits than ten gallons, unless in casks or packages of the size and content of twenty gallons at the least, such spirits and boat shall be forfeited.

XX. If in the channel islands any goods the importation whereof into the United Kingdom is prohibited, or any goods in any packages, or in any manner in which the same cannot be legally imported into the United Kingdom, shall be shipped or brought to any wharf, quay, or other place in or be waterborne to be shipped on board any ship clearing or departing from those islands to the United Kingdom, such goods shall be forfeited, and any person who shall so ship, bring, or waterbear to be shipped any such goods, or be otherwise knowingly concerned therein, shall forfeit the sum of one hundred pounds or treble the value of the goods, at the election of the Commissioners of Customs.

XXI. Where any seizure of tobacco or spirits shall be made in any of the channel islands or within one league of the coast thereof by any officer of customs or person employed for the prevention of smuggling, it shall be lawful for the Commissioners of Customs to allow to such officer or person such reward beyond the sum directed by the one hundred and eighty-fourth section of "The Customs Consolidation Act, 1853," as the said Commissioners may deem advisable, not exceeding in any case the sum of five pounds.

XXII. The terms "governor, deputy governor, and deemster," used in the two hundred and sixty-

third and two hundred and seventy-seventh sections of "The Customs Consolidation Act, 1853," shall be deemed to apply to and include jurats of any of the channel islands, and each such jurat shall have and exercise, in respect of any offence against any Act relating to the customs committed in or within one league of the island in which he may be a jurat, the same powers as are vested in any justice of the peace in respect of any such offences committed therein.

XXIII. Any goods the growth of the *Isle of Man*, or there manufactured from materials the growth of the said isle, or from materials not subject to duties in *Great Britain* or *Ireland*, or from materials upon which the duty has been paid in *Great Britain* or *Ireland* and upon which no drawback has been subsequently granted, may be brought from the said isle into *Great Britain* or *Ireland* without payment of any duty: provided always, that such goods may nevertheless be charged with such proportion of such duties as shall fairly countervail any duties of excise payable on the like sort of goods the produce of that part of the United Kingdom into which they shall be brought or payable upon any of the materials from which such goods are manufactured; and any articles either wholly or in part manufactured in the said isle from any materials upon which a higher duty is payable upon their importation into the United Kingdom than on their importation into the *Isle of Man*, may be brought from the said isle into *Great Britain* or *Ireland* on payment of the duty payable on such goods in that part of the United Kingdom into which they shall be so brought.

XXIV. The *Isle of Man* shall be deemed and taken to be part of the United Kingdom for the purposes of this or any other Act relating to the customs; but nothing herein contained shall prejudice or affect, or be construed in any way, directly or indirectly, to prejudice or affect, any of the rights or privileges legally exercised or enjoyed by the said isle at the time of the passing of this Act.

XXV. If any ship or boat belonging wholly or in part to her Majesty's subjects, or having half the persons on board subjects of her Majesty, shall be found or discovered to have been within four leagues of that part of the coast of the United Kingdom which is between the *North Foreland* on the coast of *Kent* and *Beachy Head* on the coast of *Sussex*, or within eight leagues of any other part of the coast of the United Kingdom, or if any foreign ship or boat having one or more subjects of her Majesty on board shall be found or discovered to have been within three leagues of the coast of the United Kingdom, or if any foreign ship or boat shall be found or discovered to have been within one league of the coast of the United Kingdom, or if any ship or boat shall be found or discovered to have been within one league of the channel islands, any such ship or boat so found or discovered, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, any spirits, not being in a cask or other vessel capable of containing liquids of the size or content of twenty gallons at the least, or any tea

exceeding six pounds weight in the whole, or any tobacco or snuff not being in a cask or a whole and complete package containing eighty pounds weight of tobacco or snuff at the least, or any tobacco stalks, tobacco stalk flour, snuff work, or any cordage or other articles adapted and prepared for slinging or sinking small casks, or any casks or other vessels whatsoever of less size or content than twenty gallons of the description used for the smuggling of spirits, then and in every such case the said spirits, tea, tobacco, snuff, tobacco stalks, tobacco stalk flour, and snuff work, together with the casks or packages containing the same, and the cordage or other articles, casks, and other vessels of the description aforesaid, and also the ship or boat, shall be forfeited.

XXVI. If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom or the channel islands, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, any spirits, not being in a cask or other vessel capable of containing liquids of the size or content of twenty gallons at the least, or any tobacco or snuff, imported contrary to the prohibitions and restrictions contained in this or any other Act relating to the customs, or any tobacco stalks, tobacco stalk flour, or snuff work, every such ship or boat and such spirits, tobacco, snuff, tobacco stalks, tobacco stalk flour, and snuff work shall be forfeited; but if it shall be made to appear to the satisfaction of the commissioners of customs that such spirits, tobacco, snuff, tobacco stalks, tobacco stalk flour, or snuff work were on board without the knowledge or privity of the owner or master of such ship or boat, and without any wilful neglect or want of reasonable care on their parts, then and in such case the said commissioners shall deliver up the said ship or boat to the owner or master of the same.

XXVII. Nothing herein contained shall extend to render any ship of one hundred and twenty tons burden or upwards liable to forfeiture on account of any tobacco, cigars, or snuff, if in whole and complete packages, each containing not less than eighty pounds net weight of such tobacco, cigars, or snuff; nor to render any ship of fifty tons burden or upwards liable to forfeiture on account of any tea, or of any spirits in glass bottles or stone bottles not exceeding the size of three pints each, such tea and spirits being really part of the cargo of such ship; nor to render any ship liable to forfeiture on account of any spirits or tea, or of any tobacco really intended for the consumption of the seamen or passengers on board during their voyage, and not being more in quantity than is necessary for that purpose; nor to render any ship liable to forfeiture if really bound from one foreign port to another foreign port, and pursuing such voyage, wind and weather permitting.

XXVIII. Every person who shall be found or discovered to have been on board any ship or boat liable to forfeiture under this or any other Act relating to the customs for being found or discovered to have been within any port, bay, harbour, river,

or creek of the United Kingdom or of the channel islands, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, such goods or things as subject such ship or boat to forfeiture, or who shall be found or discovered to have been on board any of her Majesty's ships or vessels or on board any ship or vessel in her Majesty's employment or service, or on board of any foreign post office packet, being a national vessel, employed in carrying the mails between any foreign country and the United Kingdom, such last-mentioned ships, vessels, or packets being found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom or the channel islands, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, any spirits not being in a cask or other vessel capable of containing liquids of the size or content of twenty gallons at the least, or any tobacco or snuff not being in a whole and complete package containing eighty pounds weight of such tobacco or snuff at least, shall forfeit the sum of one hundred pounds; and every such person shall and may be detained, and taken before any justice, to be dealt with as herein-after directed.

XXIX. The notice in writing now required by the two hundred and twenty-sixth section of "The Customs Consolidation Act, 1853," on the seizure of goods, shall not be required in cases where the seizure is made on the person or in the presence of the offender; and where any such notice is required, the same may be served either in the manner prescribed by the said section, or by delivery at the place of abode of the party to whom the same is addressed.

XXX. When any person shall have been detained for any offence against this or any other Act relating to the customs, and taken before any justice, such justice may, if he see reasonable cause, order such person to be detained, in gaol or in the custody of the police or constabulary force a reasonable time to obtain the order of the Commissioners of Customs or Inland Revenue, and to prepare the necessary informations, convictions, and warrants of commitment, and at the expiration of such time to be brought before him, or any other justice or justices, who may then finally hear and determine the matter; or when any information shall have been preferred before any justice against any person for any such offence, and it shall appear to such justice, by depositions on oath, that such person is likely to abscond before such information can be heard, such justice may, in lieu of issuing a summons for the appearance of the offender, grant his warrant to apprehend and bring such offender before him or any other justice, at a time and place to be named in such warrant, for the hearing of such information; but any person so detained or apprehended may be liberated, on giving, by recognizance, security to the satisfaction of such justice in the sum of one hundred pounds, or in the amount of the penalty sought to be recovered, to appear at such time

and place as shall be appointed by such justice for hearing the case.

XXXI. When any person is convicted before any justice and adjudged to pay a pecuniary penalty for any offence against this or any Act relating to the customs, such justice shall state in the conviction, and also in the commitment of such person, if committed in default of payment, the amount of costs awarded to be paid by such person, as well as the penalty so adjudged, and shall commit such person until payment of such penalty and costs.

XXXII. In any case where a verdict is or shall have been obtained at the suit of the Crown against any defendant in any of the Superior Courts, in any cause tried out of Term, execution thereon may issue on or after the expiration of fourteen days from the date of such verdict, in the same manner as execution may issue in any case under the one hundred and twentieth section of "The Common Law Procedure Act, 1852," unless the judge who tried the cause, or some other judge, or the court, shall order execution to issue at any earlier or later period with or without terms.

XXXIII. The option given to a defendant by section two hundred and sixty-four of "The Customs Consolidation Act, 1853," of removing any proceedings against himself before any justice to a Superior Court, shall not be exercised after the commencement of the trial or hearing thereof before such justice.

XXXIV. The words "otherwise dealing with certain prohibited, restricted, or uncustomed goods" in count sixteen of Schedule B to "The Customs Consolidation Act, 1853," shall be deemed to apply to and include the harbouring or having possession, as the case may be, of any such goods, and it shall not be necessary to prove that the party charged was concerned in the unshipping thereof.

XXXV. The condemnation of goods by any justice is referred under the laws relating to the customs may be proved in any court of justice, or before any competent tribunal, by the production of a valid condemnation purporting to be signed by such justice, or an examined copy of the record of such condemnation certified by the clerk to such justice.

XXXVI. The second section of the Act of the fourth and fifteenth years of her present Majesty, chapter ninety-nine, shall not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offence, or for the recovery of any penalty or forfeiture, under any law now in force or hereafter to be made relating to the customs or inland revenue.

XXXVII. Any writer to the signet, solicitor before the Supreme Courts in Scotland, or solicitor at law duly licensed to practise as an agent in the Courts of Session and Judiciary in Scotland, who shall be retained by any defendant at the suit of the Crown for any offence against the laws relating to the customs, shall be competent to undertake the defence of such defendant, and to instruct counsel for that purpose; and any such defendant who may not have retained any such agent shall be entitled to be heard by his counsel on any trial for such offence, although such defendant may have previously

appeared to answer such suit in person instead of appearing by agent.

XXXVIII. If any person shall in any matter relating to the customs make and subscribe any false declaration, or make or sign any declaration, certificate, or other instrument required to be verified by signature only, the same being false in any particular, or if any person shall make or sign any declaration made for the consideration of the Commissioners of Customs, on any application presented to them, the same being untrue in any particular; or if any person required by this or any other Act relating to the customs to answer questions put to him by the officers of customs shall not truly answer such questions; or if any person shall counterfeit, falsify, or wilfully use when counterfeited or falsified any document required by this or any Act relating to the customs by or under the directions of the Commissioners of Customs, or any instrument used in the transaction of any business or matter relating to the customs, or shall fraudulently alter any document or instrument, or counterfeit the seal, signature, initials, or other mark of or used by the officers of the customs for the verification of any such document or instrument, or for the security of goods, or any other purpose in the conduct of business relating to the customs, or under the control or management of the Commissioners of Customs or their officers; every person so offending shall for every such offence forfeit the penalty of one hundred pounds.

XXXIX. If any person shall have cause to complain of the insertion of any book in the lists required by the forty-sixth and one hundred and sixtieth sections of "The Customs Consolidation Act, 1853," to be published by the Commissioners of Customs, it shall be lawful for any judge at chambers, on the application of the person so complaining, to issue a summons calling upon the person upon whose notice such book shall have been so inserted to appear before such judge, at a time to be appointed in such summons, to show cause why such book shall not be expunged from such lists, and such judge shall at the time so appointed proceed to hear and determine upon the matter of such summons, and make his order thereon in writing, and upon service of such order, or a certified copy thereof, upon the Commissioners of Customs or their secretary for the time being, the said Commissioners shall expunge such book from the lists, or retain the same therein, according to the tenor of such order; and in case such book shall be expunged from such lists, the same shall not be deemed to be prohibited under the table of prohibitions and restrictions inwards contained in the forty-fourth section of the said Act: if at the time appointed in any such summons the person so summoned shall not appear before such judge, then upon proof by affidavit that such summons, or a true copy thereof, has been personally served upon or left at the last known or usual place of abode of the person so summoned, or in case the person to whom such summons was directed and his place of abode cannot be found, that due diligence has been used to ascertain the same, such judge shall be at liberty to proceed *ex parte* to hear and determine

the matter; but if either party be dissatisfied with such order he may apply to the Superior Court of which such judge is a member to review such order, and make such further order thereon as such court may see fit.

XL. From and after the passing of this Act, no book shall be inserted in any list published by the Commissioners of Customs, under the forty-sixth and one hundred and sixteenth sections of "The Customs Consolidation Act, 1853," until the person giving the notice thereby required shall have made and subscribed a declaration before the collector of the customs or any justice of the peace, at some port or place in the United Kingdom, that the contents of such notice are true: provided always, that nothing in this Act contained shall prevent prejudice, or affect any proceeding at law or in equity which any party, aggrieved by reason of the insertion of any book in any such list, in pursuance of any such notice, or upon the removal of any book from such list pursuant to any such order as aforesaid, or by reason of any declaration to be made under the authority of this Act being false, might or would otherwise have against any party giving such notice, or obtaining any such order, or making such false declaration as aforesaid.

XLII. No soldiers or militia shall be billeted on officers or coast-guard men in the service of the customs.

XLIII. The term "goods" in the table of prohibitions and restrictions inwards relating to goods absolutely prohibited to be imported contained in the forty-fourth section of "The Customs Consolidation Act, 1853," shall be deemed to include all malt, whether in grain or in the form of concentrated extract or essence, but shall not include any of the fermented liquors made from malt now specified in the tariff.

XLIII. When any of the terms mentioned in the three hundred and fifty-seventh section of "The Customs Consolidation Act, 1853," are used in this or any other Act relating to the customs, the terms so used shall have the same interpretation and meaning as are given to them in the said section.

XLIV. The several Acts and parts of Acts set forth in the Schedule to this Act annexed are hereby repealed, to the extent to which such Acts or parts of Acts are by such Schedule expressed to be repealed, except as to anything done before the commencement of this Act, and except so far as relates to any arrears of duty or to any drawback which shall have become due or payable, and except so far as may be necessary for the purpose of supporting or continuing any proceeding heretofore taken or to be taken after the commencement of this Act, and except as to the recovery or application of any penalty for any offence which shall have been committed or any forfeiture which shall have been incurred before the commencement of this Act; and all orders made by her Majesty in council, all bonds taken or licences granted, and all things done under the authority or in pursuance of any of the Acts or parts of Acts hereby repealed, shall nevertheless be valid and effectual.

XLV. Each of the several sections of this Act set forth in Column No. I. of the Table to this Act

shall be deemed and taken to be incorporated in and form part of "The Customs Consolidation Act, 1853," in the order and place assigned to each such section in and by Column No. 2 of the said Table, and the said several sections of this Act shall be read and construed with the said Customs Consolidation Act, 1853, and the provisions of the latter Act shall be deemed to relate to and be applicable to said several sections of this Act in the same manner and to the same extent as if the said several sections of this Act had been originally enacted therein, in the order and place so assigned to each such section in and by the said Table; and the several forms contained in Schedule B to the said "Customs Consolidation Act, 1853," shall and may be used with reference to any offences under this Act in the same manner as they are made applicable to offences against the said "Customs Consolidation Act, 1853," and when necessary, the numerical reference in such forms to the sections of this Act creating the offence charged shall be made accordingly.

XLVI. This Act shall be registered in the royal courts of the Islands of Guernsey and Jersey, respectively, and the said royal courts respectively shall have full power and authority and are hereby required to register the same.

XLVII. This Act shall come into operation on the day of the passing of this Act; and in citing it in other Acts of Parliament and in legal instruments it shall be sufficient to use the expression "The Supplemental Customs Consolidation Act, 1855."

SCHEDULE OF ACTS TO BE REPEALED.

NOTE.—The words printed in *italics* show the extent of repeal.

16 & 17 Vic. c. 107.—Customs Consolidation Act, 1853.—Sections 119, 192, 193, 198, 210, 212, 213, 214, 236, 240, 346, 348. *So much of the Table of Prohibitions and Restrictions inwards on goods prohibited to be imported, except subject to the restrictions on importations therein contained, as relates to tobacco and snuff under the several denominations of tobacco, cigars, cigarillos, cigarettes, and snuff, being part of section 44. The following words, viz., "With the addition of the value of such goods, if any, as shall have been previously chargeable with duty at value and of British goods," being part of the proviso contained in section 125; and so much of section 142 as relates to the delivery of a duplicate bill of lading on the shipment of goods, and within fourteen days after final clearance of the ship, & list of such goods, with the quantities and values thereof, as thereby required.*

17 Vic. c. 5.—An Act to admit Foreign Ships to the Coasting Trade.—*The whole Act.*
17 & 18 Vic. c. 112.—An Act for the further Alteration and Amendment of the Laws and Duties of Customs.—*The whole Act.*

TABLE REFERRED TO IN SECTION XLV.
Section I of "The Supplemental Customs Consolidation Act, 1855," to be incorporated after section 21 of "The Customs Consolidation Act, 1853."

Section 2, in lieu of part of section 44, repealed by this Act.

Section 3, after section 51.

Section 4, after section 64.

Section 5, after section 65.

Sections 6 & 7, after section 74.

Section 8, after section 104.

Section 9, in lieu of section 119, repealed by this Act.

Section 10, after section 125.

Section 11, after section 145.

Section 12, after section 118.

Sections 13, 14, & 15, in lieu of section 152, repealed by 17 Vic. c. 5.

Section 16, after section 158.

Section 17, after section 159.

Section 18, in lieu of section 193, repealed by 17 & 18 Vic. c. 122, s. 16.

Section 19, in lieu of section 192, repealed by this Act.

Sections 20 & 21, after section 190.

Section 22, after section 277.

Section 23, in lieu of section 348, repealed by this Act.

Section 24, in lieu of section 346, repealed by this Act.

Section 25, in lieu of section 312, repealed by this Act.

Section 26, in lieu of section 288, repealed by this Act.

Section 27, in lieu of section 213, repealed by this Act.

Section 28, in lieu of section 236, repealed by this Act.

Section 29, after section 226.

Section 30, in lieu of section 240, repealed by this Act.

Section 31, after section 263.

Section 32, after section 312.

Section 33, after section 264.

Section 34, after section 269.

Sections 35 & 36, after section 308.

Section 37, after section 223.

Section 38, in lieu of section 198, repealed by this Act.

Sections 39 & 40, after section 191.

Section 41, after section 7.

Section 42, after section 44.

Section 43, after section 357.

Section 44, after section 357.

Section 45, after section 357.

Section 46, after section 357.

Section 47, after section 357.

Section 48, after section 357.

Section 49, after section 357.

Section 50, after section 357.

Section 51, after section 357.

Section 52, after section 357.

Section 53, after section 357.

Section 54, after section 357.

Section 55, after section 357.

CAP. C.
An Act to amend the Law concerning the Qualification of Officers of the Militia.

[14th August, 1855.]

CAP. CI.
An Act for the more effectual Execution of the Convention between her Majesty and the French Government concerning the Fisheries in the Seas between the British Islands and France.

[14th August, 1855.]

CAP. CII.
An Act to confirm certain Provisional Orders made under an Act of the Fifteenth Year of her present Majesty, to facilitate Arrangements for the Relief of Turnpike Trusts.

[14th August, 1855.]

CAP. CIII.
An Act to amend an Act of the last Session 1854, relating to the Sale of Spirits by unlicensed Persons, and illicit Distillation in Ireland, and also to repeal so much of an Act of the Third and Fourth Years of his late Majesty as requires Persons applying for Licences for the Sale of Beer, Cider, or Spirits by Retail in Ireland to enter into a Bond with Sureties.

[14th August, 1855.]

CAP. CIV.
An Act for the Regulation of Chinese Passenger Ships.

[14th August, 1855.]

CAP. CV.
An Act to amend the bargein Asylums Act, 1853, and the Acts passed in the Nineteenth and Twentieth Years of her Majesty, for the Regulation of the Care and Treatment of Lunatics.

[14th August, 1855.]

CAP. CVI.
An Act to suspend the making of Tolls and the Ballots for the Militia of the United Kingdom.

[14th August, 1855.]

CAP. CVII.
An Act to authorize the Commissioners of the Treasury to make Arrangements concerning a certain Loan advanced by way of Relief to the Island of Tobago.

[14th August, 1855.]

CAP. CVIII.
An Act to enable her Majesty to carry into effect a Convention made between her Majesty, his Majesty the Emperor of the French, and his Imperial Majesty the Sultan.

[14th August, 1855.]

CAP. XCIX.
An Act to enable her Majesty to carry into effect a Convention made between her Majesty, his Majesty the Emperor of the French, and his Imperial Majesty the Sultan.

[14th August, 1855.]

CAP. C.
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[14th August, 1855.]

CAP. CIX.

An Act to make further Provisions for the Repayment of Advances out of the Consolidated Fund for the Erection and Enlargement of Asylums for the Lunatic Poor in *Ireland*, and to amend the Laws with reference to the Repayments in case of Change of Districts, and the Appointment of Commissioners of General Control and Correspondence. [14th August, 1855.]

CAP. CX.

An Act to authorize the Application of certain Sums granted by Parliament for Drainage and other Works of public Utility in *Ireland* towards the Completion of certain Navigations undertaken in connexion with Drainages, and to amend the Acts for promoting the Drainage of Lands and Improvements in connexion therewith in *Ireland*. [14th August, 1855.]

CAP. CXL

An Act to amend the Law relating to Bills of Lading. [14th August, 1855.]

"WHEREAS by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property: and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

II. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

III. Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment

as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

CAP. CXII.

An Act to continue an Act of the Eleventh Year of her present Majesty, for the better Prevention of Crime and Outrage in certain Parts of *Ireland*. [14th August, 1855.]

"WHEREAS an Act was passed in the session of Parliament held in the eleventh and twelfth years of the reign of her present Majesty, intituled *An Act for the better Prevention of Crime and Outrage in certain parts of Ireland until the First Day of December One thousand eight hundred and forty-nine, and to the End of the then next Session of Parliament*: and whereas by the Acts of the fifteenth and sixteenth *Victoria*, chapter sixty-six, sixteenth and seventeenth *Victoria*, chapter seventy-two, and seventeenth and eighteenth *Victoria*, chapter ninety-two, the said firstly-recited Act has been from time to time continued until the thirty-first day of *August*, one thousand eight hundred and fifty-five: and whereas it is expedient that the said first recited Act should be further continued for a limited period:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. The said first-recited Act shall be and continue in full force and effect until the first day of *July*, one thousand eight hundred and fifty-six.

(To be continued.)

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STATUTES PASSED IN THE 18TH AND 19TH VICTORIA, 1854-5.

(Continued from page 320.)

CAP. CXIII.

An Act to extend the Provisions of an Act of the Fourteenth and Fifteenth Years of her present Majesty, for rebuilding the Bridge over the River

[14th August, 1855.]

CAP. CXIV.

An Act for the Transfer of Licences of Public Houses in Ireland.

[14th August, 1855.]

Whereas it is expedient to provide for the transfer in certain cases of licences of inns, alehouses, and victualling houses in Ireland: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Upon the death of any person duly licensed to carry on the business of a licensed victualler, and to sell excisable liquors by retail, to be consumed on the premises, in Ireland, or upon the removal of any such person from the house or premises at which he is authorized by any such licence to carry on such business as aforesaid in Ireland, or the sale of or assignment of his interest therein by operation of law, or otherwise, it shall be lawful for the justices of the peace of the district within which any such licensed house or premises shall be situated, assembled at Petty Sessions, or the justices in any liberty, city, town, or place within which any such licensed house or premises shall be situated assembled at Petty Sessions, at any time when no Quarter Sessions shall be holden for any such county, riding, division, liberty, city, town, or place, (if they shall think proper so to do, after examining upon oath all necessary parties,) to transfer, by endorsement thereon, any and every such licence as aforesaid then in force, to any person, not disqualified by law, to whom it shall be proposed at the time of such application to transfer any such licence, to use, exercise, and carry on the business of a licensed victualler at the same house and on the same pre-

mises, and there to sell such excisable liquors as might theretofore have been lawfully sold and retailed therein; and thereupon it shall be lawful for such person so to use, exercise, and carry on the said business at such house and premises, until the Quarter Sessions of the peace which shall be holden for the same county, riding, division, liberty, city, town, or place next after the expiration of one calendar month from the time of such transfer, and no longer.

2. Provided always, that nothing herein contained shall be construed to empower any justices at Petty Sessions to make any such transfer as aforesaid, within any of the divisions assigned or to be assigned to any of the police courts already established or to be established within the district of Dublin metropolis, but that any such application as is herein-before authorized to be made at Petty Sessions shall, when the licensed house and premises shall be situated within any of the said divisions of the police district of Dublin metropolis, be made to one of the police magistrates sitting at any of the said courts, and such magistrate shall, in his discretion, make any such transfer as aforesaid, in the manner and for the time herein-before mentioned: provided also, that any person who shall be authorized under the provisions of this Act to continue to carry on the business of a licensed victualler shall, after the obtaining such authority, and so long as the same shall continue in force, be subject to all the powers, regulations, proceedings, penalties, and provisions declared by or contained in any Act or Acts in force touching the regulation, government, or control of licensed keepers of inns, alehouses, and victualling houses, in like manner as if the same had been repeated and re-enacted in this Act, and that all penalties and forfeitures imposed by any such Act or Acts shall be applied as directed by the same respectively.

CAP. CXV.

An Act to continue and amend the Public Health Act (1854).

[14th August, 1855.]

CAP. CXVI.

An Act for the better Prevention of Diseases.

[14th August, 1855.]

CAP. CXVII.

An Act for transferring to One of Her Majesty's Principal Secretaries of State the Powers and Estates vested in the Principal Officers of the Ordnance. [14th August, 1855.]

CAP. CXVIII.

An Act to repeal the Act of the Seventeenth and Eighteenth Years of the Reign of her present Majesty for further regulating the Sale of Beer and other Liquors on the Lord's Day, and to substitute other Provisions in lieu thereof. [14th August, 1855.]

CAP. CXIX.

An Act to amend the Law relating to the Carriage of Passengers by Sea. [14th August, 1855.]

CAP. CXX.

An Act for the better local Management of the Metropolis. [14th August, 1855.]

CAP. CXXI.

An Act to consolidate and amend the Nuisances Removal and Diseases Prevention Acts, 1848 and 1849. [14th August, 1855.]

CAP. CXXII.

An Act to amend the Laws relating to the Construction of Buildings in the Metropolis and its Neighbourhood. [14th August, 1855.]

CAP. CXXIII.

An Act to defray the Charge of the Pay, Clothing, and Contingent and other Expenses of the Disembodied Militia in Great Britain and Ireland; to grant Allowances in certain Cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant Surgeons, Surgeons Mates, and Serjeant Majors of the Militia; and to authorize the Employment of the Non-commissioned Officers. [14th August, 1855.]

CAP. CXXIV.

An Act to amend the Charitable Trusts Act, 1853. [14th August, 1855.]

CAP. CXXV.

An Act to confirm Provisional Orders of the General Board of Health, applying the Public Health Act (1848) to the Districts of *Middlesbrough*, *Windhill*, *Christchurch*, *Keighley*, *Tunstall*, and *Toxteth Park*, and for Alteration of the Boundaries of the District of *Ramsford*. [14th August, 1855.]

CAP. CXXVI.

An Act for diminishing Expense and Delay in the Administration of Criminal Justice in certain Cases. [14th August, 1855.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

I. Where any person is charged before any justices of the peace assembled at such petty sessions as hereinafter provided with having committed simple larceny, and the value of the whole of the property alleged to have been stolen does not, in the judgment of such justices, exceed five shillings, or with having attempted to commit larceny from the person, or simple larceny, it shall be lawful for such justices to hear and determine the charge in a summary way, and if the person charged shall confess the same, or if such justices, after hearing the whole case for the prosecution and for the defence, shall find the charge to be proved, then it shall be lawful for such justices to convict the person charged, and to commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any period not exceeding three calendar months, and if they find the offence not proved they shall dismiss the charge, and make out and deliver to the person charged a certificate under their hands, stating the fact of such dismissal; and every such conviction and certificate respectively may be in the Forms A and B in the Schedule to this Act, or to the like effect: provided always, that if the person charged do not consent to have the case heard and determined by such justices, or if it appear to such justices that the offence is one which, owing to a previous conviction of the person charged, is punishable by law with transportation or penal servitude, or if such justices be of opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment, rather than to be disposed of summarily, such justices shall, instead of summarily adjudicating thereon, deal with the case in all respects as if this Act had not been passed: provided also, that if upon the hearing of the charge such justices shall be of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the person charged, without proceeding to a conviction.

II. Where the justices before whom any person is charged as aforesaid propose to dispose of the case summarily under the foregoing provisions, one of such justices, after the examinations of all the witnesses for the prosecution have been completed, and before calling upon the person charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, and shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by us, or do you desire that it shall be sent for trial by a jury at the sessions or assizes" (as the case may be); and if the person charged shall consent to the charge being summarily tried and determined as aforesaid, then the jus-

tices shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge; and if such person shall say that he is guilty, the justices shall then proceed to pass such sentence upon him as may by law be passed, subject to the provisions of this Act in respect to such offence; but if the person charged shall say that he is not guilty, the justices shall then inquire of such person whether he has any defence to make to such charge, and if he shall state that he has a defence the justices shall hear such defence, and then proceed to dispose of the case summarily.

III. Where any person is charged before any justices at such petty sessions as aforesaid with simple larceny (the property alleged to have been stolen exceeding in value five shillings), or stealing from the person, or larceny as a clerk or servant, and the evidence, when the case on the part of the prosecution has been completed, is in the opinion of such justices sufficient to put the person charged on his trial for the offence with which he is charged, such justices, if the case appear to them to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this Act, shall reduce the charge into writing, and shall read it to the said person, and shall then ask him whether he is guilty or not of the charge; and if such person shall say that he is guilty such justices shall thereupon cause a plea of guilty to be entered upon the proceedings, and shall convict him of such offence, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding six calendar months; and every such conviction may be in the Form C in the Schedule to this Act, or to the like effect: provided always, that the said justices, before they ask such person whether he is guilty or not, shall explain to him that he is not obliged to plead or answer before them at all, and that if he do not plead or answer before them he will be committed for trial in the usual course.

IV. In every case of summary proceeding under this Act the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

V. Where any person is charged before any justice or justices with any offence mentioned in this Act, and in the opinion of such justice or justices the case may be proper to be disposed of by justices in petty sessions under this Act, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for further examination to the next petty sessions, in like manner in all respects as a justice or justices are authorized to remand a party accused under the Act passed in the session holden in the eleventh and twelfth years of her Majesty, chapter forty-two; section twenty-one, or under the Petty Sessions Act (Ireland), 1851, section fourteen.

VI. If any person suffered to go at large upon entering into such recognizance as the justice or justices are authorized under the last-mentioned Act to take on the remand of a party accused do not

afterwards appear pursuant to such recognizance, then the justices before whom he ought to have appeared shall certify (under the hands of two of them) on the back of the recognizance, to the Clerk of the Peace of the county or place, the fact of such nonappearance, and such recognizance shall be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such nonappearance.

VII. The justices adjudicating under this Act shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the depositions of the witnesses for the prosecution and for the defence, and the statement of the accused, to the next court of general or quarter sessions for the county or place, there to be kept by the proper officer among the records of the court; and a copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceeding whatever.

VIII. It shall be lawful for the justices by whom any person is convicted under this Act to order restitution of the property stolen, taken, or obtained by false pretences, in those cases in which the court before whom the person convicted would have been tried but for this Act may be by law authorized to order restitution.

IX. Every petty sessions for the purposes of this Act shall be an open public court, and shall be the petty sessions holden for a petty sessional division; and a written or printed notice of the days and hours for holding such petty sessions shall be posted or affixed by the clerk to the justices of petty sessions upon the outside of some conspicuous part of the building or place where the same are held.

X. The provisions of the Act of the session holden in the eleventh and twelfth years of her Majesty, chapter forty-three, shall not be construed as applying to any proceeding under this Act.

XI. Every conviction by justices in petty sessions under this Act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this Act shall be attended with any forfeiture.

XII. Every person who obtains a certificate of dismissal or is convicted under this Act shall be released from all further or other criminal proceedings for the same cause.

XIII. No conviction, sentence, or proceeding under this Act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.

XIV. Where any charge is summarily adjudicated upon under this Act, or an offender is under this Act convicted by justices in petty sessions upon a plea of "guilty," it shall be lawful for the justices by whom such charge has been adjudicated upon or offender convicted, upon the request of any person who has preferred the charge or appeared to prosecute or give evidence against the person charged, if such justices think fit so to do, to grant a cer-

ificate to such person of the amount of the compensation which such justices may deem reasonable for his expenses, trouble, and loss of time therein, subject nevertheless to the regulations made or to be made as hereinafter mentioned; and every such certificate shall, when granted in *England*, have the effect of an order of court for the payment of the expenses of a prosecution made under the Act of the seventh year of King *George* the Fourth, chapter sixty-four, and the Acts amending the same, and when granted in *Ireland* shall have the effect of an order of court for the payment of the expenses of a prosecution made under the Act of the fifty-fifth year of King *George* the Third, chapter ninety-one, and the Acts amending the same; and the amount mentioned in such certificate shall be paid in like manner as the money mentioned in such order of court; and all certificates to be granted under this Act shall be subject to the like regulations made or to be made in relation thereto as the certificates mentioned in the said Act of the seventh year of King *George* the Fourth to be granted by examining magistrates are or may be subject to under the Act of the session holden in the fourteenth and fifteenth years of her Majesty, chapter fifty-five; provided also, that the amount of the fees payable to the clerks of the magistrates in petty sessions, in respect of any proceeding under this Act, and of the fees payable to the clerks of the peace for filing the depositions, conviction, or certificate of dismissal aforesaid, and of all such expenses of apprehending the person charged, and detaining him in custody, and of such other expenses as are now by law payable when incurred before a commitment for trial, may be added to the certificate for compensation aforesaid, and paid in the like manner.

XV. In every city, borough, town, or place in *England* where any petty sessions shall be holden under this Act, the town hall, court house, or other public building therein belonging to any county, city, borough, town, or place, or any court house in such city, borough, town, or place provided by the Commissioners of her Majesty's Treasury, under the Act of the session holden in the ninth and tenth years of her Majesty, chapter ninety-five may be used for the purpose of holding such petty sessions, without any charge for rent or other payment, save and except the reasonable and necessary charges for lighting, warming, and cleaning, when such public building is used for the purpose of holding such courts of petty sessions, and for all other expenses necessarily incidental to the use of the said building for the purposes of the said courts: provided always, that the necessary arrangements shall be made so that the sittings of the said courts of petty sessions shall not interfere with the business of the county, city, borough, town, or place, or other business usually transacted in such town hall, court house, or other public building, or any purpose for which any such town hall, court house, or other public building may be used by virtue of any Act of Parliament in that behalf.

XVI. Any one of the magistrates appointed to act at any of the police courts of the metropolis, and sitting at a police court within the metropolitan police district, or any magistrate appointed to act

at the police courts of the *Dublin* metropolitan district, and sitting at a police court within the said district, or any stipendiary magistrate appointed for any city, town, liberty, borough, or district, and sitting at a police court or other place appointed in that behalf, may, in the case of persons charged before such magistrate, do, alone all acts by this Act authorized to be done by justices of the peace in petty sessions, and all the provisions of this Act referring to justices in petty sessions shall be read and construed as referring also to such magistrate.

XVII. Nothing in this Act shall affect the provisions of the Act of the session holden in the tenth and eleventh years of her Majesty, chapter eighty-two, "For the more speedy Trial and Punishment of Juvenile Offenders," or of the Act of the session holden in the thirteenth and fourteenth years of her Majesty, chapter thirty-seven, "For the further Extension of Summary Jurisdiction in Cases of Larceny," or of the Summary Jurisdiction (*Ireland*) Act, 1851; and this Act shall not extend to persons punishable under the said Acts, so far as regards offences for which such persons may be punished thereunder.

XVIII. "And whereas the fees and emoluments of clerks of the peace for counties and boroughs, and of other officers of the courts of quarter sessions, in criminal proceedings, may be seriously diminished by the operation and effect of this Act, and it is just and reasonable that full compensation for any such loss should be made in respect thereof to such clerks of the peace and other officers appointed before the passing of this Act," be it enacted, that immediately after the passing of this Act the Commissioners of her Majesty's Treasury, shall, upon the application of any such clerk of the peace or other officer, by such means and in such manner as they may think proper, inquire into and ascertain the annual amount, to be computed upon an average of five years immediately preceding the passing of this Act, or of such shorter period as such clerk of the peace or other officer shall have been in office, of the fees and emoluments in criminal prosecutions received by such clerk of the peace or other officer; and the said commissioners shall, upon the like application, also ascertain, in such manner as they may think proper, the total amount of fees and emoluments in criminal prosecutions received by such clerk of the peace or other officer during any year after the passing of this Act; and the said commissioners are hereby authorized and empowered, by warrant under their hands, to award to such clerk of the peace or other officer the deficiency, when and so often as the same shall occur, between the last-mentioned amount and the annual average amount so ascertained as aforesaid, and the sum so awarded shall be paid out of any moneys which may be provided by Parliament for that purpose; provided, that in all cases where any such clerk of the peace, by reason of his being paid by salary, under an order made by virtue of the Act of the session holden in the fourteenth and fifteenth years of her Majesty, chapter fifty-five, shall pay such fees and emoluments as aforesaid, to the treasurer of the county or borough for which he is clerk of the peace in aid of the county or borough rates,

as the case may be, such deficiency, when so ascertained as aforesaid, shall be paid to the treasurer of such county or borough respectively.

XIX. "And whereas by section nine of the Act of the session holden in the second and third years of her Majesty, chapter seventy-one, provision is made for payment out of the moneys in the hands of the receiver of the metropolitan police district of such salaries as her Majesty shall direct to the magistrates of the police courts of the metropolis, the salary to the chief magistrate not being more than one thousand two hundred pounds, and to each of the other magistrates not more than one thousand two hundred pounds: and whereas after the passing of the said Act the salary of the chief magistrate was fixed at one thousand two hundred pounds, and the salaries of the other police magistrates at one thousand pounds: and whereas the duties of the said chief and other magistrates have increased, and are subject under this Act to be further increased: and whereas the salaries of such other magistrates have, in consequence of such increase of duty, been increased from one thousand pounds to the limit permitted by the said Act, and it is expedient to authorize such increase of the salary of the said chief magistrate as hereinafter mentioned: the salary to be paid out of the moneys aforesaid to the said chief magistrate shall be such yearly sum, not exceeding one thousand five hundred pounds, as her Majesty may direct.

XX. "And whereas by the Act of the session holden in the fifteenth and sixteenth years of her Majesty, chapter seventy-three, certain powers were granted and provisions made for the payment to the several clerks of assize of annual sums for salaries, and for the expenses of their office, in respect of their duties as associates, in lieu of the fees and emoluments appertaining to those duties: and whereas it is expedient that the principle of payment by salary in lieu of fees should be further provided for, and that the clerks of assize should be so paid for the performance of all their other duties: it is therefore enacted, that all fees and emoluments heretofore payable to the clerks of assize for the performance of their duties as clerks of the crown shall be and they are hereby abolished; and all the powers and provisions made by the before-mentioned Act, except as is hereinafter provided for the payment of clerks of assize by salary in lieu of fees, in respect of their duties as associates, shall be and the same are hereby extended and made applicable to the payment of clerks of assize by salary, and to the expenses of their offices, in lieu of fees and emoluments, for the performance of their duties as clerks of the crown and of all other duties appertaining to the office of clerk of assize: provided always, that the Commissioners of her Majesty's Treasury for the time being shall fix and determine the amount of salary to be allowed to any subordinate officer now employed or who shall hereafter be employed by any clerk of assize, and shall be empowered to order the payment of such salary to the said officers in the first instance, and not through the medium of the clerk of assize: provided also, that the salaries and expenses of the officers of the said clerks of assize

for the whole of their duties on the criminal and civil sides of the court shall be paid out of any moneys which may be provided by Parliament for that purpose.

XXI. "And whereas by Acts of the twelfth and fourteenth years of King Richard the Second payments are provided for justices of the peace and their clerks in each county, as wages by the day for the time of their sessions, to be payable by the sheriff, as therein mentioned, and in several counties in England sums are claimed from the sheriffs and paid in respect of such statutory wages, and it is expedient that such payments should be discontinued; be it therefore enacted, that so much of the several Acts of the twelfth year of King Richard the Second, chapter ten, and of the fourteenth year of King Richard the Second, chapter twelve, or of any other Act now in force as directs or authorizes the payment of wages to justices of the peace and their clerks for the time of their sessions, shall be repealed.

XXII. "And whereas it is expedient to amend the law as to witnesses in cases of wilful or malicious injuries to property: be it further enacted, that in all cases where any justice or justices of the peace have or shall hereafter have power to order a sum of money to be forfeited and paid to the party aggrieved, as amends or compensation for any injury to property, real or personal, the right of such party to receive the money so ordered to be paid shall not be affected by such party having been examined as a witness in proof of the offence, any law or statute to the contrary notwithstanding.

XXIII. In the interpretation of this Act "county" shall be construed to include riding, parts, liberty, and division of a county; "borough" to include city, county of a city or town, and town corporate; "property" to include everything included under the words "chattel, money, or valuable security," as used in the Act of the session holden in the seventh and eighth years of King George the Fourth, chapter twenty-nine; and in the case of any "valuable security" the value of the share, interest, or deposit to which the security may relate, or of the money due thereon or secured thereby, and remaining unsatisfied, or of the goods or other valuable thing mentioned in the warrant or order, shall be deemed to be the value of such security.

XXIV. This Act shall not extend to Scotland.

SCHEDULE.

Form (A.)

Conviction.

Be it remembered, that on the _____ day of _____, in the year of our Lord _____, at _____, in the said [county] A B being charged before us the undersigned _____ of her Majesty's justices of the peace for the said [county], and consenting to our deciding upon the charge summarily, is convicted before us, for that [he the said A B, &c., stating the offence, and the time and place when and where committed]; and we adjudge the said A B for his said

offence to be imprisoned in the [house of correction] at [in the said [county]], [and there kept to hard labour] for the space of

Given under our hands and seals, the day and year first above mentioned, at the [county] aforesaid.

J. S. (L.S.)
H. M. (L.S.)

FORM (B.)

Certificate of Dismissal.

We, the Justices of her Majesty's Justices of the peace for the [county] of [to wit,] certify, that on the [day] of [in the year of our Lord] at [in the said [county]] *A B* being charged before us, and consenting to our deciding upon the charge summarily, for that [he the said *A B*, stating the offence charged, and the time and place when and where alleged to be committed], we did, having summarily adjudicated thereon, dismiss the said charge.

Given under our hands and seals, this [day] of [at] [in the [county] aforesaid].

J. S. (L.S.)
H. M. (L.S.)

FORM (C.)

Conviction upon a Plea of Guilty.

Be it remembered, that on the [day] of [in the year of] to wit, [our Lord] at [in the said [county]] *A B*, being charged before us, the undersigned, of her Majesty's Justices of the peace for the said [county], for that [he the said *A B*, &c., stating the offence, and the time and place when and where committed], and pleading guilty to such charge, he is thereupon convicted before us of the said offence; and we adjudge the said *A B* for his said offence to be imprisoned in the [house of correction] at [in the said [county]], and there kept to hard labour] for the space of [year first above mentioned, at] [in the [county] aforesaid].

J. S. (L.S.)
H. M. (L.S.)

CAP. CXXXVII.

An Act to make better Provision for the Union of contiguous Benefices, and to facilitate the building and endowing of new Churches in spiritually destitute Districts. [14th August, 1855.]

CAP. CXXXVIII.

An Act further to amend the Laws concerning the Burial of the Dead in England. [14th August, 1855.]

CAP. CXXXIX.

An Act to apply a Sum out of the Consolidated Fund and the Surplus of Ways and Means to

the Service of the Year One thousand eight hundred and fifty-five, and to appropriate the Supplies granted in this Session of Parliament.

[14th August, 1855.]

CAP. CXXX.

An Act for raising the Sum of Seven Millions by Exchequer Bills and Exchequer Bonds, for the Service of the Year One thousand eight hundred and fifty-five. [14th August, 1855.]

CAP. CXXXI.

An Act to render more secure the Conditions upon which Money is advanced out of the Parliamentary Grant for the Purposes of Education. [14th August, 1855.]

CAP. CXXXII.

An Act for facilitating the Erection of Dwelling Houses for the Labouring Classes. [14th August, 1855.]

"WHEREAS it is expedient that facilities should be afforded for the erection of healthful and commodious dwellings for the labouring classes;" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. This Act may for all purposes be cited as "The Labourers Dwellings Act, 1855."

Constitution of Companies.

II. Any number of persons not less than six may, by subscribing articles of association or a schedule thereto, form themselves into a company for the purposes hereinafter mentioned: the articles shall be in the form set forth in the schedule hereto, or as near thereto as circumstances permit: there shall be set opposite to the name of each subscriber the sum subscribed for by him in the capital of the company, and his subscription shall be deemed to imply a covenant on the part of himself, his heirs, executors, and administrators, to pay to the company the amount so subscribed for.

III. The articles shall be registered by the Registrar of Joint Stock Companies, who shall charge in respect of such registration such fees as may from time to time be directed by the Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade and plantations, hereinafter called the Board of Trade; and upon such registration being made the subscribers, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name prescribed in the articles of association, having a perpetual succession and a common seal; but no such registration shall be made until it is proved to the satisfaction of the said Registrar that three-fourths of the proposed capital has been subscribed for, and that ten per centum upon such capital has been paid up.

IV. The said registrar shall grant a certificate

stating the date of the incorporation of the company, and such certificate shall in all cases be *prima facie* evidence of the fact of such incorporation.

V. The Companies Clauses Consolidation Act, 1845, shall be incorporated into and form part of this Act with the exception of the provisions relating to the recovery of damages, and to the provision to be made for affording access to the special Act; and in the construction of the said Companies Clauses Act the articles of association shall be deemed to be the special Act, and the date of the incorporation of the company, as certified in manner aforesaid, shall be deemed to be "the time of the passing of the special Act;" and whenever the term "prescribed" is used in this or in the said incorporated Act, it shall mean "prescribed by the articles of association."

Rights and Obligations of Company.

VI. Every company incorporated under this Act, and hereinafter referred to as "the company," shall be established for the purpose of providing dwellings for the labouring classes, with or without private gardens, or with or without common gardens or places of common recreation for the use of the inmates of such dwellings, and for no other purpose whatever; and for the above purposes the company shall have power to accept grants and leases of and to purchase and hold land, to erect thereon dwellings for the labouring classes, and to let such dwellings to lodgers by the week or month, or to demise the same to lessees for any estate or interest not greater than a term of twenty-one years, upon such terms of remuneration as they think fit; subject to this proviso, that the company shall not be entitled to hold at any one time more than ten acres of land, except with the licence of the Committee of Privy Council for Trade.

VII. The following regulations shall be made respecting any dwellings provided by the company; that is to say:

(1.) All such dwellings shall, as respects drainage, ventilation, supply of water, and necessary conveniences, be constructed and provided in such manner as may be approved by the General Board of Health, and shall be maintained by the company in good and sufficient repair:

(2.) Any person appointed by the General Board of Health may at all reasonable times inspect any such dwellings as aforesaid.

VIII. The following matters and things may be prescribed by the articles of association, and if so prescribed but not otherwise, shall be binding; that is to say:

(1.) That the capital of the company may, with the approval of the Board of Trade, and subject to such condition as they may impose, be increased by the issue of a prescribed number of shares, and of a prescribed amount:

(2.) That no premium is to be taken in respect of any lease granted by the company:

(3.) That the interest granted to any lessee is not to exceed the prescribed term, such term being less than twenty-one years:

(4.) That the interest of a lessee is not to be disposed of without the consent of the directors: But no power hereby given shall be exercised in such manner as to prejudice any right under any subsisting lease or contract for a lease.

IX. In cases where it is prescribed by the articles of association that the dwellings belonging to the company are to be let only to lodgers by the week or month and not for any greater interval, the company may, as soon as half the subscribed capital is paid up, borrow on the security of their property to the prescribed amount, such amount not to exceed one-third of such subscribed capital; but no mortgagees shall have power to eject any tenant before the expiration of his tenancy; and in no other case shall the company have power to borrow money.

X. The following rules shall be observed with respect to demises and lettings made by the company:

(1.) The dwellings provided by the company, with the private gardens (if any) appurtenant thereto, shall be divided into such parcels as may be conveniently held in distinct occupations:

(2.) The parcels shall be numbered in arithmetical progression, beginning with the figure one, each parcel being distinguished by a separate number:

(3.) The interests of the lessees, other than monthly or weekly tenants, in the property of the company, shall be deemed to be shares in a capital consisting of the dwelling houses of the company, with their appurtenances; and in all cases where such interests are not restricted to the original lessee, the transfer or transmission of such interests shall take place in manner in which the transfer or transmission of shares takes place in pursuance of the said Companies Clauses Consolidation Act, 1845, or as near thereto as circumstances admit; and the clauses of such last-mentioned Act with respect to the transfer or transmission of shares shall, with the necessary alterations, be held to apply to the transfer or transmission of the interests of any such lessees as aforesaid.

XI. The company may purchase the interest of any registered lessee, and upon such purchase being made such interest shall be deemed to be extinguished, and the company may demise the premises so purchased in the same manner as if no previous lease thereof had ever before been made.

XII. If any funds of the company are advanced to any person by way of loan, or are with a view of gaining profit appropriated to any purpose other than the purpose for which the company is hereby declared to be established, every director of the company shall, in addition to any other liabilities he may be under to replace such funds, be liable, at the suit of any shareholder or other person, whether implicated or not in such loan or misappropriation, to pay to such shareholder or other person, to be applied by him to his own use, in respect of each such advance or misappropriation, a sum by way of penalty not greater in amount than the

sum so advanced or misappropriated, and not less than half such sum.

XIII. If any dwelling belonging to the company is insufficiently drained or ventilated, or insufficiently supplied with water or necessary conveniences, or is in a bad state of repair, the General Board of Health may, by order left at any office of the company, or served on any director of the company, require the company, within a reasonable time, to be specified in such order, sufficiently to drain, ventilate, and supply with water and necessary conveniences, or put in a good state of repair, such dwelling; and if default is made in compliance with the requisitions of such notice, the company shall incur a penalty not exceeding five pounds for every day during which such default continues; and it shall be lawful for any justices by whom such penalty is imposed, if they think fit, to order the whole or any part thereof to be laid out in executing the works in respect of which the penalty is incurred; and in addition to the above remedy the said General Board may themselves do the works required by such notice, and recover from the company in a summary manner the expenses of so doing the same; but any order made by the General Board in pursuance of this section may be appealed against, and, on application by motion, be set aside or otherwise modified by any of her Majesty's Superior Courts of Law at Westminster.

XIV. If any person obstructs any inspector of the General Board of Health in the inspection of any dwelling belonging to the company, he shall for each offence incur a penalty not exceeding five pounds.

Miscellaneous.

XV. The provisions of the Lands Clauses Consolidation Act, 1845, with reference to the purchase of lands by agreement, shall be incorporated with this Act, and shall apply to the purchase of land by the company in pursuance of this Act.

XVI. All penalties imposed by this Act, or by any byelaws made in pursuance of this Act or of any Act incorporated herewith, and all sums of money hereby directed to be recovered in a summary manner, may be recovered in a summary manner before two justices, as directed by an Act passed in the eleventh and twelfth years of the reign of her present Majesty Queen Victoria, chapter forty-three, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*.

XVII. This Act shall not extend to Scotland.

SCHEDULE.

Articles of Association of the Company.

1. The name of the company shall be the company.
2. The capital of the company shall be pounds, divided into shares of pounds each.
3. The first ordinary meeting of the company shall be held days after the date of the incorporation of the company.
4. The number of directors shall be ;

but the company may reduce such number to any number not less than , and may increase it to any number not exceeding .

5. The first directors of the company shall be the following persons; that is to say,

(Insert Names of Directors.)

CAP. CXXXIII.

An Act for limiting the Liability of Members of certain Joint Stock Companies.

[14th August, 1855.]

"WHEREAS it is expedient to enable members of joint stock companies to limit the liability for the debts and engagements of such companies to which they are now subject:" be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Any joint stock company to be formed under the Act of the eighth year of her Majesty, chapter one hundred and ten, (other than an Assurance Company,) with a capital to be divided into shares of a nominal value not less than ten pounds each, may obtain a certificate of complete registration with limited liability upon complying with the conditions following, in addition to doing all other matters and things now required in order to obtain a certificate of complete registration; that is to say,

- (1.) The promoters shall state on their returns to the office for provisional registration that such company is proposed to be formed with limited liability.
- (2.) The word "limited" shall be the last word of the name of the company:
- (3.) The deed of settlement shall contain a statement to the effect that the company is formed with limited liability:
- (4.) The deed of settlement shall be executed by shareholders, not less than twenty-five in number, holding shares to the amount in the aggregate of at least three-fourths of the nominal capital of the company, and there shall have been paid up by each of such shareholders on account of his shares not less than twenty pounds *per centum*:
- (5.) The payment of the above per-centage shall be acknowledged in or endorsed on the deed of settlement, and the fact of the same having been *bona fide* so paid shall be verified by a declaration of the promoters, or any two of them, made in pursuance of the Act made in the sixth year of the reign of his late Majesty King William the Fourth, chapter sixty-two:

And upon such conditions being complied with, and such other matters and things done, the registrar of joint stock companies shall grant a certificate of complete registration with limited liability to such company.

(To be continued.)

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(Concluded from page 328.)

II. Any joint stock company, except as aforesaid, now or hereafter completely registered under the said Act of the eighth year of her Majesty, may obtain a certificate of complete registration with limited liability, in manner and subject to the condition following; that is to say,

The directors of such company may, with the consent of at least three-fourths in number and value of its shareholders who may be present, personally or by proxy, at any general meeting summoned for that purpose, make such alteration in the name, nominal value of shares, and mode of settlement of the company as may be necessary for enabling it to comply with the conditions hereinbefore mentioned with respect to joint stock companies seeking to obtain certificates of complete registration with limited liability; and upon compliance with such conditions the registrar, after the affairs of the company shall at the expense of the company have been audited by some person appointed by the Board of Trade, and on certificate from the said board that the complete solvency thereof has been established on such audit to its satisfaction, shall grant to such company by its new name, a certificate of complete registration with limited liability, and thereupon all privileges and obligations hereby attached to companies with limited liability, their shareholders, directors, and officers, shall attach to the company named in such certificate, its shareholders, directors, and officers.

III. Any joint stock company, except as aforesaid, constituted under any private Act of Parliament, whereof it shall be proved to the satisfaction of the Board of Trade, after the affairs of the company shall, at the expense of the company, have been audited by some person appointed by the Board of Trade, that the said company is perfectly solvent, and that not less than twenty *per centum* of three-fourths of the nominal capital of such company has been paid up, may obtain a certificate of complete

registration with limited liability, in manner and subject to the condition following; that is to say,

The directors of such company may, with the consent of at least three-fourths in number and value of its shareholders who may be present, personally or by proxy, at any general meeting summoned for that purpose, make such alteration in the name and nominal value of shares as may be necessary for enabling it to comply with the condition in that behalf hereinbefore mentioned with respect to joint stock companies seeking to obtain certificates of complete registration with limited liability; and upon compliance with such condition the registrar, on receipt of a certificate of the solvency of the company, and of the payment of capital as before mentioned, shall grant to such company, by its new name, a certificate of complete registration with limited liability; and thereupon all privileges and obligations hereby attached to companies with limited liability, their shareholders, directors, and officers, shall attach to the company named in such certificate, its shareholders, directors, and officers.

IV. Every company that has obtained a certificate of complete registration with limited liability shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal; and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, cheques, orders for money, bills of parcels, invoices, receipts, letters, and other writings used in the transaction of the business of the company.

V. If such company do not paint or affix, and keep painted or affixed, its name, in the manner aforesaid, each of the directors thereof shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed; and if any director or other officer of the company, or any person on its behalf, use any seal

purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issue or authorize the issue of any notice, advertisement, or other official publication of such company, or of any bill of exchange, promissory note, cheque, order for money, bill of parcels, invoice, receipt, letter, and other writing used in the transaction of the business of the company wherein its name is not mentioned in the manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money, for the amount thereof, unless the same shall be duly paid by the company.

VI. No increase to be made in the nominal capital of any company that has obtained a certificate of complete registration with limited liability shall be advertised or otherwise treated as part of the capital of such company, until it has been registered with the registrar of joint stock companies; and no such registration shall be made unless a deed is produced to the registrar, executed by shareholders holding shares of the nominal value of not less than ten pounds to the amount in the aggregate of at least three-fourths of the proposed increased capital of the company, nor unless it is proved to the registrar, by such acknowledgment and declaration as herein-after mentioned, that upon each of such shares there has been paid up by the holder thereof an amount of not less than twenty pounds *per centum*: and if any such increase of capital as aforesaid be advertised or otherwise treated as part of the capital of the company before the same has been so registered, every director of such company shall incur a penalty of fifty pounds; and the payment of the above per-centage shall be acknowledged in or endorsed on the deed so produced, and the fact of the same having been *bona fide* so paid shall be verified by a declaration of the directors, or any two of them, made in pursuance of the said Act made in the sixth year of the reign of his late Majesty King William the Fourth, chapter sixty-two.

VII. The members of a joint stock company which has so obtained a certificate of complete registration with limited liability, after such certificate is granted, notwithstanding the provisions contained in the said Act of the eighth year of her present Majesty, shall not be liable, under any judgment, decree, or order which shall be obtained against such company, or for any debt or engagement of such company, further or otherwise than is herein-after provided.

VIII. If any execution, sequestration, or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy or enforce such execution, sequestration, or other process, then such execution, sequestration, or other process may be issued against any of the shareholders to the extent of the portions of their shares respectively in the capital of the company not then paid up, but no shareholder shall be liable to pay in satisfaction of any one or more such execution, sequestration, or other process a greater sum than shall be equal to the portion of his shares not paid up: provided

always, that no such execution shall issue against any shareholder except upon an order of the court, or of a judge of the court, in which the action, suit, or other proceeding shall have been brought or instituted, and such court or judge may order execution to issue accordingly, with the reasonable costs of such application, and execution to be taxed by a master of the said court; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee.

IX. If the directors of any such company shall declare and pay any dividend when the company is known by them to be insolvent, or any dividend the payment of which would to their knowledge render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter contracted, so long as they shall respectively continue in office; provided that the amount for which they shall all be so liable shall not exceed the amount of such dividend, and that if any of the directors shall be absent at the time of making the dividend, or shall object thereto, and shall file their objection in writing with the clerk of the company, they shall be exempted from the said liability.

X. No note or obligation given by any shareholder to the company whereof he is a shareholder, whether secured by any pledge or otherwise, shall be considered as payment of any money due from him on any share held by him, and no loan of money shall be made by any such company to any shareholder therein; and if any such loan shall be made to a shareholder, the directors who shall make it, or who shall assent thereto, shall be jointly and severally liable to the extent of such loan, and interest for all the debts of the company contracted before the repayment of the sum so lent.

XI. Where any company completely registered under the said Act of the eighth year of her present Majesty, or any company constituted under any Act of Parliament, shall obtain a certificate of complete registration with limited liability, the grant of such certificate shall not prejudice or affect any right which previously to the grant of such certificate has accrued to any creditor or other person against the company in its corporate capacity, or against any person then being or having been a member of such company, but every such creditor or other person shall be entitled to all such remedies against the company in its corporate capacity, and against every person then being or having been a member of such company, as he would have been entitled to in case such certificate had not been obtained.

XII. No alteration made by virtue of this Act in the name of any company shall prejudice or affect any right which previously to such alteration has accrued to such company as against any other company or person, or which has accrued to any other company or person as against such company, but every such company as against any other company or person, and every other company or person

as against such company and the members thereof, shall be entitled to all such remedies as they or he would have been entitled to if no such alteration had been made; and no such alteration shall abate or render defective any legal proceeding pending at the time when such alteration is made.

XIII. In the case of any company which has obtained a certificate of limited liability, whenever, on taking the yearly accounts of such company, or by any report of the auditor thereof, it appears that three fourths of the subscribed capital stock of the company has been lost, or has become unavailable in the course of trade, from the insolvency of shareholders, or from any other cause, the trading and business of such company shall forthwith cease, or shall be carried on for the sole purpose of winding up its affairs; and the directors of such company shall forthwith take proper steps for the dissolution of such company, and for the winding up of its affairs, either by petition to the Court of Chancery, or by exercise of the powers of the deed of settlement, or by such other lawful course as they may think most fit.

XIV. In cases where a certificate of registration with limited liability has been obtained, when one auditor only shall have been appointed under the thirty-eighth section of the Act of the eighth of *Victoria*, chapter one hundred and ten, that single auditor, and when two or more such auditors shall have been so appointed then one of such auditors, shall be subject to the approval of the Board of Trade, and such board in case the auditor submitted to them for approval shall for any reason appear unfit or objectionable shall appoint another in his place.

XV. Every pecuniary penalty imposed in pursuance of this Act shall be deemed a debt due to the Crown, and shall be recoverable accordingly.

XVI. This Act shall, so far as is consistent with the contents and subject matter thereof, be taken as part of and construed with the said Act of the eighth year of her present Majesty, chapter one hundred and ten, and the Act of the eleventh year of her Majesty, chapter seventy-eight, all the provisions of the said Acts, save in so far as they are varied by this Act, shall apply to persons and companies applying for or obtaining a certificate of complete registration with limited liability.

XVII. The provisions of the Act of the eighth year of her present Majesty, chapter one hundred and eleven, and of the Joint Stock Companies Winding-up Act, 1848, and of the Joint Stock Companies Winding-up Amendment Act, 1849, shall apply to persons and companies obtaining a certificate of complete registration with limited liability, subject only to such variations as may be occasioned by the provisions of this Act.

XVIII. This Act shall not apply to *Scotland*.

XIX. This Act may be cited for all purposes as "The Limited Liability Act, 1855."

CAP. CXXXIV.

An Act to make further Provision for the more speedy and efficient Despatch of Business in the High Court of Chancery, and to vest in the Lord Chancellor the Ground and Buildings of the said Court situate in *Southampton Buildings, Chancery Lane*, with powers of leasing and Sale thereof. [14th August, 1835.]

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Queen's Bench,

RIGHT HON. THOMAS LEFROY, C. J.
HON. PHILIP CECIL CRAMPTON.
RIGHT HON. LOUIS PERRIN.
RIGHT HON. RICHARD MOORE.

Common Pleas.

RIGHT HON. JAMES H. MONAHAN, C. J.
HON. ROBERT TORRENS.
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WILLIAM G. CHAMNEY, Esq., BARRISTER-AT-LAW.

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DECIDED IN ALL

THE COURTS OF EQUITY AND COMMON LAW IN IRELAND.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.—1854.*

IN THE MATTER OF THE ESTATE OF THOMAS PONSONBY CAREW.—Oct. 18.

[Reported by R. W. OSBORNE, Esq., Barrister-at-Law.]

A, a father, on the marriage of one of his daughters, passed a bond to A and B, conditioned for the payment of £2000, and was a party to the settlement, whereby the sum secured by the bond was limited upon the trusts therein contained. The father by his will directed his debts and legacies to be paid, and charged same upon his real estate in aid of his personality, and devised the lands of D to the said A, and appointed H and two others his executors; the said A received sufficient assets for the payment of said bond debt, but did not in fact retain or pay same. The lands devised to the said A were sold in the Incumbered Estates Court. Held, that under the above state of facts, the said bond debt was payable out of the proceeds of the said sale.

Richards v. Molony overruled.

THIS was an appeal by Thomas Ponsonby Carew and Edward Croker from an order of the Incumbered Estates Court, bearing date the 13th of April, 1854. By that order it was declared that inasmuch as the petitioner, Thomas P. Carew, was one of the executors of Ponsonby May Carew, the obligor of a bond bearing date the 16th day of April, 1822, and also one of the obligees named in the said bond, and had received assets of the obligor sufficient to pay the said bond debt; that the petitioner, Thomas P. Carew, notwithstanding he was entitled to the said bond debt only as a trustee jointly with the petitioner, Edward Croker, must be presumed to have retained sufficient of the said assets to satisfy the said bond, and that same is now satisfied, and is no charge against the obligor's estate.

From the petition it appeared that by indenture bearing date the 16th of April, 1822, and made between the Rev. Ponsonby May Carew, therein de-

scribed as of the town of Youghal, in the County of Cork, clerk, of the first part; Mary Carew, now Croker, his eldest daughter, of the second part; Walter Croker, therein described as of Lisnabrin, in the County Cork, captain in the Royal Navy, of the third part; and the said Thomas P. Carew and the said Edward Croker of the fourth part; after reciting that a marriage was intended between the said Walter Croker and Mary Carew (and which was shortly afterwards duly solemnized), and reciting that the said Walter Croker, for the purpose of securing the annual sum of £60, to be payable to the said Mary Carew during her life, in the event of her surviving him, and for other purposes in said indenture mentioned, had agreed to advance unto the said Ponsonby May Carew the sum of £1,000, upon his, the said Ponsonby May Carew, securing the same in the manner in said indenture mentioned; and also passing his bond, with warrant of attorney for confessing judgment thereon, unto the said Thomas P. Carew and Edward Croker, bearing equal date with the said indenture, in the penal sum of £2,000, conditioned for the payment of the same sum of £1,000, with interest at the rate of 6 per cent. per annum. The said Ponsonby May Carew granted and conveyed unto the said Thomas P. Carew and Edward Croker, their executors, administrators, and assigns, the lands of Ardo therein described, to hold from the solemnization of the said intended marriage, for the term of 100 years, upon trust, among others, to permit the said Walter Croker during his life to have, receive, and take out of the rents, issues, and profits of the said lands, one annuity, yearly rent-charge, or sum of £60; and upon further trust, that in case the said Mary Carew should survive the said Walter Croker (which event has happened), to permit the said Mary Carew and her assigns during her life out of the rents and profits of said lands, to have and receive the annual sum of £60, clear of all deductions, to be paid and payable by equal portions on every 25th day of March and 29th day of September. And upon further trust, after the decease of the survivor of the said Walter Croker and Mary Carew, by sale or mortgage of the said lands, or any part

* The following Privy Councillors were present:—The Lord Chancellor, Monahan, C. J., the Right Hon. F. Blackburne, the Right Hon. R. Keating, Judge of Prerogative Court, and the Right Hon. J. Napier.

of the said term, if such mortgage or sale shall be by them, the said Thomas P. Carew and Edward Croker, or the survivor of them, or the executors, administrators, or assigns of such survivor, deemed necessary to levy and raise the sum of £1,000 lawful money of Ireland, together with interest for the same at the rate of 6 per cent. per annum, calculated from the time when such annuities or yearly sums of £60 should cease to become payable, to the time when such principal sum and interest should be so raised in trust for the younger children of the said intended marriage. That the said Ponsonby May Carew executed his bond, with warrant of attorney for confessing judgment thereon, bearing even date with the hereinbefore stated indenture, and as a collateral security therewith, wherein he bound himself, his heirs, executors, or administrators, unto your petitioners, the said Thomas P. Carew and Edward Croker, their executors, administrators, and assigns, as trustees of the said indenture, in the penal sum of £2,000, with a condition thereunder written, making void the same on payment by the said Ponsonby May Carew, his heirs, executors, or administrators, unto your petitioners, their executors, administrators, or assigns, of the sum of £1,000, on the 16th day of April, 1823; and it was agreed farther, that said bond should not bear interest during the life of the said Ponsonby May Carew. That judgment was never entered upon said bond, and the said marriage between the said Walter Croker and Mary Carew was duly solemnized.

The said Ponsonby May Carew died in 1826, having by his last will and testament, of the 25th of February, 1826, devised unto his eldest son Thomas P. Carew, one of the petitioners, his heirs and assigns, the several lands and estates that have been already sold in this matter, subject to his debts, and appointed his wife, Anne Carew, the petitioner, Thomas P. Carew, and his son, Walter Carew, executors and executrix of his will, probate to which was obtained by Thomas P. Carew and Walter Carew on the 5th day of April, 1828. Walter Croker died in 1840, leaving his wife, Mary Carew, now Croker, who is still alive, and several children him surviving. The petitioner, Thomas P. Carew, received of the assets of the said Ponsonby May Carew sufficient for the payment of his debts, but he did not in fact pay off the said bond debt or retain any portion of the said assets which have long since been paid away. The sum of £1,000 secured by the said indenture and bond has never been paid to or received by the petitioners or the parties beneficially entitled thereto, but interest has been paid thereon to the said Mary Carew, otherwise Croker, by Walter Carew and Thomas P. Carew up to the year 1844. The lands so devised by Ponsonby May Carew to petitioner, Thomas P. Carew, were sold in the Incumbered Estates Court in April, 1853, for £5,705, which was insufficient to pay the several charges thereon. The lands of Ardo, in which the sum of £1,000 was secured, were not included among the lands sold in this matter. The petitioners prayed to be paid said sum of £1,000 out of the proceeds of the lands sold in this matter.

Henry Martley, Q.C. (with *John Garde Brown*,) for the petitioners, admitted that this case and *Richards v. Molony*, (2 Ir. Ch. R. 1,) were similar, and to succeed on this appeal it is necessary that that case be overruled. We do not dispute the correctness of that decision so far as the legal question is involved, but submit that in the present case equity will control the legal effect. If a creditor makes his debtor his executor, although a court of law holds it to be an extinguishment of the debt, yet equity has in many cases disregarded this legal consequence, and held that the debt still existed, and that the executor was a trustee in equity for the creditors of the testator, and even for his legatees,* *Willock v. Dargem*, (2 Ir. Ch. R. 39.) The case of *Plummer v. Marchant*, (3 Burr. 1380,) cited in *Richards v. Maloney*, we submit, only decides that the executor may retain, but does not decide that a simple retainer without bringing the co-trustee into privity with the money so retained will bar the co-trustee on the *cestui que* trust. Equity will not, in all cases, allow a retainer. *Player v. Hosall*, (1 Russ. 538.) The question here is, will a court of equity violate its own rule, that where there are two trustees, and the debtor has notice of the trust, payment to one, without the receipt of the two, will not discharge the debt. *Owen v. Dickson*, (4 Ves. 97); *Hull v. Frank*, (11 Beav. 519.)

F. Fitzgerald, Q.C., (with *Wheeler*,) for one of the legatees of the obligor in support of the order of the Commissioners, relied upon *Richards v. Moloney*. Payment by debtor to one of two trustees is in equity no discharge, only in cases where the debtor had notice of the trust. Here payment is made by a presumption of a court of law. The court had not and could not have notice of the trust, and therefore that essential element (notice) being wanting, equity will not interfere and overrule the strict rule of the common law. The effect of allowing this appeal will be to deprive the legatees, who are innocent parties, of their legacies, the fund being insufficient to pay the debt and legacies in full. If an actual payment were made by an executor in his own wrong, a court of equity would attach the executor's own property to make the debt good. In this case the court has no property, and therefore could not be made to pay the debt.

Browne, in reply.—Suppose the executor was not one of the trustees, and that he had paid the debt to one of the trustees without having obtained a joint receipt, he having had notice of the trust, that, at law, would have been a discharge of the debt; yet, in that case, a court of equity would disregard the rule of law, and decree payment of the debt, if necessary, out of the assets of the original debtor, even though subsequent creditors or legatees of the debtor would thereby be deprived of their debts or legacies. The hardship in the supposed case would be just as great as in the present, and yet a court of equity would not give any weight to an assignment founded on such hardship. The court having no property cannot affect the question, for in the case supposed, if the executor has no pro-

* See *Fox v. Fox*, (1 Atk. 462.)

perty of his own, the debt will have to be paid a second time out of the obligor's estate.

Oct. 24.—The Right Hon. FRANCIS BLACKBURNE, at the request of the Lord Chancellor, delivered judgment.—This was an appeal from an order by which a claim to be paid a bond debt was disallowed by the Commissioners of the Incumbered Estates Court. The learned Commissioners decided solely on the authority of the case of *Richards v. Molony*. We therefore are now, as a court of final appeal, in affirming or reversing their order, necessarily compelled to examine the grounds on which *Richards v. Molony* was decided: and with the most unfeigned respect and deference to the Lord Chancellor, if we dissent from the view he took and acted on, we have no alternative but to reverse the order appealed from. I must observe of the case of *Richards v. Molony* that the course of the argument was very much calculated to lead to the conclusion that the decision was to be governed by the legal effect of the debtor's appointment of his creditor, either joint or sole, to be his executor, whereas it ought to have been governed by the rule of a Court of Equity, as distinguished from, and (in the case of a creditor and trustee) opposed to that at law. Regarding it in this light, the case is shortly as follows. The debt was due to two trustees by the testator, who was cognizant of the trusts on which they held it. It follows that, if he paid one of them, he could defend himself in an action at law, yet, as he knew that the debt was the property of the *cestui que trust*, that payment if the fund were afterwards misapplied by the trustees, could not release him, or be a constructive satisfaction of the rights of those beneficially entitled to the money. As a direct payment to one of the trustees could not have had that effect, it follows of necessary consequence that the debtor could not, by any act of his, even though done with the best intention, defeat rights placed under the protection and guaranteed by the responsibility of both trustees. For instance, suppose the testator-debtor to have vested funds in a trustee, or to have handed money to another party to pay the debt, if the person so confided in did not pay, it would have remained due and the debtor liable. Now this is substantially what the testator did do in this case: for, when he appointed one of the trustees his executor, he constituted him a trustee to pay this and all his other debts, putting this in a better position than others of the same degree, by giving the executor a right to retain it for his *cestui que trust* in preference to them. The result was, that this trustee of the testator's own nomination for the payment of this out of the assets, has made default, has wasted the assets, and left the debt unpaid, and the loss must, therefore, fall on the estate of the debtor, which has never paid the debt, nor been released from it by the other trustee or the parties beneficially interested. The order of the Commissioners must, therefore, be reversed.

IN THE MATTER OF THE ESTATE OF JOHN HENRY
KEOGH.—Oct. 17.

Liability of a solicitor.

Where a solicitor, without using due precaution, assisted his client in drawing out of funds in court the amount of an incumbrance, to which another party subsequently proved to have been entitled; Held, that although no fraud or collusion could be imputed to him, he was personally liable to replace same.

THIS was an appeal by Thomas E. Snagg, solicitor, from an order of the Commissioners of Incumbered Estates Court on the 28th of May, 1854, which directed that the petitioner, Thos. E. Snagg, should bring in and lodge the sum of £1109 6s. drawn out by his clients under the following circumstances. From the petition it appeared that Mr. Snagg was introduced in the year 1851 by a mutual friend to Richard Albert Moll, a gentleman residing in London, and Annette Garstin, otherwise Douglas, his wife, and in the month of March, 1852, acted for said Annette as her solicitor, on the occasion of her obtaining letters of administration with the will annexed to her aunt, Miss Anne Garstin (who died a spinster in 1844, being then about 90 years of age.) That having arranged said administration and his client's claim to a charge on certain lands in said will specified, petitioner had no further communication with his said clients from March, 1852, until October, 1853, when petitioner received instructions from his said clients, who are residents in London, to investigate their rights on foot of a certain bond debt for £640 (which was a charge upon a portion of Colonel O'Bins's share of the funds realized by sale of the lands in this matter), and directions for petitioner to take the necessary steps for the said Annette's obtaining letter of administration to her father and grandmother, so as to entitle her to obtain payment of the said bond debt out of said funds, and petitioner was requested to inquire into the state of the same. That accordingly on the 18th October last, petitioner went to the proper office of the Incumbered Estates Court to examine the final schedule of incumbrances in this matter, which he was informed had been lodged in the month of March, 1853, for the purpose of ascertaining the amount due and payable to the representatives of the said late Colonel O'Bins, out of said funds, and upon which said bond debt of £640, and interest, was a charge. That until said 18th October, 1853, the petitioner was totally ignorant of the proceedings for sale in this matter, and for distributing the funds thereby realized, neither was petitioner, up to that time, acquainted with the rights or claims of any of the parties entitled thereto. That upon so examining said final schedule, petitioner observed that there was a debt of £600 principal money, and six per cent. interest, making up (with other money), a sum of £1061 19s. 9d., exclusive of further interest, reported as due and payable to the personal representative of "Anne Garstin, deceased," without any further description of her identity, and petitioner well knowing that said Anne Garstin, spinster, had been a most intimate friend, if not a near connection, of the Keogh family, and petitioner never having, up to said 18th October, 1853, nor for some time af-

terwards, even heard of the existence of "Anne Garstin, a widow," (hereinafter named). Petitioner conceived that said principal sum of £600, with interest, &c., as aforesaid, was payable to the said Annette Garstin Moll, as the personal representative of said Anne Garstin, spinster, deceased, and accordingly apprized his said clients of the information which he had so obtained from the examination of said final schedule, and which was the only document in this matter he then saw or considered it necessary to examine. In reply, the said Annette Garstin Moll, stated to petitioner that such information, which was most agreeable, confirmed her own impressions that her aunt, the said Anne Garstin, spinster, deceased, had claims upon the property of said John Henry Keogh, of which she had often heard her said aunt and her grandmother (hereinafter named) speak, and the said Annette then instructed petitioner to adopt the necessary steps to obtain payment for her of the said money, as the personal representative of the said Anne Garstin, deceased, and that, when all was ready, she and her said husband would come over to Dublin to receive the same. Accordingly, upon receipt of said letter, the petitioner waited upon the secretary of said court with the administration first herein alluded to, who examined same, and concluded that petitioner's clients were the proper parties to be paid the money in question, and he thereupon informed petitioner that the Commissioner's draft or order on the Bank of Ireland for £1109 6s. had been lying with him since the month of May preceding for the representative of Anne Garstin, deceased, and said secretary then filled the blank in said check or bank order with the name of "Annette Garstin Moll, the wife of the said Richard Albert Moll," as the payee thereof, and told petitioner that whenever his said clients came over to Dublin, they should be paid the amount thereof, and consequently petitioner never for a moment conceived that there was any necessity for making further investigation as to the right of his clients to receive said money, more particularly as there was no stop or stay put upon said draft or bank order by any person, although it had been issued by the said Commissioners on the 9th of May, 1853, nor was any notification given to said secretary that any party had a better right or claim thereto. Annette Garstin Moll and her said husband having come over to Dublin, and having stated to petitioner that the said Anne Garstin, spinster, during her lifetime received the interest upon the principal or greater portion of the money secured by said judgment, (a fact which has since been corroborated by the affidavit of the Rev. Henry Clopton Keogh, filed in this matter on the 27th of January, 1854,) petitioner was still further impressed with the belief that the said Annette's claim as such representative to the money in question was indisputable, and accordingly petitioner accompanied her and her said husband to said secretary's office on the 31st October, 1853, when said letters of administration were again produced, and marked by the assistant of said secretary, who also concluded that same were correct, and that petitioner's clients were the proper per-

sons to receive said money. The secretary having then required petitioner to draw up an affidavit for his client as in such cases usual, stating that to the best of her knowledge and belief said money was justly and fairly due and payable to her as such administratrix as aforesaid, and he did accordingly, and in conformity to the instructions of his said client, prepare such affidavit, which was sworn to by said Annette, and handed to said secretary or his assistant, and in return she received the aforesaid draft on the bank for said money. The petitioner shortly afterwards accompanied his clients to the accountant-general's office of said court, where the entry in that officer's books corresponded with the bank order, and stated that the money was payable to the representatives of Anne Garstin, deceased, without any further description or identification of her, and the accountant-general likewise considering that all was right, he got the said Annette to sign the proper books, and acknowledge the receipt of said money, which was subsequently paid to her by the Bank of Ireland. No notice was given by or on behalf of said Annette or her husband to any person, previous to her drawing out said money, such notice not being required by the rules of said court, nor considered necessary upon this occasion, as the claim appeared to be perfectly fair and payable to her as representative of her said aunt upon the production of said letters of administration as aforesaid, besides which there was no stay or other memorandum placed upon said commissioner's draft or bank order, and which had been lying unclaimed by any other person from the 9th May, 1853, as hereinbefore mentioned. During his client's stay in Dublin, in November, 1853, the said Annette Garstin Moll, obtained administration to her father, the late Cunningham Douglas, Esquire, and her proctor thereupon adopted the usual preliminary steps necessary for her to obtain administration to her grandmother, Mrs. Elizabeth Douglas, deceased, so as to substantiate her claim on foot of the aforesaid bond for £640 and interest thereon so due by Colonel O'Bins's representatives as hereinbefore mentioned, but nothing further could be done towards obtaining said last mentioned administration until Hilary Term, 1854, in consequence of the intervening Christmas vacation. Accordingly after remaining in Dublin for some time, the clients of the petitioner returned to London, when he heard no more of the transaction till the 13th of December, 1853, when he was informed by the secretary that the wrong party was paid, and that there was another person entitled to the sum of £1109 6s., viz., the Rev. Henry Clopton Keogh, who had the day previously obtained administration to Anne Garstin, a widow, of whose existence petitioner alleged he was totally ignorant. That he has since ascertained that the description of the last named Anne Garstin in the Final Schedule did not correspond with the original judgment obtained by her, or with the redocketing thereof. The petitioner distinctly denied there was any fraud or collusion between him and his clients, and that the only pecuniary consideration which he expected to receive or had received was the sum of twelve pounds, which was paid him by his said clients.

Hayes, Q. C., and Longfield, Q. C., in support of the petition.

Rolleston, Q.C. for the respondent, cited Erart v. Goodhill, (5 Beav. 585.)

Oct. 19.—THE LORD CHANCELLOR, after reviewing the facts of the case, stated that [although there was no fraud or *mala fides* on the part of the appellant, he concurred in making a representation which there was no reasonable ground for believing to be true, but which, on the contrary, there was abundant evidence to show was untrue. When the appellant found that his client's alleged rights were founded upon a judgment, he ought to have gone to the Roll, and certified himself with that muniment of her title. He should also have made inquiries as to the interest upon the debt, of which there should be a great deal more due than was actually the case if the representation were true. It was gross negligence to forget to make these inquiries. He ought not to have assumed as a fact that his client was the real person, and in that view of the case he was bound to pay. Having circumstances before his eyes to lead him to inquire as to the genuineness of the statement, he should not have embarked without investigating it further. They must all regret that an innocent party should be made the victim of a transaction of this kind; but the principles of justice could not give way to individual hardship. The order of the court below must therefore stand confirmed.]

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1854.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

DOWLING v. BROWNE.—Non. 4—6.

Judgment Debtor—Right of assignee of creditor to intervene—3 & 4 Vic. c. 107.

A recovered judgment against B in an action of libel for £350. Prior thereto the estate of A had been vested in C, the ad interim creditors' assignee under the Insolvent Court. C, after judgment marked and execution issued on foot of said judgment, having applied to the court for an order for the payment of said money, either into this court or the Insolvent Court, for behoof of creditors, was refused on the ground of absence of jurisdiction to make such an order, independently of any other difficulty arising from the nature of the judgment.

THIS was a motion on behalf of Wilson Kennedy, the *ad interim* assignee of the plaintiff, that the Sheriff of the County of the City of Limerick, if he had levied, and, if he had not levied, that the defendant should lodge in court, to the credit of the cause the sum of £350 recovered by the plaintiff against the defendant, as damages in an action of libel, tried at the late Assizes of Kildare, or that he should lodge the same amount in the Insolvent Court to the credit of the *ad interim* assignee, without prejudice to the lien of the plaintiff's attorney for his costs. There had been a previous notice of motion, that the plaintiff should be restrained from issuing execution for the above, but, before the same

could be moved, the execution was put in force, and the notice was varied accordingly. It appeared from the affidavits that on the 22nd of November, 1852, the Tipperary Joint Stock Bank, of whom Wilson Kennedy, the assignee, is the public officer, recovered judgment against Dowling for £470 10s.; and that at the time of its recovery Dowling was in prison, at the suit of a person named Crotty, and a detainer was lodged by the bank on the 23rd of November. Dowling not having presented any petition to the Insolvent Court, on the 25th of April, 1853, Mr. Kennedy presented a creditors' petition, upon which, on the 11th of May, a vesting order was pronounced, by which the property of the plaintiff vested in the provisional assignee, and on the 13th of August Mr. Kennedy was appointed *ad interim* assignee. The plaintiff refused to file his schedule, and still remains in custody. Since then an action for libel had been brought by the plaintiff against the defendant, in which he recovered £350 damages, and the assignee served notice upon the defendant, cautioning him not to pay over the money to the plaintiff in that action. Mr. Kennedy, as assignee, had recently been applied to for £200 rent due to the landlord of Dowling, by the nonpayment of which a valuable interest would incur the risk of being evicted. It also appeared that the sheriff had very recently made his return with respect to the writ issued for the principal debt and costs, that he had seized a cistern worth £1, and with reference to a second writ for the levy of £11 costs on foot of an interlocutory order in the cause, he returned a seizure of two printing presses, forty cases of type, &c. value for £10, which remained unsold for want of buyers. In the cause of *Dowling v. Sadleir* an order had been made, *on consent*, that the amount of £1100 damages should be paid into court, but upon the express terms that the payment into court should not prejudice or affect the discussion afterwards to take place as to the right of Mr. Kennedy in that case to have the money paid in, and, on the plaintiff's subsequent application to have the same paid out to him, the court made no rule.

J. D. Fitzgerald, Q. C. and R. Armstrong, Q. C. in support of the present application contended that the court had the same jurisdiction to deal with this case in a summary way as a Court of Equity on a bill filed for an injunction to restrain execution. By the 20th section of the Insolvent Act the effect of the vesting order was to vest in the assignee of the insolvent all the property to which he was then entitled, and the assignee was further entitled to all that the insolvent should acquire previous to the adjudication, which had not taken place, as yet, in this case. There was a distinction between that, and the future acquired property of the insolvent, as provided for by the 78–80 sections of the Act, (3 & 4 Vic. c. 107.) It was, however, impossible for the assignee in this case to make himself a party to the record of the judgment by *sci. fa.*, as the judgment had been recovered subsequent to the vesting order. Even assuming that a *sci. fa.* lay for the assignee, still the court would not, in the meantime, and until he could avail himself of that remedy, hesitate to protect the property for the creditors. With respect to the character of the

action in which judgment had been obtained, admitting that the cause of action would not *per se* have passed to the assignee, as being of a nature personal to the insolvent, as soon as judgment had been obtained, its nature was changed, and it henceforward acquired the character of property, which would pass under the Act.

Macdonough, Q. C. and *Whiteside, Q. C.* contra, contended that the court had no jurisdiction to make the present order, and should not interfere, even though it had jurisdiction. No authority had been cited in support of such a proposition: and, as to the case of *Dowling v. Sadlier*, the order for the payment of money into court was made expressly by consent. If they have a case for an injunction, they ought to resort to that jurisdiction, where the proceedings would be subject to an appeal, and not to the summary jurisdiction of this court, which could not be reviewed. [They also cited several authorities, in answer to the proposition that the property in the judgment passed to the assignee.]

LEFROY, C. J.—We are clearly of opinion that this motion ought to be refused. This is an application by a third person to interfere with the rights of the parties to the judgment recovered by the plaintiff against the defendant, and to have a sum of money on foot thereof paid into court on his account. We have no such jurisdiction. Let him, if he can, make himself a party to the record, but we cannot take notice of the rights of a third party. We must therefore refuse this motion with costs.

Rule accordingly.

COURT OF EXCHEQUER.

TRINITY TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

WISDOM v. J. KELLY; SAME v. R. KELLY; SAME v. M'COURT.—June 2 and 3.

Attorney—Unprofessional agent—13 & 14 Geo. 3, cap. 23.

A Dublin attorney, residing in the country, and seldom coming to town, employed a nonprofessional agent to transact his business, with instructions that whenever a plain and simple case came into his hands he might commence proceedings and sue out writs of summons, without communicating with his principal, and also that he should procure for him all the business he could. It did not appear that the agent had received instructions to inform his employer what was done in the conduct of such suits as might be commenced without the knowledge of the latter. A conditional order for an attachment against the attorney and agent was made absolute, upon the ground that such a practice was a violation of the provisions of 13 & 14 Geo. 3, c. 23.

THESE actions had been brought to recover the amount of a bill of exchange, against the several parties liable: and in the month of October, 1853, an application was made in chamber before Judge Jackson on behalf of the defendants, that the proceedings in these actions should be set aside for irregu-

larity, upon the grounds that the residence of the plaintiff, and the registered residence of the plaintiff's attorney, as stated in the writ of summons, were not the true residences of the plaintiff or his attorney respectively. It appeared from the affidavit of the defendant's attorney, that there was reason for suspecting that the writs in these cases had been sued out without the knowledge of C. Harrison, the attorney of the plaintiff upon the record; and that the writs had been issued by one G. P. M'Grath, acting in concert with another person named O'Byrne, a clerk of Harrison's. This application was opposed by counsel, but the learned judge set aside the proceedings in these actions with costs, according to the terms of the application; and of his own mere motion directed a conditional order for an attachment against G. P. M'Grath for practising in the name of an attorney without his authority. Affidavits were filed as cause by M'Grath, Harrison, and O'Byrne, and it appeared that Harrison was an attorney residing for the greater portion of his time in the country, and seldom coming to Dublin; that in January, 1853, he had employed O'Byrne, who was not an attorney, as his town agent, the latter being also the conducting clerk of another attorney named Lyons; that, when employing O'Byrne, he had told him to procure all the business he could for him, and gave him authority in any plain and simple case, such as an action upon a bill of exchange, when the bill might have been lodged with O'Byrne, and instructions given to him to institute proceedings upon it, that in such a case he might issue the necessary writ or writs without having previously obtained the express authority of Harrison so to do. It also appeared that M'Grath, who was the person really interested in the bill of exchange (Wisdom being confessedly nothing more than a trustee for him), had instructed O'Byrne to sue upon the bill in question, and had lodged it with him for that purpose. Upon the 24th of November following an application was made for the purpose of making this order absolute, and the above facts were laid before the court, and it was also stated, and not denied by the other side (although it did not appear by affidavit), that the writs in the above action, which were produced at the hearing of the motion, pursuant to notice, were filled up in the hand-writing of M'Grath. Baron Pennefather, before whom cause was shown, made absolute the conditional order, directing that the costs of the motion should be paid by M'Grath, with a further direction that the attachment should not issue until further order; and the court further directed that M'Grath, Harrison, and O'Byrne should attend upon the first day of the ensuing Term, to answer such interrogatories as should be put to them; but in consequence of the illness of Mr. Baron Pennefather the matter stood over until the month of April, 1854, when M'Grath and O'Byrne attended in court according to the order. Harrison being prevented by indisposition from doing so, counsel on behalf of M'Grath and the others then submitted (without objecting to the propriety of the attachment that had been ordered to issue) that inasmuch as M'Grath had already paid a sum of £42 as costs of

the attachment order, and was desirous of expressing in the most ample manner his contrition for the transgression he had been guilty of in violating the practice of the court, the attachment should not issue, nor the matter be further prosecuted. Counsel appeared on behalf of the Law Society, stating, that after what had occurred it was considered necessary to press the matter further; protesting, at the same time, against the impropriety and inconvenience of attorneys residing in the country employing unprofessional persons to conduct their business in Dublin; and the court, after conferring together, expressed it to be their opinion that further inquiry as to this matter would be desirable; stating, that they were much struck by the admissions of Harrison in reference to the nature of the authority with which he had invested O'Byrne; and that in order to put the matter in train for further inquiry they would direct a conditional order for an attachment against Harrison and O'Byrne, grounded upon the facts which had appeared upon the affidavits filed in the preceding motions. A conditional order having been made for this purpose,

Martley, Q. C. in support of the order.—It is submitted that the authority given to O'Byrne amounts to a permission to practise generally for Harrison. [*Pennefather, B.*—The view I took of the matter upon the former motion was this—that Harrison, residing in the country, acted very improperly in allowing O'Byrne to institute suits without communicating with him; and that O'Byrne acted very improperly in so doing.] An agent acting in this manner may conduct a suit for both plaintiff and defendant. [*Pigot, C. B.*—That objection does not apply in the present case, as such a practice may be carried on even though the agent be an attorney.]

Armstrong, Q. C. (with him *Brown*,) contra.—An attorney residing in the country requires an agent in Dublin to conduct his business, and it may be extremely difficult to obtain the services of a professional man to do so at certain periods of the year, when attorneys are employed on circuit. [*Pennefather, B.*—This is altogether a different case; the attorney in the present instance residing in the country for the greater portion of the year, and employing an unprofessional agent to conduct his business without communicating with him.] Harrison had, at the time of the issuing of these writs, a registered residence in Dublin, and in contemplation of law that must be regarded as his place of abode. It is submitted that the commencement of these suits would not admit of delay; and it was only in cases of this kind, and where the suits were of a very simple nature, that Harrison permitted O'Byrne to commence them without communicating with him. [*Pigot, C. B.*—One question in this case is, whether Harrison is to be considered as substantially carrying on business in Dublin at all.] This case does not come within the provisions of 13 & 14 Geo. 3, c. 23, in which practising in the name of an attorney means not merely using his name, but also appropriating the proceeds of suits in which his name is so used.

Walker, Q. C., was heard in reply.

Pigot, C. B.—An investigation into the facts of

this case has become necessary, in order to ascertain how O'Byrne acted in connection with Harrison, and whether or not we are to consider that the provisions of 13 & 14 Geo. 3, c. 23, s. 8, have been violated. It appears to us upon the facts stated in the affidavits that there has been a *prima facie* case of violation of this statute. The person issuing these writs was not an attorney, and there were other matters connected with the case which induced us to think that it would be desirable to give O'Byrne an opportunity of explanation, and of removing, if possible, the inference raised in this case. This inference was, not that an attorney had acted through his clerk, but that the clerk had acted in the name of the attorney; and, upon comparing the several affidavits that have been made in the case, we decided that there was a case substantiated that the clerk did act in the name of the attorney, and that the wrong done was of that nature; it is necessary that we should state distinctly, as a matter of fact, that such is the conclusion to which we have arrived as the foundation of our judgment. The Act of Parliament is one of great importance with a view to the interests and protection of the members of the profession of attorney; but this is a consideration only secondary to another which is, the interests of the suitors, who must employ attorneys to conduct their suits. The provisions of the statute are as follows:—[His Lordship read 13 & 14 Geo. 3, c. 23, s. 8*.] Such are the large and summary powers vested in the court for the suppression of such acts; and it appears to me that in such cases there is an obligation laid upon the court to exercise its powers. In the present case the court did not think it right, in the first instance, to exercise these powers to their full extent, conceiving that it would be more proper, as regarded the interests both of the attorney and his clerk, instead

* Sec. 8, "And be it further enacted by the authority aforesaid, that no person shall for the future be permitted to practise or make use of the name of any attorney of any of the said Four Courts in Dublin, unless he shall have been regularly admitted an attorney in some other of the said courts; and that from and after the first day of Trinity Term, 1774, it shall and may be lawful for the Judges and Barons of the said courts respectively, wherein any person not properly qualified shall presume to act or practise, or make use of the name of any attorney as aforesaid, by order of the court to require any person so making use of the name of any attorney as aforesaid or otherwise practising without being properly qualified, as also any person or persons permitting his or their name or names to be so used, and all and every such other person or persons as the said judges or barons respectively shall think necessary or proper, to appear before them respectively in open court, and to examine upon oath such person or persons in relation to such practice; and if such unqualified person, or such person permitting his name to be made use of as aforesaid, shall, upon such order being duly served upon him, refuse or neglect to appear, or if after appearance by his or their voluntary confession, or by proof made by one or more credible witness or witnesses upon oath, it shall appear that such person or persons hath or have so acted or practised, or permitted his or their name or names to be made use of as aforesaid, that then and in any of these cases it shall and may be lawful for the said judges or barons of the said courts respectively for every such offence to punish such unqualified person or persons, or such person or persons so permitting his or their name or names to be made use of, as for a contempt of such court."

of interrogating them personally, to afford them an opportunity of meeting by affidavit the charges made against them. The Act of Parliament has given to the court this power of punishing as for a contempt, not merely any attorney so permitting his name to be used by an unqualified person, but also the person using the name of the attorney for that purpose. The object of this enactment was not merely to protect the rights of attorneys, but the intention of the Legislature and of those who framed the rules regulating the conduct and practice of attorneys was, to secure for the public a body of men who should possess two qualifications: first, that by a certain course of instruction they should, as far as the capacity of each would permit, possess a capability to conduct the business of their clients with safety and fairness; and secondly, that they should be put in such a position under the control of the judges, as to be liable to a direct responsibility to the court for their acts. In other words, the object of the Legislature was to obtain skill and responsibility—qualities quite requisite in persons who have complete control over the important affairs of their clients. A practice appears to have grown up among attorneys, and as far as I am aware, one of considerable standing, namely, for attorneys not residing permanently in Dublin, and therefore under the necessity of giving their employment into the hands of partners or other professional men, instead of doing so, to carry on their business through clerks, that is to say, through servants. That such a practice may be liable to abuse is quite apparent. Any course of practice may be liable to abuse, and this is clearly so; and, as long as it exists, great care must be taken to prevent such abuse. By the order that we are about to make we do not intend to interfere with this practice; it has been a subject of consideration elsewhere: it has long continued, and we do not mean to interrupt it. But the practice of employing a clerk must be subject to this rule, that although the business transacted by the clerk be that of the attorney, his employer, and although the latter may require the clerk for his services, yet the attorney himself must be the person, as far as his client is concerned, to exercise all the skill, duty, and responsibility requisite in conducting the cause; and which, when he permits his name to be thus made use of, as in the present instance, he violates. The present case is not only one not belonging to the class I have mentioned, but most strongly contrasted with it. Nor was it merely the case of a country attorney residing out of Dublin, doing country business, and occasionally coming to Dublin; but in the present case the attorney resides permanently out of town. I do not refer to this as a test of his responsibility, but merely as throwing light upon the case—he lives in the country, and his attendance in Dublin is the exception; he selects a person to act for him in Dublin upon this understanding, that this person is to obtain business for him; in fact, that he is to beat up for business in Dublin for this attorney, the latter residing permanently in the country. I must repeat that I do not refer to the latter fact as the sole test, but merely as throwing light upon the case. It may frequently happen that an attorney must be absent

himself from Dublin upon several occasions, and I do not say that a person employed by him may not advance the interests of his employer amongst the persons with whom he has dealings; but when I find these two facts co-existing, the attorney residing permanently out of town, and having a clerk in town beating up for business, I think it is fair to come to a different conclusion. What further appears in this case? It appears by the statements of Harrison that he placed considerable confidence in the skill and attention of O'Byrne; that he did employ him as stated, but that it formed no part of his instructions to O'Byrne that the latter was to communicate with him before commencing law proceedings, or after they were commenced, as to how they should be conducted. It is remarkable that in the original instructions given to O'Byrne,—if he was really conducting the business of an attorney, and nothing else—that it is not made a part of his duty to communicate with his employer as to what he had done in cases arising without his employer's knowledge. This is a third important fact in the case. It appears that three writs were issued upon this one bill of exchange, and an informality appeared upon one of them. There had been a change in the registered residence of the attorney, and upon one of these writs neither the old nor the new registered lodgings of the attorney appeared, but another residence, which appears to have been the residence of a relation of O'Byrne, a person in no manner connected with Harrison. What followed? A person named in one of the writs that had issued, went to this place for the purpose of settling the amount of the bill of exchange, but found no person there authorized to deal with him or receive the money. Then these proceedings were instituted for the purpose of setting aside the writ—proceedings perfectly fair on the part of a person ready to pay the amount of the debt, and who not being able to make a tender of the money, was exposed to further expense. This writ was set aside, and eventually the whole proceedings proved abortive, after the defendant had been exposed to considerable expense, in consequence of these proceedings, and all through the misprision of the plaintiff's agent. That is not all: a notice was served, apprising the person acting for Harrison that these proceedings were irregular, of which I do not find that there was any intimation given to Harrison, but there appears to have been a notice in reply, not signed by Harrison, and of which he was not apparently aware. Here then, in addition to the three facts I have before alluded to, this practice is acted upon and illustrated. Under these circumstances, without looking for anything else, can there be any doubt that O'Byrne was invested by Harrison with full power of practising in his name, without communicating with Harrison, and of enlarging as far as he could the sphere of his clients in Dublin? If we allowed such proceedings to continue unchecked, we would not be able to protect the interests of the public, or of those persons employed by professional men in the country. In this case O'Byrne appears to have been acting, not as servant of Harrison, but as something more, being permitted by Harrison to act for himself. He has

come within the provisions of this Act of Parliament, and except we apply the rule in the present instance, I cannot conceive under what circumstances it can ever be applied, or how the most extensive violation of the Act could be opposed. At the time when this matter was first presented to our notice, we felt so much the necessity of inquiring into the proceedings of these parties that we made a conditional order for an attachment against Harrison and O'Byrne. The matter already came before Baron Pennefather in chamber, and he thought it proper to bring the proceedings before the full court, and we considered it to be one of those cases at which we should not wink, and upon further examining the circumstances, we thought fit of our own motion to direct that the conditional order should issue, and thus to offer to the parties interested an opportunity of explaining the facts of the case. I rejoice that we have done so, although I regret that the proceedings may, perhaps, press heavily upon innocent parties; but it would be a spurious leniency if we did not exercise the powers of the court so as to make this case an example. We shall make the order for an attachment absolute against both parties—the attachment not to issue until further order.

PENNEFATHER, B.—These proceedings originally were instituted before Mr. Justice Jackson, who directed a conditional order for an attachment against M'Grath, for practising in the name of another attorney without his permission, and when cause was shown before me, and the circumstances of the case were exhibited, it appeared to me that the order should be made absolute. But it did not appear to me that at that time the case was ripe for decision as against Harrison, although sufficient appeared then to induce me to think that he had employed O'Byrne to act in violation of the law. It subsequently appeared to the court to be necessary to call upon Harrison and O'Byrne to explain, if they were able to do so, the mode of dealing between them. We are now about to make absolute the conditional order that was made for that purpose. The Chief Baron has fully stated the grounds of our decision. This case is not to be regarded as affecting those whom attorneys residing in the country intrust with their business. A person so employed under the authority of an attorney may conduct his business, but it must be *his* business. Perhaps we would not lay down the rule too broadly by saying, that in every instance the attorney must be the first mover. In the present case the employment of O'Byrne was not to conduct the business of Harrison, but to look for business wherever he could, and to make use of the name of Harrison as attorney in that business. We cannot conceive that O'Byrne would act without the expectation of profit, nor that Harrison would allow his name to be used without deriving some profit from the arrangement. Such being the object of the employment of O'Byrne, he was to sue out writs—he says in plain simple cases—to proceed with the suits, and it is not stated that he was not authorized to go on to judgment. He was also to look out for clients, and to proceed in this manner for *his* clients I should call them, not the clients of Harri-

son. This is a mode of dealing which I conceive to be contrary to the express words and policy of the Act of Parliament, whether it be in reference to the public in general or to the profession of attorneys themselves, to whom the public must be largely indebted when they conduct themselves as they generally do; but if such proceedings were sanctioned, they would lead not only to the injury of the profession, but to enormous injustice to the public at large. Let us see what occurred in the present case. In one of these simple cases O'Byrne succeeds in obtaining a client, and upon one bill of exchange three writs of summons are issued. One of the parties sued was ready and willing to pay the debt and costs, but there was no one to be found to receive either the one or the other. There may be cases in which three parties should be sued upon one bill of exchange, but it is not a practice that should be encouraged or exercised by a person who is not an officer of the court. It has been fully argued upon the part of these persons that they did not think that they were acting improperly, or in contempt; but the intention of an act contrary to the provisions of an Act of Parliament is not so much to be considered, as whether or not the act has been committed; and, if so, such an act must be treated as a contempt. We cannot pass it over upon the ground that it is the first time that it has been brought before the court. The practice must be put a stop to, and the court must commence some time or other. However, it is not a case for exemplary punishment, and therefore we shall order that the attachments are not to issue until further order, but this must be upon payment of costs.

GREENE, B.—The case has been dealt with so fully by the other members of the court, and so perfectly in accordance with my views, that I need only say that I entirely concur.

Rule accordingly.

MICHAELMAS TERM, 1854.

M'NAMARA v. O'LOGHLEN.—Nov. 3.

*Practice—Taxation of Costs—Appeal to principal Taxing Master—16 & 17 Vic. c. 55, ss. 3 & 4.**

16 & 17 Vic. c. 55, sec. 3, "The business to be transacted by such officers shall be the taxing of all such costs as are specified in the said recited Act of the first and second years of the reign of King George the Fourth, and thereby directed to be taxed by the Taxing Officers for Common Law business; the business of the said office shall be divided between the said officers as they shall from time to time find most expedient, subject however to the approbation of the Lord Chief Justice of her Majesty's Court of Queen's Bench in Ireland; such distribution and arrangement to be reduced to writing, with the approval thereof by the said Lord Chief Justice under his hand; and if the said officers shall not agree to such distribution or arrangement, it shall and may be lawful for the said Lord Chief Justice by an order under his hand to direct in what manner and proportion such business shall be divided between, and transacted by, the said two officers; and in all and every case where any party or person is dissatisfied or feels himself aggrieved by the decision of the Assistant Taxing Officer, *it shall and may be lawful* for such party or person, before the bill of costs shall be certified, to bring the item, question, or other matter, by

A bill of costs in an action of trespass had gone before the Assistant Taxing Officer, and he had made and signed a certificate of his taxation. The defendant made an application to the court that the officer should review his taxation, which was refused (but without prejudice) upon the grounds that the matter should have been previously carried by appeal under 16 & 17 Vic. c. 55, s. 3, before the principal Taxing Master. The defendant then served notice upon the other party to appear before the principal officer, which the latter accordingly did, but under protest, on account of the certificate having been filed and execution issued in the meantime. The principal officer nevertheless (the Assistant Master having refused to view his taxation) undertook to tax the costs, and rescind the taxation of the assistant Master; but ultimately adopted the several items as taxed by the latter. This was an application that the taxation so made should be reviewed. Held, that before an application, such as the present one, could be made for the purpose of reviewing a taxation of costs made by the Assistant Taxing Master, the question should be previously carried by appeal (under 16 & 17 Vic. c. 55, s. 3,) before the principal Taxing Master.

Held also, that the taxation in the present case did not substantially amount to a taxation by the principal officer, so as to enable the defendant to apply to the court for a review of taxation.

The principal Taxing Master does not possess original jurisdiction to cancel the taxation of the Assistant Taxing Master.

In certain exceptional cases, a party may appeal immediately from the taxation of the Assistant Master to the court.

THIS was an application that the Taxing Officer should review his taxation. It was an action for a trespass in which the plaintiff had succeeded upon some of the issues, and the defendant upon others; and the present application was made on behalf of the latter. It appeared that these costs had been carried for taxation before the Assistant Taxing Master in the first instance, that the taxation had been completed by him, and that he had certified the taxation, but the certificate had not been then filed. An application had been made upon the last day of Trinity Term that the taxation of these costs (as

way of appeal from the decision of the assistant officer, before the principal officer, who shall with all convenient despatch dispose of the item, question, or other matter so brought before him on such appeal."

Section 4; "The said two officers appointed or to be appointed under the provisions of this Act, shall have the same power and authority, and be subject to the same regulations as to duties and attendance, as are given and contained with reference to Taxing Officers in and by the said herein-before recited Acts of the 1st and 2nd years of the reign of King George the Fourth, and of the 7th and 8th years of the reign of her Majesty Queen Victoria; and all and every the provisions, powers, authorities, and directions contained in the said recited Acts or either of them, with reference to the Taxing Officers created thereby, so far as the same shall be consistent with the alterations hereby effected, shall be and be deemed applicable to the Taxing Officers appointed or to be appointed under this Act, and to the taxation of costs by them or either of them, and all matters and proceedings belonging to or connected with the business thereof."

certified by the Assistant Taxing Master) should be reviewed; but the court refused the motion, upon the grounds that the proper course of the defendant would have been to have proceeded by appeal to the principal Taxing Master, before making an application to the court. This order was made without prejudice to any subsequent application that the defendant might be disposed to make in the case. Subsequently to the refusal of this application the defendant served notice upon the opposite party to go before the principal Taxing Officer for the purpose of taxing these costs; and counsel on behalf of the plaintiff appeared accordingly, but under protest, upon the grounds that the time for appeal to the principal Taxing Officer had expired under the provisions of 16 & 17 Vic. c. 55, s. 3, and that the certificate already given had since been filed and execution issued. The defendant then, at the suggestion of the principal Taxing Master, applied to the Assistant Taxing Master to review his former taxation, but the latter having refused to do so, the principal Taxing Officer rescinded the taxation of costs as made, and entered the matter in his list, not by way of appeal, but as an original taxation of the costs. But he subsequently, in his taxation, adopted the several items of the former taxation.

Sir Colman O'Loughlen, Q. C., in support of the motion.

Brereton, Q. C., contra.—There is a preliminary objection to this application, namely, that the question should have been first brought before the principal Taxing Master on appeal under the provisions of 16 & 17 Vic. cap. 55, s. 3. [*Pennefather, B.*—We will hear the other side upon that question.]

Sir Colman O'Loughlen, Q. C., (with him *J. D. Fitzgerald, Q. C.*)—The original application of the defendant to this court having been refused, the plaintiff filed this certificate of costs for the purpose of preventing an appeal to the principal Taxing Officer, but the latter nevertheless proceeded to a taxation of the costs, the Assistant Master having refused to re-consider the matter. There are certain cases specified in a letter signed by the Chief Justice of the Court of Queen's Bench in which the Assistant Master is the proper person to tax costs in the first instance, but in cases like the present either of the officers has a co-ordinate power to arrange the taxation between themselves; and therefore the present application is to be regarded as an application that the principal Taxing Officer should review his taxation; an appeal from one officer to the other not being in such cases in practice deemed requisite, and the objection made to the former application being thereby removed. [*Richards, B.*—We should be unwilling to interfere with the practice of the office; but it is very questionable whether the principal Taxing Master has the power to treat the taxation of the other officer as so much waste paper, and proceed to a re-taxation, the matter not being regularly brought before him on appeal. If, however, such be the case, your present motion is a proper one; but that is a question quite distinct from the consideration whether or not the case is *coram non judice*.] The taxation of these costs by the Assistant Officer was in aid of the principal officer, and therefore the latter considered it as his

own taxation, and undertook to review it without a regular appeal, which the defendant could not bring, the other party, who had the carriage of the certificate, having filed it in the meantime. [*Richards, B.*—I conceive that it is the duty of a party receiving the certificate of the Master, if he does not quarrel with the items, to file it at once, and not to keep the matter open. *Pennefather, B.*—We cannot hold that the taxation before the Assistant Master was *coram non judice*, as we think that he had full jurisdiction to tax the costs; and if the party was dissatisfied with his taxation, he should have immediately adopted the mode provided by the statute—namely, an appeal to the other officer.] The question altogether depends upon the construction of 16 & 17 Vic. c. 55, s. 3. Under the former Act, 1 & 2 Geo. 4, cap. 53, there was no doubt but that a party could have appealed directly from the taxation of either of these officers to the court; and it is submitted that this right is not taken away by the present Act; and the other side must contend that the provisions of section 3 (by which the power of appeal to the principal officer is for the first time created) are *mandatory*, and that the court can in no case entertain an application of this nature, except it be preceded by such an appeal; but the language of that section is, that the party in such case *may* appeal to the other officer if he be dissatisfied with the taxation of the assistant. [*Pennefather, B.*—The word “may” in an Act of Parliament often has the force of “shall” (as in the case of suggesting breaches on bonds), where it is the object of the Legislature, and conducive to the public good, that it should be so; and the present case appears to me to be one of that nature.] It is admitted that it may be so in some cases; but the power of appeal to the court existed long before the passing of this Act, which for the first time gave the right of appealing to the principal Taxing Master, and does not interfere with the other jurisdiction. If the inherent power of the court were to be so restricted, clear mandatory words should have been used; but in either case the taxation having gone before the principal Master, the court may now entertain the motion.

Brereton, Q.C. in reply.—This cannot be treated as an original taxation before the principal officer, as he had no right to rescind the proceedings before the assistant master, except upon a regular appeal; for what would be the use of the power of appeal created by 16 & 17 Vic. c. 55, if he had the power of acting in this manner? The two officers, both under this Act and the former, (1 & 2 Geo. 4, c. 33,) were and are co-ordinate, and the terms “principal” and “assistant” are not to be distinguished, save only as to the right of appeal to the former. [*Pennefather, B.*—If the principal officer had made his decision regularly, there is no doubt that this motion could be entertained by the court, and the only question is, whether what took place may be regarded as substantially amounting to a taxation of the costs by him, and that thus the grounds upon which the original motion was refused have been removed.] The entire proceedings before the principal taxing master were under protest. The intention of the Legislature clearly was, that, at any

rate in ordinary cases, the court should be relieved from entertaining the consideration of small matters of costs; and there is no fatality in this case rendering the interposition of the court necessary.

*PENNEFATHER, B.**—The court has received considerable assistance, and much light has been thrown upon this case, by the able arguments of counsel on both sides. This is a question of much importance, depending upon the construction of this statute, the 16 & 17 Vic. c. 55, ss. 3, 4, by which the pre-existing mode of taxation has been, to a certain extent, altered. Under the former statute of Geo. 4, two coequal taxing officers were appointed; but no power of appeal from one to the other was given, and therefore, if either party was dissatisfied with the taxation of costs by either of these officers, his course was to come to the court for assistance. The latter statute, in remodelling the office, has created a power of appeal. It provides that there are to be, as before, two taxing officers; but not exactly co-ordinate, for one is called the “principal” and the other the “assistant;” but it provides that in all cases (consistently with the alteration so introduced) their jurisdiction is to continue the same as under the former Act. It therefore becomes necessary to consider what is the operation of the third section; and it provides that if either party be dissatisfied with the taxation of the assistant-master, “it shall and may be lawful” for such party or person, before the bill of costs has been certified, “to appeal from the assistant to the principal officer.” The question therefore is, what construction is to be put upon these words? It appears to me that the words “before the bill of costs shall be certified” mean the certifying of the taxation by the assistant-master, and therefore that the party dissatisfied with this taxation shall and may appeal before the costs were so certified. What therefore is the fair construction of these words? He “shall” appeal, that is to say, it shall be his duty so to do if he be dissatisfied with the taxation, and in this case he has not done so before the signing of the certificate. An application was made last Term to set aside the taxation of the assistant-master, but the court being of opinion that the course laid down by the statute had not been pursued, refused the application; not however laying down any rule to the effect that the jurisdiction of the court had been restricted by the Act of Parliament, but being of opinion that the course prescribed by the Act of Parliament should be followed, except in cases of fatality or others of a clearly exceptional nature, and that it would not feel itself bound to be called into activity except the provisions of the statute were carried out. Nevertheless, in refusing that application, the court at the time made this salvo, that the party should not be prejudiced by the order, in case he should renew the application, in order that he might be thus enabled to effect a retaxation of the costs, and open the question again, it being one that had thus for the first time come before the court. We now come to consider the matter as presented to us upon the present application. It has been admitted upon both sides

* Pigot, C. B. was absent.

that no appeal was made to the principal master within the time provided by the statute, but it is contended, although such is the case, yet that the principal master did *substantially* consider and decide upon these costs. It does not strike us that such is the case. There is frequently a difficulty in the taxation of costs. The Act points out a salutary course to be pursued in such cases; but that course has not been adopted in this case, and in fact the judgment of the principal taxing master has not been given in the manner pointed out by the Act of Parliament. When the matter came before him, the plaintiff objected to his going into the case, and protested against the proceedings; the officer nevertheless went on with the taxation of the costs, regarding the taxation that had been made by the assistant taxing officer as his own taxation. No regular taxation has been made by the principal officer. No summons to tax before him was served; and the business would have been much better done in the regular way. We therefore think that there is a sufficient case before us for requiring the adoption of the rule as laid down in the Act, and which is to be used except in certain cases. I make use of this latter expression, there being nothing in the Act to take away the inherent power of the court in these matters, which may therefore in certain cases be called into operation. But we do not think that the present case is one of this nature, and therefore we think it more advisable that the rule as laid down by the Act of Parliament should, generally speaking, be adopted in cases like the present. Therefore we are of opinion that, upon this objection that has been raised by the plaintiff's counsel, we should not entertain the present question; however, having already refused the original motion with costs, and having, perhaps, by the order then made induced the defendant to reopen the question, we shall now refuse the motion, but without costs.

RICHARDS, B., concurred.

GREENE, B.—I fully concur in the judgment of the court, as expressed by my brother Pennefather. This is an application to us to review the taxation of the principal taxing master; and I for one do not see how we could entertain such an application, without at the same time recognizing the act of the principal taxing master in assuming original jurisdiction to cancel the acts of his co-ordinate officer in the taxation of these costs; and it is for this reason especially that I concur in the judgment of the court. I also think that it is salutary that it should be understood that in cases of this nature, before the court is resorted to, parties dissatisfied with the taxation of the assistant master are to go before the co-ordinate officer in the manner provided by the Act.

Motion refused without costs.

CONSOLIDATED CHAMBER.

Coram PENNEFATHER, B.

BLAKE v. MANNION.—July 16.

Ejectment—Issues—Mesne rates—Statute of Limitations.

In ejectment, where the defence was, that the plaintiff was barred by the Statute of Limitations, the court allowed the parties to depart from the Form of Issue given by the Common Law Procedure Act, in order to enable the plaintiff, if successful, to recover Mesne rates, from a date anterior to the commencement of the action, and to enable the defendant to raise the question as to whether the plaintiff was barred by the statute at the commencement of the action.

William Duggan applied to the court to settle the issues in this case, which was an ejectment on the title. The summons and plaint stated that the plaintiff, on the 1st day of January, 1845, was entitled to the possession of the premises. The defendant filed his defence in the form given in the schedule to the Common Law Procedure Act, and the abstract of issues was also in the form given by that schedule, (see Ferg. C. L. Proc. Act, pp. 231 and 235.) The defendant returned the abstract having altered the issue so furnished, and having put it in these words, "Whether the plaintiff was entitled to the possession of the premises on the day of the commencement of the action," the effect of which would be to limit the right of the plaintiff to recover mesne rates from the day when the action was commenced.

Fitzgibbon, Q.C., for the defendant, submitted that the issue so framed was the proper one, the defendant's case being that the plaintiff was barred by the Statute of Limitations in the year 1853, and if the issue as framed by the plaintiff were to be the issue to be tried, the defendant would be precluded from the defence of the statute if the plaintiff showed he was entitled to the possession on the 1st day of January, 1845; and as to mesne rates, he submitted that the plaintiff was not bound by the day of the demise stated in the plaint.

PENNEFATHER, B.—The abstract furnished by the plaintiff is undoubtedly in the form given by the Act, but if that form were literally followed, the difficulty suggested by the defendant's counsel might certainly arise. But on the other hand, if the issues as tendered by the defendant were adopted, the plaintiff's right to mesne rates might be prejudiced. To avoid either of these contingencies, I shall suggest two issues, which I think will get rid of the difficulty: 1st, Whether the plaintiff was entitled to the possession of the premises on the day of the commencement of the action; 2ndly, If so, whether he was entitled to such possession on the 1st day of January, 1845, or any and what day subsequent thereto.

These issues were accepted by both parties.

JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL.—1854.*

[Reported by R. W. OSBORNE, Esq., Barrister-at-Law.]

IN THE MATTER OF RICHARD LAWLESS AND
OTHERS, OWNERS; HENRY CAMPION AND
OTHERS, PETITIONERS.—Oct. 20, 21.*Renewable Leasehold Conversion Act—Compensation for loss of reversion.**Where a landlord is seised in fee simple of the reversion, expectant on a lease for lives renewable for ever, and is not likely to suffer any special loss by the conversion of his tenant's interest into a perpetuity, the renewal fine being nominal, he is not entitled to compensation under the 5th section of the Renewable Leasehold Conversion Act.**Ex parte Knox, (3 Ir. Ch. Rep. 57,) overruled.*

THIS was an appeal by the vicars choral of St. Patrick, Dublin, from an order of the Commissioners for the Sale of Incumbered Estates of the 10th of July, 1854, confirming a conditional order of the 24th of May, 1854, for the conversion into a fee farm grant of the lease bearing date the 10th of May, 1822, of a parcel of ground situate in St. Michael's Hill, in the County of the city of Dublin. From the petition it appeared that by lease bearing date the 10th of May, 1822, and made by the Commissioners of Wide Streets for the City of Dublin, of the one part, and Richard Bergan, of the other part, the said Commissioners being seised in fee simple of a plot of ground in St. Michael's Hill, demised the same unto Richard Bergan for three lives therein named, and the survivors and survivor of them, and for and during the life and lives of all such other person or persons as should for ever thereafter be added thereto by virtue of the covenant for renewal, subject to the payment of the yearly rent of £30 15s., late Irish currency, with the usual covenants, &c., for payment of rent, and re-entry, and distress; and also a covenant for renewal in the words following: "And the said three Commissioners, parties hereto, do hereby for themselves, and the rest of the said Commissioners, their successors and assigns, covenant, promise, and agree to and with the said Richard Bergan, his heirs and assigns, in manner following, that is to say,—that upon the death of the said Richard Bergan, Malachias Bergan, and Eliz. Bergan, or any of them, which shall first happen, and within six calendar months to be computed from the day of the death of such persons so happening first to die, upon the payment of one pepper-corn as a fine and payment of all rent to the said Commissioners, their successors or assigns, and naming the life of any other person in the place and stead of the person so happening first to die as aforesaid; they, the said Commissioners, their successors or assigns, shall and will add and insert to the time and term of this lease the life of such person so nominated in the place and stead of the person so happening first to die as aforesaid; which life to be nominated and inserted, is to be endorsed on this lease, or written

in a deed, label, or parchment to be affixed to this lease for that purpose; or in a separate deed or writing, declaring the life or lives last failing, and the life or lives so added in lieu thereof, and in like manner from time to time, successively for ever hereafter on the failure of every other several life and lives in this lease now named, or hereafter to be nominated; and upon the like payment of the fine of one pepper-corn, and payment of all rent by the said Richard Bergan, his heirs or assigns, within six calendar months after the death of every other such several life or lives in being, and so to be nominated as aforesaid, unto the Commissioners, their successors and assigns, upon the like nomination of any other life and lives successively, in lieu of every other such several life and lives of such person or persons so successively dying as aforesaid; which life and lives to be added and inserted successively, are to be endorsed on this lease, or written on deeds, labels, or parchments to be affixed hereunto, or in separate deeds or writings declaring the life and lives so failing, and the life and lives so added in lieu thereof, so that the said Richard Bergan, his heirs and assigns, may at all times for ever hereafter have a term for three lives in being, and undetermined in the said premises, at and under the rents and covenants herein contained, all which deeds of renewal are to be at the proper costs and charges of the said Richard Bergan, his heirs or assigns. And the said Richard Bergan doth hereby for himself, his heirs, and assigns, covenant, promise, and agree, to and with the said Commissioners, their successors and assigns, that he, the said Richard Bergan, his heirs and assigns, shall and will after the death of every person and persons for whose life the premises are hereby demised, and of every other person or persons for ever hereafter to be nominated and added hereunto, according to the covenants and agreements herein contained, nominate and appoint one other person or persons in the place and stead of every other person and persons so dying, and at the same time pay to the said Commissioners, their successors or assigns, one pepper-corn, as a fine on such renewal, and likewise all arrears of rent which shall happen to be then due for the further and better assuring the said demised premises unto the said Richard Bergan, his heirs and assigns, according to the true intent and meaning of these presents." After the execution of the said lease the reversion in fee-simple, expectant upon the determination of said lease, became vested in petitioners, who are now the "owners of the reversion" within the meaning of the terms of the "Renewable Leasehold Conversion Act;" and the estate and interest of the lessee under said lease is now vested in the owners in this matter, who are now the "owners of the said lease" within the meaning of the terms of the said Act. That Richard Bergan, one of the said *cestui que vies*, died on the 27th of December, 1825; Malachias Bergan, another of said *cestui que vies*, died on the 10th of March, 1826; and said Elizabeth Bergan is also dead. The order of the 24th of May, 1854, directed that the said lease should be converted into a fee farm grant on the following terms—first, the

* The following Privy Councillors were present:—The Lord Chancellor, Monahan, C. J., the Right Hon. F. Blackburne, the Right Hon. R. Keating, Judge of Prerogative Court, and the Right Hon. J. Napier.

fee farm rent should be the yearly sum of £29 1s. 7d., sterling, in lieu of the rent of £31 late currency; secondly, that the amount due for arrears of rent up to the 1st day of May, 1854, after deducting the proper proportion of poor's rate, was £56 2s. 1d.; and, thirdly, that there were no exceptions, reservations, or rights under covenants sought to be commuted *unless* cause be shown within 21 days from service of the order. The petitioners, in showing cause against the above order, produced as evidence the affidavit of Maurice Colles, civil engineer, who stated that he was acquainted with the marketable value of the interests of tenants holding by lease for lives renewable for ever, and of the interests of lessors of such leases, and that the difference between the leasehold and the grant in fee claimed in this matter would be at least two years' purchase, or value of the premises demised by the said lease, in favour of the vicars choral of St. Patrick's Cathedral; and that he was of opinion that the conversion of the tenant's estate or lessee's estate for lives renewable for ever into a fee farm grant would increase the value of the said lessees to that extent at least, and that the vicars choral would be entitled to have an annual sum equal to the interest of £5 per cent. per annum on the amount of two years' purchase or value, added to the fee farm rent into which the rent payable under the said lease might be converted under the provisions of the Renewable Leasehold Conversion Act; and that he had come to that conclusion because he considered that if the Renewable Leasehold Conversion Act had not been passed, tenants holding by leases for lives renewable for ever would in most cases gladly have paid to the owners of the reversion held by them thereunder two years' purchase, or value thereof, for a grant in fee farm; and, further, because he considered that an owner of a reversion in premises held by lease of lives renewable for ever, and who had parted with the rent payable thereunder, but retained the bare reversion in himself, would obtain about two years' purchase on the rent for it, and therefore that the fee farm makes a difference of two years' purchase in the tenants' favour, which comes out of the lessor's pocket.

F. A. Fitzgerald, Q. C. and Harrison for the petitioner.—It is evident, from a consideration of the statute and the object with which it was introduced, that the Legislature regarded the rights and position of the landlord and tenant in a lease for lives renewable for ever in precisely the same way a Court of Equity would have done in the case of a bill filed for renewal. The object of the court there always was to preserve both parties in the position in which they were placed by the original contract, *Lennon v. Napper*, (2 Sch. & Lef. 682,) and by that contract the landlord had not only his rent and covenants but also a reversion with many privileges incidental thereto. By the second section of the statute the landlord is secured his rent and an equivalent for renewal fines, and by the 3rd and 4th exceptions and reservations interfering with the proper cultivation of the soil are commuted, and certain rights compounded for by consent. By subsequent sections covenants which ran with

the reversion are made to run with the estate created by conversion under the Act, and every means adopted to secure both parties in their original position. Still there was something unprovided for by the statute until the 5th section was introduced, and it is evident from an attentive consideration of the statute that it would be incomplete without it, and cases may be pointed out which must have been under the consideration of the Legislature when the Act passed in which the owner of the reversion would have been seriously injured but for such a section. For example, by section 38 a "lease in perpetuity" is declared to include a case where lands, &c., are demised "for one or more life or lives, with or without a term, or for years determinable upon one or more life or lives," and in a subsequent part of the section the word "covenant for perpetual renewal" is declared to apply to a covenant "given in respect of a lease or under lease for a term of not less than ninety years determinable on a life or lives, or perpetual right of renewal on the dropping of a life or lives within the term for which such lease or under-lease may have been granted, although such covenant may not give right of renewal in the event of the termination of such term by effluxion of time." Now, suppose a lease granted for ninety years determinable on a life, with a covenant for perpetual renewal on the dropping of the life within the term, and that the term of years is within a year of expiring, the life being upwards of 90, but in good health and likely to live for several years. The purchaser of such a reversion before the Act and after would be in a very different position if the statute gave the tenant a right to a grant under the Act without compensating the landlord for the loss of his reversion. [*Monahan, C. J.*—That case may, in case it should ever arise, afford a proper instance for compensation under section 5, but that is not the case before the court.] No; but it shows that the Legislature itself contemplated cases where a loss would accrue from a deprivation of the mere reversion, and therefore it comes in every case to a question of evidence whether that loss has taken place; and here we have the affidavit of a competent person, which the court is bound to act upon, that such loss has occurred. [*Rt. Hon. F. Blackburne.*—The affidavit does not show us what the landlord loses; the tenant may gain, but that is not enough.] What the tenant gains the landlord must lose, there is no other party from whom the gain can be derived, and as the court cannot deal with the amount of loss, we are entitled to a reference to ascertain it. The cases which have been hitherto decided in apparent opposition to this view of the Act, cannot conclude this. In *Ex parte Somerville*, (2 Ir. Jur. 203,) the landlord claimed compensation for the benefit the tenant acquired by being relieved from the litigation and expense incident to renewals, and for this the Master of the Rolls decided he was not entitled to compensation. The next case was that of Lord Donegall, which it was decided did not differ from an ordinary case notwithstanding the provisions of his private Act of Parliament. This decision the Lord Chancellor affirmed, where however the argument turned on the same point as in the Rolls

Then comes the case of *Ex parte Knox*, (3 Ir. Ch. R. 57,) where the Master of the Rolls in a maturely considered judgment decided that the landlord was entitled to compensation for the loss of the reversion under circumstances similar to those in the present case.

Blake, Q.C., (with *Morris*), for the respondents.

—The case was not one of reference as to amount, but of determination by the court whether the appellants were entitled to any compensation. It was manifest the Legislature, in conveying the reversion to the tenant, intended to deprive the landlord of all chance of forfeiture, and of the power to harass the tenant by litigation, but did not intend that he should obtain any compensation for such loss, although previous to the Act a prudent tenant might have paid something to be free from the necessity of renewing. It being conceded that such a source of profit was not a loss to be compensated for, it was necessary for the appellants to show the loss they complained of did not arise from the very cause which was not the subject of compensation. That the affidavit of Mr. Colles, relied on as evidence by the appellants, did not attempt to show that the loss to the landlord was occasioned from any other causes than those which it was clear the Act did not intend to be compensated. It was not necessary to discuss whether the cases which Mr. Fitzgerald has discovered as coming within the 5th section were within it or not; if they were, he had removed one of the great difficulties in giving effect to the 5th section—but it was necessary for him to show the present case came within it—and while it was admitted the 5th section was to apply to exceptional cases, if it was to apply to a case like the present, the difficulty would be not to find cases within it, but cases without it. [They cited *Ex parte Somerville*, (2 Jur. 203.)]

The LORD CHANCELLOR, in giving judgment, said that the committee were unanimous in their opinion that the Acts did not impose on the tenant the condition of paying anything for the mere loss to the lessor of a long reversion. Previous to the passing of the Act the tenant was exposed to litigation, and the expense of renewals, by which his interest in perpetuity was depreciated as compared with an estate in fee farm. The object of the Act was to remove this cause of depreciation to which the lessee's interest was subjected, but to do so in such a manner as would not in reality prejudice the landlord's security for his rent and fines, and other rights under the lease. There might be some special cases in which the new estate of the landlord under the fee farm grant would be of less value than his estate under the lease, but such would be met by the 5th section. The case before the committee is not within that section, which is not general, but intended to remedy cases of a very special nature, and the affidavit of Mr. Colles declares no sufficient grounds from which any loss can be inferred. The argument of the appellant assumed that the landlord had a vested interest in the injustice and inconvenience which the statute intended to remove, but it was an advantage which the statute intended to

remove. It might happen that he had an occasional advantage, and the tenant a prejudice, but it was an advantage which the Legislature thought ought not to be continued, and a prejudice which ought to be removed. The order of the Commissioners must therefore be affirmed.

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at-Law.]

KNIGHT v. NAGLE.—Nov. 3.

Plaintiff out of jurisdiction—Security for costs.

A, who resided out of the jurisdiction, filed a bill to recover certain judgments; B, who was only a notice party, entered an appearance in the common form. On a motion by B further proceedings were stayed until security for costs were given by A.

In a cross bill, or bill for an injunction by a plaintiff out of the jurisdiction, it is not usual to order such security to be given.

CERTAIN lands were sold in the Incumbered Estates Court, and a claim was there made by the plaintiff Knight for the amount of certain judgments; the claim was rejected, but the court stayed the paying out of the money, on the plaintiff undertaking to revive a bill which they had previously filed to establish their right to the judgment. The bill had been filed in 1847, and no other step had been taken until May, 1854, when the bill was amended. In July, 1854, notice of the bill was served on the defendant, Edward Farmer, who entered a common appearance on the 14th August following. The plaintiff resided in Great Britain out of the jurisdiction of the court, and the defendant, Edward Farmer, by notice served the 6th of September, 1854, had called on the plaintiff to give security for costs. The affidavit stated that the defendant was advised and believed that he had a good defence upon the merits against the relief sought by the bill.

E. Sullivan now moved pursuant to notice for an order on the plaintiff to give security for costs, and that further proceedings be stayed until the plaintiff should give such security.

Pilkington contra.—The defendant here is not entitled to require security for costs, being a mere notice party in the suit. It is not required that in every case a plaintiff out of the jurisdiction shall give security for costs. In *Watteu v. Billam*, (18 Law Jour. 455, C.) A brought an action against B concerning certain bills of exchange, and B thereupon filed a bill against A requiring the bills to be delivered up. On a motion by A that B should give security for costs of the suit, it was held, that he was not entitled to such security, and Knight Bruce, V.C., there said, that he had come to this conclusion after consulting the officers of the court, who differed in opinion, and after having the benefit of the opinion of the Master of the Rolls, and Sir James Wigram, who took the same view with him.

E. Sullivan in reply.—As to notice parties not being entitled to require security for costs, this is answered by the 18th Gen. Order of 1843, where-

by if a party served with notice desires the suit to be prosecuted against him, he has only to enter an appearance in the common form as was done here, and the suit shall then be prosecuted against him in the same way as if he had been served with a subpoena.

MASTER OF THE ROLLS.—The plaintiff in this case must give security for costs, as by the 18th General Order of 1843 Mr. Farmer is now in the position of an ordinary defendant, and the application is made in time. The case cited from the Law Journal does not apply, for that was the case of a cross bill, and when the proceedings are a cross bill or an injunction bill, security for costs is not required, for the plaintiff in such cases is a mere defendant, and it would be a strange anomaly to restrain a party from defending himself until he had given security for costs. But here the plaintiff makes a claim, that claim is disputed by the defendant, and if the plaintiff, then residing out of the jurisdiction, institutes proceedings for establishing his claim he must give security for costs. I am bound to order the plaintiff to give such security.

“Let further proceedings in this cause be stayed until plaintiff shall give security for costs in this cause, and accordingly refer it to the Master to measure the amount of such security, and to approve of two sufficient sureties to enter into such security by recognizance before the said Master, or before a Master Extraordinary in the country, to be first approved of by the said Master conditioned for payment of such costs, if any, as may be awarded to the defendants against the plaintiff in the cause, and upon such security being so measured let said plaintiff be at liberty, if he shall think fit, instead of entering into security by recognizance, as aforesaid, to transfer to the credit of the cause, with the approbation of said Master and privy of the Accountant General of this court, so much Government $3\frac{1}{4}$ per cent. stock as will be equivalent to the amount of such security, and upon such stock being so transferred as aforesaid let the Accountant General draw on the Bank of Ireland, from time to time, in favour of the said plaintiff, or of his attorney thereto lawfully authorized, for the dividends to accrue due on said stock.”

SIMPSON v. MULLINS.—Nov. 2.

Renewable Lease—Receiver.

The owner of a lease of lives renewable for ever upon the payment of a fine within six months after the fall of each life, where a receiver had been appointed over the lessor's interest, and all the cestuis que vies were dead, tendered to the receiver the amount of renewal fines and septennial fines, which he declined to accept. A reference was directed to the Master to ascertain the amount due for fines, and to approve of a proper renewal to be executed.

By an indenture of lease bearing date the 20th of February, 1803, Baron Ventry demised to John Eagar certain premises during the lives of the *cestui que vies* therein named, which indenture contained a covenant for renewal as follows:—“That

Baron Ventry his heirs and assigns on the fall and decease of all and every or any of the aforesaid lives, to wit, of them the said Dorothy Eagar, John Eagar, party thereto, or his said eldest son Alexander Eagar, shall and will from time to time and at all times hereafter, as often as there shall be occasion, renew this demise by inserting a new life or lives in the room and stead of every such life dying, and continue to renew the same for ever, he the said John Eagar, his heirs, executors, administrators, or assigns, paying unto the Right Honorable Thomas, Lord Baron Ventry, his heirs or assigns, for every such life so dying and to be so renewed the sum of £5 5s. sterling, as a fine for such renewal, within the space of six calendar months after the decease of any of the lives herein mentioned or hereafter to be nominated, name another life and pay the fine payable thereon as aforesaid, otherwise that the said John Eagar, his heirs, and assigns, shall for ever after be barred from any right of renewal.” The lessee's interest in this lease had become vested in the Rev. Thomas T. Eagar, and a receiver had been appointed over the Baron Ventry's interest. The lease had been renewed from time to time, and all the lives in the last renewal were dead, the last having died on the 20th of April, 1854. The Rev. T. T. Eagar furnished to the receiver on the 9th of October, a calculation of the amount due for renewal fines and septennial fines, which amounted to £119 19s. 7d., and setting forth the names of the new lives to be inserted. This amount was tendered to the receiver, who refused to accept it.

John Leahy now moved, pursuant to notice, for a reference to the Master to settle the amount of rent and septennial fines and interest payable under the covenant for perpetual renewal, and to settle and approve of a proper renewal to be executed to the said Rev. Thomas Thompson Eagar, upon payment of the sum so found due.

MASTER OF THE ROLLS.—You are entitled to have the reference in the terms of the notice.

Order made accordingly.

MOORHEAD v. MOORHEAD.—November 9.

Sale—Purchaser—Plaintiff bidding.

After lands had been sold under a decree, the court may direct a sole plaintiff to be substituted as purchaser for another party who had bid at the sale, and had been declared the purchaser, he consenting thereto.

THE suit in this case had been instituted by Joseph Cooper Moorhead to recover the amount of £350, secured by a memorandum of agreement. The lands of Dromartin and Tandragee had been directed to be sold under a final decree in the cause for the payment of said charge, and the same were set up and sold by public auction in September last, and Henry Whiteside having bid for lots No. 2 and 3, a portion of said lands, he was duly declared the purchaser thereof for the sum of £265. The affidavit filed for the purpose of the motion stated that the said H. Whiteside, since the sale, had agreed to convey to the plaintiff all his right and interest in the lands so purchased for the said sum of £265,

and that no consideration had passed between the said H. Whiteside and the plaintiff in respect of the said agreement, or to induce him to make such conveyance, and that the lands were not worth more than the amount of such purchase-money. A consent was entered into between the said purchaser and the plaintiff, that the name of the plaintiff might be substituted in the place of the said H. Whiteside as such purchaser, in consideration of his paying the amount of the purchase-money, and that the deed of conveyance might be made to the said plaintiff.

John Perrin, on behalf of the plaintiff, now moved that the said plaintiff, Joseph Cooper Moorhead, might be substituted in the place of Henry Whiteside as the purchaser of lot No. 2, being part of the lands of Dromartin, and lot 3, being the reversionary interest of James Moorhead in part of the lands of Tandragee sold under the decree, and that the conveyance might be made by the Master in the cause, and the other parties to the said Joseph Cooper Moorhead, and stated that a similar order had been made in a former case of *Campbell v. Young*.

MASTER OF THE ROLLS.—I do not see any objection to the order.

VIRIDET v. EVANS, AND OTHER CAUSES AND MATTERS.—Nov. 11.

Receiver—Judgment—Revival—5 & 6 W. 4, c. 55, and 3 & 4 Vic. c. 105.

Where a judgment has been revived within six years, and no interest paid on it, a receiver will be extended to pay the amount of such judgment and interest.

THIS was a motion founded on the petition in the matter, and the Lord Chancellor's fiat thereon, and seeking to extend a receiver to pay the amount due on foot of a certain judgment, under the following circumstances:—In Michaelmas Term, 1847, Alexander Brown obtained a judgment against the defendant, Evans, for the sum of £466, which was duly registered on the 13th November, 1847, and had been revived in Michaelmas, 1849. The affidavit stated that there was now due to the said Alexander Brown the sum of £233 for principal, and £89 2s. 4d. for interest, making together the sum of £322 for principal and interest, and that deponent was informed and believed that the defendant Evans was at the time of the rendition of the judgment and still was seized of an estate for life, in certain lands mentioned in the affidavit, that defendant believed the lands were in the hands of the tenantry under the receiver, and from which there was a profit rent receivable of £1589 9s. 11d., that the receiver had been appointed over the lands in 1847, and had been afterwards extended to other matters, that Francis R. O'Grady was the receiver over the lands.

A. H. Graydon, now moved upon notice that, pursuant to the provisions of the above Acts, the receiver might be extended for the purpose of paying the amount of the judgment. By the 148th section of the Common Law Procedure Act* the

time within which execution may be issued on a judgment, after its revival, is extended from a year to six years. [*Master of the Rolls*.—An important question is raised here, for the judgment is more than six years old from its rendition, and it is not quite clear that you are entitled to have the receiver extended, after six years from the entering up of the judgment.] The case of *Ottwell v. Farran*, (Sau. & Sc. 218, note,) decides that the terminus from which the six years should run is, six years from the revival of the judgment, for every new revival of an original judgment was a bringing down of that judgment to the period of revival. The judgment here was revived in Michaelmas, 1849, so that we are in time.

MASTER OF THE ROLLS.—As the judgment is in the Common Pleas, I will ascertain whether, according to the practice of that court, they would now issue an *elegit* upon such a judgment; and if so, I will make the order, but not otherwise.

Nov. 15.—The order was now made, extending the receiver, as required by the notice.

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1854.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PRET, Esq., Barristers-at-Law.]

THE PRINCIPAL OFFICERS OF THE BOARD OF ORDNANCE v. LEWIS.—Nov. 3, 7.

Contract—Pleading—Condition precedent.

An action was brought upon a contract under seal, whereby the defendant bound himself to deliver certain quantities of coal under certain terms, as to quality, condition, and price, at the places and in the quantities to be ascertained by a notice in writing to be furnished him on the part of the Board of Ordnance. One of the conditions in the contract was: that the coal offered for delivery should be inspected by a board of officers, whose decision should be final and binding on all parties; and in case they should see fit to object to the fitness of the coal, and that same should be thus rejected, it should be immediately removed by the contractor, and a proper supply forthwith delivered in lieu thereof: with a further stipulation for enabling the board to obtain a fresh supply in case of the default of the contractor, and to charge the loss to his account. The summons and plaint alleged a requisition in writing to the contractor to deliver coals at several places, and alleged in respect of each place a general non-delivery. A pleaded that he was at all times ready to deliver the several quantities required of him at the several places and times pursuant to his agreement, but that the plaintiffs refused to accept the coal so ready for delivery. He further alleged the tender of different portions on several days at Cork Barracks, and that the plaintiffs refused to accept same, and that the coal so ready for delivery, the several portions whereof were so tendered as aforesaid, was of good and unexceptionable quality,

six years after the recovery of the judgment, by or against the plaintiffs or defendants, or the survivors of them, without any revival of such judgment."

* "Writs of execution may be issued at any time within

dry, and sufficiently round. Held, on general demurrer, that the plea was no answer to the action, inasmuch as the defendant ought, according to the terms of the contract, to have tendered the coals at the particular places for survey, the result of which was to be conclusive between the parties; and that a general allegation of readiness and willingness and of a refusal by the plaintiffs to accept, did not disclose a valid dispensation with this condition.

THIS was an action of contract on a specialty. The summons and plaint alleged that the defendant on the 14th of June, 1852, by a certain memorandum of agreement, sealed with the seal of the defendant, and made between the principal officers of her Majesty's Ordnance, for and on behalf of her Majesty, of the one part, and the defendant of the other part, did agree to supply whatever quantity of fuel might be required for the use of her Majesty's forces at the therein mentioned station or stations in Ireland, for twelve months, from the 1st day of July, 1852, to the 30th day of June, 1853, at the price or prices, and subject to the terms and conditions thereafter mentioned, and set forth by a schedule in and forming part of the said memorandum of agreement, the said stations, probable quantities and descriptions of fuel to be supplied, and the price to be paid for the fuel, were next set forth; namely, at Buttevant Station, 6 tons of coke, 450 tons of sea coal, &c., (setting forth a list of stations, quantities, price, &c.) and the said agreement was made subject, amongst others, to the terms and conditions following: first, the coal to be of good and unexceptionable quality, dry, and sufficiently round; secondly, all fuel to be delivered at the barrack stores, or into such other place or places as may be pointed out, in such proportions and at such times as shall be required by notice in writing from the principal officers of the Ordnance Department, or acting on their behalf, the Clerk of Survey Dublin, respective barrack masters, or any other properly authorized person, free from all expense except the contract price; third, the contractor upon receiving 10 days notice, to deliver whatever further quantities of fuel may be so required for the public service at the station or stations contracted for beyond that expressed in the said schedule; sixth, on the 1st of November, the contractor, if so required, must have delivered the quantity of fuel stated in the said schedule, and should he fail to do so, the principal officers of her Majesty's Ordnance, or acting on their behalf, the Clerk of Survey Dublin, may direct the purchase thereof at whatever the cost may be; seventh, all fuel for delivery shall be inspected by a board of three military officers, (one of whom shall be of the ranks of a field officer or captain, if present) whose decision shall be final and binding on the parties, and should they see reason to object to the quality, roundness, and dryness, of the coal offered for delivery, and that the same should be rejected as unfit for the use of the troops, the coals so rejected to be immediately removed by the contractor and a proper supply to be forthwith delivered in lieu thereof, and in case of any failure in the delivery of the coal at the times specified in the requisition, or in replacing what may be rejected, the principal officers of her Majesty's Ordnance, &c., to have full power to purchase and

provide, at whatever the cost may be, such quantities of coal as the contractor may have so failed to deliver and replace, and the costs of such purchase, with all other attending expenses, to be charged to the contractor's account and immediately refunded by him. Averment—that they did all things necessary on their part to entitle them to the performance of the said agreement by the said defendant and to enable them to maintain this action, and that the defendant during the continuance of this contract, though required by a notice in writing from the barrack master at Cork acting on behalf of the plaintiffs, to deliver 1200 tons of coal at the barracks in Cork as soon as possible after the 1st of July, 1852, did not deliver the same at the said barracks in pursuance of the said notice in writing or at all, but therein failed and made default contrary to his said agreement, and that the defendant during the continuance of the said contract, though required by notice in writing by the barrack master at Buttevant acting on behalf of the plaintiffs to deliver certain quantities of coal amounting in the whole to 250 tons at the barrack stores in Buttevant within 10 days from the date of such order respectively, did not deliver the same or any part thereof at the said barrack stores in pursuance of the said notice in writing, or any of them, or at all, but therein made default contrary to his said agreement, &c. The writ proceeded to allege similarly breaches to deliver 20 tons at Mallow, 20 tons at Mill-street, and a cargo at Cork, and alleged as special damage that by reason of defendant's default the board had to purchase coals exceeding the contract price by £819 15s. 10d.

The defendant pleaded that "he was at all times ready to deliver the several quantities of coal required of him by the plaintiffs, or the Barrack-Master acting on their behalf, at the several places and times in the said plaint mentioned, pursuant to the agreement of the defendant; but the plaintiffs, or the Barrack Master acting on their behalf, refused to accept the coal so ready for delivery, and that a portion thereof, to wit, 6 tons and 15 cwt., was, on the 14th day of July, 1852, and that another portion thereof, to wit, 15 cwt., was, on the 10th day of July, 1852, and another portion thereof, to wit, two tons, was, on the 5th day of August, 1852, and another portion thereof, to wit, three tons, was, on the 9th day of October, 1852, and another portion thereof, to wit, three tons, 15 cwt., was, on the 14th day of December, 1852, and another portion thereof, to wit, two tons, was, on the 23rd day of October, 1852, and another portion thereof, to wit, 90 tons, 10 cwt., was, from the 13th to the 18th day of November, 1852, tendered for delivery to the said plaintiffs at Cork Barracks, and that the said plaintiffs, or the Barrack Master acting on their behalf, refused to accept the same, and the defendant avers that the coal so ready for delivery, and the several portions whereof, were so tendered as aforesaid, was of good and unexceptionable quality, dry and sufficiently round.

To this defence the plaintiffs demurred generally, alleging as grounds of demurrer, that it did not traverse one or more material matters of fact stated in the plaint, nor did it state any sufficient matters of avoidance, &c., to excuse the breaches assigned,

nor did it aver an offer or tender for delivery of the several quantities of coal which the defendant averred that he was ready to deliver, it being consistent with said last mentioned averment that defendant never did offer or tender for delivery the said several quantities of coals at the places and in the manner required of him, and also because the averment of the tender for delivery at Cork Barracks of divers small quantities of coal at several times was not accompanied by an averment of a similar tender of the remainder at the several other places.

By leave of the court the plaintiffs replied to said defence, alleging that the coal so tendered was rejected by the inspectors pursuant to the 7th condition, and denying that the plaintiffs refused to accept coal of the proper quality, &c.

J. F. Ekrington (with whom was *Fitzgibbon, Q. C.*) in support of the demurrer.—The averment in the defence of *readiness* on the part of the defendant to deliver the coal does not amount to a tender and refusal by the plaintiffs to accept. The defendant was bound to supply coal, which had passed the survey of a board of officers. The case of an averment of readiness and willingness on the part of the plaintiff is altogether different from such an allegation on the part of the defendant.—1 Chitty on Pleading, last edition, 329, where it is stated that “in the case of reciprocal covenants, constituting mutual conditions to be performed at the same time, the plaintiff must aver performance and readiness to perform his part of the contract.” [*Crampton, J.*—This is more like the case of a plea of tender of money.] The averment in a declaration of the plaintiff's willingness and readiness to pay is sufficient, without averring the tender of the money. On the other hand, this plea on the part of the defendant ought to show an actual tender to the plaintiffs. *Rawson v. Johnson*, (1 East. 203,) was an action for the non-delivery of goods as required, and it was held to be sufficient for the plaintiff to aver such request, and that he was ready and willing to receive and pay for them upon the terms of the sale without averring an actual tender. The same was decided in *Boyd v. Lett*, (1 M. G. & S., 222,) where, in an action for not accepting goods, an averment of readiness on the part of the plaintiffs to deliver the goods, without alleging a tender, was held to be good. So also in the case of *Jackson v. Alloway*, (6 M. & G. 942,) where, in addition to the averment of readiness and willingness of the plaintiff to deliver to the defendants the quantities of iron ore contracted for, and that he then tendered and offered to sell the same, a plea alleging that he did not tender or offer, was held good. The principle to be deduced from these cases is that the averment of readiness and willingness on the plaintiff's part is either for the purpose of showing the performance of a condition precedent or of showing that the defendant is entirely in the wrong. On the other hand the defendant must show an actual performance of his contract, unless hindered by the acts of the plaintiff. Here the defendant was bound after notice not only to supply coals, but such coals as should pass the inspection of a board of officers; and if the plea had gone on to state a refusal to receive coal which had so passed, it would have

been an answer. Here there is no allegation of any intimation to the plaintiffs of the defendant's readiness and willingness, but only of the state of the defendant's mind on the subject. He says that he was at all times ready and willing. Now that is entirely a question of intention; and if the defendant swore to it at the trial, it would be impossible to disprove the fact. The only tender alleged was of portions, and those only at Cork, and without any averment of their having been submitted for approval. The roundness and quality of the coal was a question, not for the jury, but for the board of officers.

Hickey and Macdonagh, Q. C. contra.—As to the objection arising from the generality of the averment of readiness, the case of *Caines v. Smith*, (15 M. & W. 189,) shows that an averment that the plaintiff was “during all the time aforesaid ready,” is good. [*Crampton, J.*—You have not made your plea such as would be requisite for one of tender. *Lefroy, C. J.*—You ought to have averred that the coals were passed by the board of officers.] That averment was proper to have come from them by way of replication. [*Perrin, J.*—The real question is, whether you ought not to have gone on and averred that the officers did not reject the coal.] We had no power to summon the board of officers to act upon the occasion. These are matters to come by way of replication and not of plea. To an action for the non-delivery of goods there are in general three modes of defence: first, the defendant may say, ‘I delivered the goods;’ secondly, ‘I was ready to do so, and tendered them, and you would not receive them;’ and thirdly, in the case of bulky commodities, ‘I offered some, which you refused, and discharged me from tendering the residue.’ The mode of pleading which we have adopted shows that the opposite party dispensed with the condition as to survey. It in fact alleges what amounts to a rescinding of the contract. *Cort v. The Ambergate Railway Company*, (17 Q. B., 127,) was an action for the breach of contract to purchase certain railway chairs, contracted to be supplied by the plaintiff to the company, subject, as in the present case, to the approval of a person to be appointed by the company, and, after same had been delivered, notice was given by the company to the plaintiff that he need not supply any more; there the plaintiff was allowed, upon an averment of readiness and willingness, to perform his part of the contract, and that the defendants prevented him from so doing, to recover damages for the breach of the contract. In *Jackson v. Alloway*, it was held that the neglect of the defendant, who was bound to provide waggons for carrying away the coal, discharged the plaintiff from the necessity of pleading a tender. It is therefore enough for the defendant by his plea to put forward a *prima facie* defence. If under the new system of pleading, everything should be stated in the plea or interpretation of the replication, a new difficulty would be created, but the rules of pleading substantially remain the same as before, while its technicalities are abolished. [*Crampton, J.*—Were you bound to notice one condition in your plea more than the other?] What the defendant is bound to aver is, such a state of facts as should have taken place on his own

part, such as the readiness to give good coal, which devolved on him. On the other hand, the duty of having officers to inspect same, devolved on the plaintiff. However incumbent it might have been on us to state our own case, we need not go into their camp for theirs. How, for instance, were we to know whether they inspected the coal at all. The object of the late Act will be frustrated by requiring the defendant to anticipate every possible view which the plaintiff may take of his defence. [Crampton, J.—Either party might have called for a meeting of the board of officers.]

Fitzgibbon, Q. C., in reply.—It was a principle of the old law of pleading that if a good cause of action were stated in the declaration, and the defendant admitted that to be true, and stated other facts in answer, the truth of which the plaintiff in his turn admitted, and yet the same amounted to no answer to the declaration, a general demurrer would lie to the plea. Our contract was not to take the coals whenever the defendant was ready to bring them, but that he should bring them for our inspection. [Crampton, J.—It would seem to be consistent with this plea that the defendant might have brought you some samples of coal, and that you declined to take them.] *Jackson v. Allaway*, the case where the defendant did not send his waggons, does not at all resemble the present. [Perrin, J.—The defendant says that you do not complain in your declaration that he did not deliver such coal as passed the approval of the officers, but that you allege that you served notice requiring the delivery of the coal, and that he did not, pursuant to that notice, or at all, deliver the said coal, but therein failed and made default, and that the meaning of your complaint is an absolute non-delivery of coal, and not what you now say, of coal of the proper description, and that if such had been your complaint he would have answered it accordingly.] The plaintiffs here were to take the first step, namely, to serve notice upon the defendant of the quantities of coal required; then next, the defendant is to send these coals to certain places for inspection. If then the defendant breaks the contract at that stage of the proceedings, what are the plaintiffs to do but to sue him?

LEFROY, C. J.—This case has been so carefully discussed, as to make it a waste of time to go into its details at much length. There was a contract to deliver at certain specified places quantities of coal, with a proviso that "all fuel offered for delivery (not to be ready for delivery, and thereby showing that the parties contracted for an actual offer,) should be such coals, in the quantities specified in the notice, as should be finally approved of by the board of officers." The breach then is, that although the defendant received such notice he did not deliver the coals at a single place therein mentioned. The plaintiffs did not say that the defendant failed to deliver coals "approved of," because they say he did not deliver any at all. They were not bound to allege a breach with respect to the insufficiency of the coals, inasmuch as they say that they were not offered at all. At one place, indeed, it would appear that though 1200 tons had been ordered, about 120 were tendered, and these are not stated to have been approved of by the officers.

At the other places there is no allegation of delivery or anything approaching to it, but only of the readiness of the defendant to deliver. Now, was the contract between the parties, that the defendant should be ready to deliver, as it was in the case which was cited, where the plaintiff was bound to provide waggons for carrying away the iron ore. Was it in fact a contract by the defendant, that he should be ready to deliver the coals to the Board of Ordnance when they should send ships to draw. In the case of *Cort v. The Ambergate Railway Company*, where notice was given not to make the remainder of the quantity of the chairs ordered, the action was brought to recover damages, not for the value of the chairs not supplied, but for the disappointment of the plaintiff. Where has there been in this case any similar prevention or obstruction, so as to make that case any way applicable to the present? A defence has been pleaded here not meeting the plaintiffs' case at all, and as Mr. Fitzgibbon has said, why are they to take issue on it, when no part of it covers their case. I must say that there was a clear impression on my mind from the time I read these pleadings, that it was a bad defence to allege readiness in answer to a complaint for not doing an act, when notice to do it has been given. Upon every rule of pleading, of common sense, and justice, and upon the general principles of law, it is quite impossible that this plea can be sustained.

CRAMPTON, J.—I quite agree with the doctrine stated by Mr. M'Donagh, that special demurrers have been got rid of by the recent Act of Parliament. If there be a substantial defence set up by the plea, technical defects will not invalidate it, but here there is no answer to the plaintiffs' case at all. The plea, in fact, suggested certain issues, which it would have been highly inconvenient for the plaintiffs to have accepted. It commenced by alleging a readiness on the part of the defendant to deliver coals, which the plaintiffs refused to accept, and it required wariness on the part of the plaintiffs' counsel to avoid falling into the trap thus laid for them. This was an action for the non-delivery of coal at the times and places required pursuant to agreement. Then the defendant says, "I was all along ready to deliver them, but you refused to accept the coals which I was willing and ready so to deliver; and moreover, I offered certain portions of these coals to you." Now, what signifies whether the defendant was or was not ready, if he did not show his readiness by making the offer, and if there were a refusal to accept on the plaintiffs' side, it was only of the smaller portions tendered in lieu of the entire. Then it comes to this: the plaintiffs require coal at six different places; the defendant avers that he was always ready, and that he offered portions, and that the plaintiffs refused to accept them. The defendant, in short, wants to raise the question for the jury whether the refusal of the portions was equivalent to a refusal of the whole. That would necessarily create a difficulty in the plaintiffs' way.

PERRIN, J. concurred, with some hesitation, on account of the mode in which the breach was laid in the summons and plaint.

*Judgment for the plaintiffs.**

* Moore, J. was at Nisi Prius.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

TRINITY TERM, 1854.

FITZGERALD v. LONGFIELD.—May 30.

52 Hen. 3, cap. 4.—Action for excessive distress—*Misdirection.*

Where the amount produced at the sale of goods distrained for rent is slightly in excess of the rent due, it is not an excessive distress, and no action will lie.

CASE for excessive distress. The declaration contained four counts. The first stated the plaintiff to have been tenant to the defendant at a certain rent, of which a sum of £65 was due, and that defendant distrained articles of much greater value than the amount of said arrears, and thereby took an unreasonable distress, when half would have satisfied it, contrary to the statute. The second, a distress, and tender of a sum of £76, sufficient to discharge the amount due, and refusal by the plaintiff to accept same. The third, a distress and sale of part of the goods distrained for more than the rent and charges due, of which defendant had notice, and yet he had sold the residue, when unnecessary. The fourth was trover. At the trial before Perrin, J. at the Spring Assizes for the County of Cork, the jury found a verdict for the plaintiff of £125. A conditional order for a new trial had been granted on the grounds of misdirection, rejection of evidence, and excessive damages. It appeared that the plaintiff held two farms from the defendant, and in the month of April the defendant had distrained him for the sum of £95 11s., being a year's rent of the entire, due the 25th of March previously, and an additional half-year's rent of one of the farms upon an agreement that the plaintiff was to pay that gale in consideration of some tillage and manure which was on the lands at the time the plaintiff got possession. The year's rent of the two farms was £73 14s.; the additional half-year's rent distrained for amounted to £21 17s. At the sale (about the *bona fides* of which there was no controversy) the goods had realized the sum of £76 7s. 6d., being £2 13s. 6d. more than the rent. The plaintiff, in his evidence at the trial, stated that the goods were worth £106. His Lordship told the jury that if they believed that the distress was made for more than was really and *bona fide* due for rent, they were bound to give damages to the plaintiff; and that if they were satisfied that the amount levied by distress exceeded the amount justly due, it was a wrong within the first and third counts, and the plaintiff was entitled to be compensated for the injury sustained. The defendant, at the trial, objected to these portions of the charge, and asked the learned judge to tell the jury, that, according to the evidence, the defendant was entitled to a verdict on the first count, unless the distress was unreasonable and excessive with reference to the rent distrained for as stated in the notice of distress; and also to tell the jury that if they be-

lieved the auction to have been *bona fide*, they should take the price at what the goods sold as their real value, and that they should, in such case, only find a verdict for the difference between the price for which the goods sold at the auction and the rent due, with damages for detaining that difference.

Deasy, Q. C., (with him *Chatterton*), now showed cause.

Lane, Q. C., and *Longfield, Q. C.*, in support of the conditional order.—At the trial it was submitted that the first count could not be supported, as the amount for which the goods were sold, and which the Statute of 25 Geo. 2, c. 13, s. 5, provides shall be taken as the true value of them, did not sufficiently exceed the amount of rent due to support the action, particularly where there was no express evidence of malice. If that statute is to be taken as the criterion of the value of the distress, then there is no excess here, as the goods only sold for between £2 and £3 more than the sum due. The general rule is to take the sale as the criterion of whether the distress be excessive or not, unless there be a count in the declaration for selling at an under value, and there is no count here impeaching the sale, nor any question left to the jury on that point. The Statute 52 Hen. 3. c. 4, which gives the action, uses the word *unreasonable*, and it is contended that the learned judge ought to have left the question to the jury, as to whether the distress was *unreasonable* as well as excessive.

Chatterton in reply.—The objection now before the court is, that the judge told the jury that if the landlord had levied for anything above the amount due, they were bound to find a verdict for the plaintiff. We say he did not, we must take the whole charge together, and in that case it does not bear that meaning, the plain meaning of the word *excessive*, as used by the learned judge, was *unreasonable*. [*Monahan, C. J.*—Is not the literal meaning of the charge this—that if the levy exceeded the amount by even £1, the distress was excessive? a landlord is not bound to weigh with golden scales the question of whether or not he has taken a little too much or otherwise.] If the judge be consulted as to the meaning of the word *excessive*, the court will find that he used it in the sense of *unreasonable*. In the present case an exorbitant demand was made in the first instance, and a distress levied for such, and that state of facts presents a different case from that of a distress for the sum actually due, but which happens to exceed that amount by a trifling sum. [The following cases were cited: *Tancred v. Leland*, (16 Q. B. 664, s. c. 1b. 669); *Sells v. Hoare*, (8 Moore, 451.)

PER CURIAM.—We think the judge was in error in leaving the question to the jury in the form he has done, and we must grant a new trial. The recovery of rent by distress would be a perilous proceeding if a slight excess in the goods distrained was to render the landlord liable to an action. We must therefore set aside the verdict.

Order absolute for a new trial.

IN RE BARRETT.—June 9.

Alleged Lunatic—Payment out of court.

Where money was lodged in court to the credit of a party alleged to be a lunatic, leave was given to invest the money in the name of the Master of the court in the public funds.

The Court refused to make any order as to the dividends until they had accrued.

AN action had been brought in the name of Maria Barrett, who was generally considered to be a lunatic, but who had never been declared one under a commission *de lunatico inquirendo*. The defendant in that action had for his own protection paid the amount of the demand against him into court.

Duggan now applied that the money which had been lodged in this court to the credit of Maria Barrett should be paid either to her or to her mother, or should be invested in the funds in the name of the Master of the court, and, if so, that an order should be made to pay the dividends as they accrued. Although she is said to be a lunatic, she has never been declared one, and there is a medical certificate to the effect that she is competent to manage her own affairs. If the court should not be satisfied with this, still, as the money amounts only to £200, and she has no other means of subsistence, and as it would swallow up all the fund if the expense of appointing a committee were incurred, the court can order the money to be paid over to her mother, with whom she lives. [He cited *Rock v. Slade*, (7 Dowl. 22); *Bray v. O'Keefe*, (6 Ir. Jur. 246.)]

MONAHAN, C. J.—The money may be invested in the name of the Master, but we will make no order about the dividends. When they have accrued it will be time enough to see what order we shall make.

Rule accordingly.

MICHAELMAS TERM, 1854.

BATES v. FOREMAN.—Nov. 3.

Practice—Indorsement of Particulars of Payment.
16 & 17 Vic. c. 113, s. 41.

The court refused to set aside, as irregular, a plea of payment, the particulars endorsed whereon merely stated generally the amounts of certain judgments "and executions thereon," without alleging that any levy had taken place or when.

Meads moved to set aside the defence in this case on the ground that the full particulars of payment were not indorsed.—This motion had been made in chamber, but was ordered to stand over for the full court. The defence was a plea of payment, which would be good, if proved. But the indorsements are only of judgments and executions issued, without any statement that there was a levy under the execution, so that no payment in fact is indorsed; and, even if it were, no dates are given of the times of payment under the executions, as required in similar cases in this court. The defendant's affidavit distinctly states that he had not paid the amount.

M'Meehan contra.—The particulars of payment

indorsed are as follows: "Sep. 6, 1853—Amount of defendant's bond of this date, judgment and execution thereon, £730 6s. 10d. Dec. 28, 1853—Amount of judgment and execution thereon, £302 0s. 3d." The defendant does not know the time at which the execution was levied.

The Court refused to grant the motion.

Motion refused.

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

BISHOP v. WIGRAM.—Nov. 9.

Practice—Amendment of defence—Affidavit of merits.

Where the defendant had put upon the file a defence calculated to embarrass the plaintiff, and applied for leave to amend, the court required an affidavit of merits.

THIS was an application for leave to set aside the defence that had been pleaded in this case and to mark judgment in the action upon the ground that the defence was calculated to embarrass the opposite party. It was an action for goods sold and delivered, and upon the other common counts, and the defence stated that the defendant was "not indebted to the plaintiff in the sum demanded, or any part thereof," on account of the goods alleged to be sold, or the work done, or any other account whatsoever.

Bastable, in support of the motion, relied upon 16 & 17 Vic. c. 113, ss. 70 and 83.

Sherlock contra.—This application should have been made within a reasonable time, being for irregularity. [*Pennefather, B.*—I conceive that such is not the case. It is to set aside the defence as "embarrassing," not "irregular."] The defendant seeks for leave to amend his pleadings. It has been allowed in such cases as the present. [*Pennefather, B.*—Do you produce an affidavit of merits?] It is not necessary. *Brennan v. Monahan*, (4 Ir. L. Rep. 415.) [*Pennefather, B.*—To allow parties to amend their pleadings in such cases as the present, except upon an affidavit of merits, would encourage a lax and vicious mode of pleading, under the protection of this Act.]

Bastable was heard in reply.

GREENE, B.—I am convinced that this court has not granted such an application as the present except upon an affidavit of merits. We must therefore refuse the latter motion.

Rule accordingly.

BUSTEED v. RAYMOND.

Practice—Changing the Venue—Common Law Procedure Act—Witnesses.

In an affidavit to change the venue, it is not sufficient in support of the application for the deponent to aver that "all his witnesses reside" in the locality to which it is sought to change the venue, but he should have stated that he has witnesses to examine, and who they are.

THIS was an application to change the venue from

the County of the City of Dublin to the County of Kerry. It was an action for the rent of a house, money paid, and upon a promissory note. The defendant's affidavit stated, among other things, that the entire cause of action arose in the County of Kerry, and that "all his witnesses resided" in the County of Kerry, and, as he believed, all the witnesses of the plaintiff also. No affidavit was filed in reply.

Leahy in support of the application.—In the present case there is no difficulty in measuring the preponderance of convenience as to the venue, which is the principle upon which such questions are decided under the Common Law Procedure Act, inasmuch as the plaintiff makes no case.

De Moleyns contra.—The right of trying a case where the cause of action arose cannot now be relied upon; even in the case of Justices of the Peace that privilege is taken away. The plaintiff had not time to file an answering affidavit. [*Pennefather, B.*—The defendant's affidavit appears to be defective in not stating who his witnesses are.] He does not even state that he has any witnesses, but merely that all his witnesses reside in Kerry.

Leahy in reply.—It is submitted that this averment is a sufficient allegation that the defendant has witnesses, and that they reside in the county to which he seeks to change the venue. As to the repeal of the statute enabling magistrates to be sued in the counties in which they reside, the reason was to create an uniformity of practice by permitting the court in all cases to exercise a discretionary power.

*PENNEFATHER, B.**—The defendant does not state that he has any witnesses to examine. It is only upon a preponderance of convenience that the court will change the venue in such cases, but it will never do so upon such a statement as that made in this case by the defendant, that all his witnesses reside in the County of Kerry; an allegation which it is impossible to construe as amounting to a statement that he has any witnesses at all, which should have been positively averred in the affidavit. We shall say no rule.

GREENE, B., concurred.

No Rule.

BELL v. SHANNON.—Nov. 14.

Practice—Security for Costs—Affidavit of Merits—Plaintiff residing out of the Jurisdiction.

The action had been brought by the plaintiff, who resided out of the jurisdiction, upon a contract entered into between him and the defendant, according to which the former agreed to raise as much as was practicable of a quantity of ship-wrecked property lying under water. The defendant applied that the other party should give security for costs, as residing out of the jurisdiction, and having no property in this country; and his affidavit stated that the defendant is advised and believes that he has a good defence upon the merits, "inasmuch as the plaintiff did not, as deponent firmly be-

lieves, raise as much of the property as he might have raised," &c. Held, that, under the circumstances of the case, the affidavit of merits was sufficient.

THIS was an application that the plaintiff should be compelled to give security for costs, it appearing by affidavit that he resided at Whitstable, in the County of Kent, and had no property in this country. The action was brought upon an alleged contract that the plaintiff had agreed to raise shipwrecked property lying under water, as far as was practicable, and to place what he should so raise upon the pier at Drogheda. The defendant's affidavit stated that he was advised and believed that he has a good defence upon the merits, "inasmuch as the plaintiff has not, as the defendant firmly believes, raised" as much of the property as he could have raised, or delivered what he had raised to the plaintiff according to the agreement.

Gibbons in support of the motion.—It is denied by the other side that the defendant has made a sufficient affidavit of merits; but the allegations made are sufficient; the defendant states, that he believes and is advised that he has a good defence on the merits, and then he states his reasons, namely, that the other party has not completed his contract.

R. R. Warren contra.—It is submitted that an affidavit upon belief is not sufficient according to the practice of this court. It would be otherwise if the alleged condition precedent was positively sworn to have been broken, either by the defendant, or his agents residing upon the spot, but he only swears that he firmly believes such to be the case. Had he sworn simply that he "believed" the fact to be as stated, it would be less ambiguous than a statement that he firmly believes it to be so. This qualification of belief evades the entire affidavit.

O'Driscoll in reply.—We could not state the grounds of our belief without disclosing the nature of our evidence, and it would be impossible to state this matter positively.

*RICHARDS, B.**—I do not see how the defendant could have sworn positively to the matters which are the subject of his affidavit unless he swore very rashly. All cases of this nature must be examined in reference to their peculiar circumstances. If the court requires a positive affidavit of merits in such cases as the present, it is to be so far positive as the nature of the case will admit, and I would be much more disposed to favour an affidavit such as the present, considering the nature of the case, than if the defendant had undertaken to swear positively upon the subject.

GREENE, B.—This is a peculiar case, the question to be tried being, whether or not the plaintiff did all that was in his power in regard of the contract. The proof of this may depend upon several facts, and the evidence of many witnesses, and therefore it may be exceedingly difficult to do all this by a single affidavit. The expression used in the Act, namely, "satisfactory," means satisfactory to the mind of the court; and, under the circumstances

* Pigot, C. B. was absent.

* Pigot, C.B., and Pennefather, B., were absent,

of this case, the court would feel much difficulty in refusing this application.

Motion granted.

LUSCOMBE v. MARTIN.—Nov. 14.

Practice—Production of documents—16 & 17 Vic. c. 113, s. 64.

In an action upon a guarantee the defendant applied to the court that he should be furnished with a copy of the document by the plaintiff, stating in his affidavit that he had no copy of the guarantee in his possession, and that he was advised and believed that the production of the instrument might be material to his defence: and the court granted the motion, although it appeared that the instrument had been prepared by, and was in the hand-writing of the defendant, who was a solicitor.

THIS was an application on the part of the defendant that the plaintiff should furnish him with copies of two guarantees, the former paying the scrivenery charges. The action was brought upon two guarantees in reference to a sum of money lent to the defendant's sister, and as a security for which the defendant had given the guarantees in question. The plaintiff's affidavit stated, that he never had either of the documents, nor a copy of either of them, in his possession; that the defendant had been his solicitor at the time the loan was effected, and that it was at the solicitation of him that he had been induced to make the loan; that the defendant was the person who had prepared the documents, and that they were in his handwriting; and that no other person had acted for the plaintiff in the matter. The grounds stated in support of the application were, that the defendant was advised and believed that the inspection of the documents might be material in support of his case.

Lawson in support of the application.—16 & 17 Vic. cap. 113, sec. 64, provides for the production of documents in cases of this nature, whenever a party shall rely upon them in aid of his case, unless the non-production can be satisfactorily excused. Even under the former practice such applications have been granted—*Bluck v. Gompertz*, (7 Exch. 67.) In that case the principle, as laid down in a former decision, is thus recognized by Parke, B.:—"I think the true rule is to be found as laid down by Tyndal, C.J., in *Blogg v. Kent*, (4 Y. & C. 139,) where the Lord Chief Justice says: 'It appears that one party only has a copy, and it comes round to the ordinary case that where there is only one copy of the contract in dispute between the parties, the party who holds it is a trustee for

the production of it to the other party.'" That was, like the present, an action upon a guarantee. [*Greene, B.*—Is not the guarantee stated in the summons and plaint?] It is stated, but only in general terms.

Driscoll contra.—The relation subsisting between the parties, and the fact that it was the defendant who prepared these documents, disentitle the latter to the relief sought. The documents in question are sworn to be in the hand-writing of the defendant, and the object of the latter is therefore not to ascertain the contents of the instruments, of which he must be aware, but to look for some flaw or informality upon which to ground a defence. He does not deny that he owes the debt; he only states that he is advised and believes that it may be material to his defence to have copies of the documents. [*Greene, B.*—The principle upon which an application of this nature is to be refused is, when it is a mere fishing application. This appears from the decision in *Scott v. Walker*, (2 EL. & BL. 555.)] The same rule is also thus stated in *Galsworthy v. Norman*, (21 L. J., Q. B., 70,) by Erle, J.: "The defendant is not entitled to search the plaintiff's papers with a view of finding out some invalidity in the case put forward by the plaintiff." [*Greene, B.*—The decision in that case is rather unfavourable to you.] *Pepper v. Chambers*, (7 Exch. 226,) was a stronger case than the present. The affidavit upon which that application was founded stated that there was, as deponent believed, in the possession of the defendant certain documents, and proceeds thus—"and this deponent is advised that it may be necessary that the said minutes, &c. should be adduced at the trial of this action, and that without an inspection thereof this deponent cannot safely proceed to the trial of this action; stating also, that the plaintiff had no copy in his possession. The affidavit in that case was stronger than the present, and yet it was considered insufficient. A similar application was refused in *Snieder v. Mangino*, (7 Exch. 230,) although it was alleged in the affidavit of the defendant that it was made *bona fide*, and that the production was necessary in order to enable the defendant to defend the action. [*Greene, B.*—The guarantees must be produced at the trial, and I do not see how the plaintiff will be damaged by a previous production of them.]

RICHARDS, B.—This is a very proper case for granting the application.

GREENE, B.—I am of the same opinion. Where the defendant seeks, by an application of this kind, to get at the evidence of the opposite party, it is a very different thing. We shall, therefore, grant the motion, the costs to be costs in the cause.

Rule accordingly.

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at-Law.]

ERSKINE v. BAKER.—Nov. 3.

Receiver—Contempt—Attachment—False Return.

A receiver having neglected to lodge his balance pursuant to the Master's order, an attachment was issued against him directed to the sheriff, who made a return of non est inventus, and it was afterwards renewed and a similar return was made; it was then directed to the coroner who made an improper return. An attachment was then issued against the coroner, which was also renewed from time to time. On taxation the Master refused to allow the plaintiff the costs of those proceedings, which he had taken against the receiver and against the coroner. The court refused, in the first instance, to allow these costs out of the estate, as it did not appear that the receiver or his sureties were insolvent, but directed the recognizance to be put in suit and the motion to stand over.

The payment of the amount for which the attachment was issued against the receiver, would not discharge the contempt, but he would still be liable to the costs of the proceedings against him, and if he could be identified with the coroner, perhaps also for the costs of the proceedings against the coroner.

It appeared from the affidavit that a bill had been filed in 1844 to raise the arrears of a jointure charged on certain lands, and that in 1845 a receiver had been appointed over the lands pursuant to a decree in the cause. On the 12th May an order was made whereby David Kellett, the receiver in the first and second matter, was extended to the first and second causes, and the plaintiffs in these causes were declared entitled to their costs of the motion. The receiver passed his account in April, 1846, showing a balance in his hands of £130, which he was directed to invest by the 30th of that month. In June, 1846, an order was made extending the receiver over other lands, and requiring him within a month to enter into the necessary security, and in default of his so doing that it should be referred to the Master to appoint another receiver in his place. This he neglected to do, and was therefore prevented receiving the rents of the lands, but was not removed by any order of the court, nor were his recognizances vacated. He filed another account on the 17th May, 1847, on which there was a balance due of £61 6s. 6d., which he was directed to lodge. Having neglected to lodge this balance, an order for an attachment was granted against him in June, 1847. This attachment was directed to the sheriff, who made a return of non est inventus. It was then renewed and directed to the coroner of the county, and on the 28th January, 1848, he made a return thereon that he had taken Mr. Kellett, the receiver, and had detained him until he paid the debt, and then discharged him. The attachment having been for a contempt, and not for payment of money, an application was made to the Rolls Court, and a conditional order was granted directing the coroner to amend his return, and that the attachment should be taken off the file for the purpose of being so

amended, and this order was afterwards made absolute. The coroner not having amended his return an order for an attachment was granted against him, and it was issued to the sheriff of the county. The coroner then wrote saying he had sent the attachment to Mr. Erskine, his returning officer, and thought that it was all right, but could not amend it. This Mr. Erskine was the plaintiff in the first cause. The sheriff wrote saying that the coroner lived in a lawless part of the country, and was so guarded by his men that he could not arrest him, and afterwards made a return of non est inventus. The plaintiff's solicitor then wrote to the receiver's sureties, Robert Kellett and Wm. Mortimer, for payment of the balance left due by the receiver, in answer to which he received a letter from his friend, Mr. Carmichael, stating that the money, £61 1s. 7d., had been paid to the coroner. The plaintiff, by the advice of counsel, renewed the attachment in 1849, and again directed it to the sheriff, who again made a return of non est inventus. The attachment was again twice renewed, when the sheriff made a return that he had arrested the coroner, but that he had been discharged by the judge of assize, as he had been attending sessions as coroner when arrested. Part of the estates over which the receiver had been appointed were sold in the Incumbered Estates Court, and for the purpose of allocating the funds it became necessary that the costs in Chancery should be taxed. The costs were lodged at £188 16s. 3d., and the sum of £148 was struck off by the Taxing Master, on the grounds that there was no order allowing them, and that the proceedings against the coroner were not costs in the cause.

Hughes, Q. C. (with whom was *G. O. Malley*.) now moved, pursuant to notice, that the plaintiffs in the second cause should be declared entitled to the costs of the orders for attachment against D. Kellett, the receiver, bearing date the 30th of June, 1847, and also to the costs of the order for attachment against the coroner, bearing date the 11th February, 1848, and the order making same absolute, and the costs of the several renewals thereof. The amount of the costs incurred by the proceedings against the receiver were about £50, previous to the proceedings against the coroner.

H. Smythe, for Mr. Butler, the minor, submitted that the receiver had virtually discharged the contempt, for he had paid to the coroner the amount for which the attachment was issued. [*Maunsell v. Egan*, 8 I. E. R. 372,) was cited.]

MASTER OF THE ROLLS.—There is some difficulty in granting an order such as you seek. As to a portion of the costs there is no difficulty. There are some cases where the estate is held not to be liable to the costs, unless proceedings are first taken against those parties who are primarily liable; as, in the case of proceedings against tenants for rent, where the Masters do not allow the costs out of the estate until the receiver shows that all necessary steps had been taken against the tenants, and that they were insolvent or could not be made liable. Mr. Kellett and Mr. Mortimer, are clearly liable to pay all the costs up to the 24th January, 1848. All these costs, that is, the costs of all the proceedings up to the return of the coroner to the attach-

ment, were clearly chargeable against the receiver, and his sureties are responsible for them. As to the question whether these costs should now be given out of the estate, it has not been shown to me that the receiver or his sureties are insolvent, and therefore I will not at present order them to be paid out of the estate. If the party primarily liable is proceeded against, and the amount of the costs cannot be realized, then there may be a question whether they cannot be got out of the estate; but, at present, supposing the receiver and his sureties to be solvent, I cannot see why I should allow them out of the estate. Even suppose he paid the £58 to the coroner as alleged, this did not discharge him from the contempt that he was guilty of in not lodging his balance pursuant to the order, and he will be liable to all the costs. The only order I can make at present is, that you be at liberty to put the recognizance in suit, and that this motion stand over. As to the subsequent costs, viz. for the proceedings against the coroner, perhaps if you identify the receiver with the coroner you may be able to recover these costs also.

Nov. 6.—The following order was made:

“Mr. Carmichael, solicitor for the minor, Robt. Butler, and his trustees, stating to the court that he believes that the receiver and his sureties are solvent, let this motion stand over, and let Sir Thomas Finlay and John Finlay be at liberty to put in suit the recognizance of David Kellett, the former receiver in these matters and causes, and of Robert Kellett and William Mortimer, his sureties, enrolled on the 25th January, 1845, unless in ten days after service of this order on said Daniel Kellett, Robert Kellett, and William Mortimer, good cause be shown to the contrary, and reserve further order and the question of the costs of this motion.”

FENTON v. FENTON.—*Nov. 10.*

Attachment—Renewal.

An attachment for £6 17s. 7d., payable under an order of the Court of Chancery was issued in 1837, and was renewed in 1848, but not afterwards, as it could not now be executed in consequence of the 11 & 12 Vic., c. 28. The court gave liberty to issue a fi. fa. for the amount.

UNDER an order in the cause bearing date 21st of June, 1837, the defendant, George Fenton, was directed to pay to Henry Quinan the sum of £6 17s. 7d., with the costs of a petition which had been filed. Two attachments were issued against him in 1837 to enforce payment, and they were renewed from time to time up to 1848, but without effect. On the 23rd of May, 1848, the attachment was renewed, and under it the defendant was arrested, but was afterwards discharged by the Assistant Barrister. In June, 1851, notice was served to renew the attachment, but there not having been any attendance, the case was struck out. The affidavit stated that the attachment was not renewed because there was no prospect of the amount being paid; that no settlement nor arrangement had been made concerning it, and that

the whole amount was due; but that as the attachment was more than a year old, it would not be renewed in the office.

Hemphill now moved, pursuant to notice, to renew the order for attachment issued in 1848, as under the Act for Imprisonment for Debt, 11 & 12 Vic. c. 28, s. 1.—The attachment could not now be issued, the sum being under £10. [*Master of the Rolls.*—You cannot issue a second attachment until the return of the first, whereas your application now is to renew the writ of attachment issued in 1848.] If your Lordship will renew the original order, we will be able to issue a *fi. fa.*

MASTER OF THE ROLLS.—I will make an order that you be at liberty to issue a *fi. fa.* for the amount stated in the order of 1837.

“Let the clerk of appearances and writs of the court be at liberty, if so required by the said Henry Quinan, to issue a writ of *fi. fa.* against G. Fenton, marked for the sum of £6 17s. 7d., being the sum for which the attachment directed by the order made in that cause, bearing date the 21st June, 1837, issued against said George Fenton.”

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

DALY v. NOLAN.—*Nov. 4.*

3 & 4 Vic., c. 107—16 & 17 Vic., c. 113.

Semble, the court will allow a replication to be filed when it appears that there is a bona fide question of law or fact to be raised by it.

Walter Bourke, Q.C., for the plaintiff, moved for liberty to file a replication. The action was debt on a judgment. The defendant pleaded a discharge under the Insolvent Debtors' Act, and the replication he asked for liberty to file was, that the discharge under the Insolvent Act was obtained by fraud.

Fitzgibbon, Q.C., and *J.O. Malley*, contra.—The Court for the Relief of Insolvent Debtors is an independent court, and not subject to this court; the 85th section* of the Insolvent Act (3 & 4 Vic. cap.

Sec. 85.—And be it enacted, that every such adjudication as aforesaid by the said court or commissioner as aforesaid, with respect to any prisoner and the order thereupon so made as aforesaid, shall be final and conclusive, and shall not be reviewed by the said court unless the said court shall thereafter see good and sufficient cause to believe that such adjudication has been made on false evidence or otherwise improperly made or fraudulently obtained, in which case it shall be lawful for the said court upon the application of such prisoner, or of any creditor of such prisoner, to order such prisoner, upon due notice to be given to such persons and in such manner as the said court shall direct, to attend, or to be brought up, and the said matter to be reheard before the said court or one of the commissioners thereof on his circuit, as the case may require, who shall thereupon rehear the same, and shall and may if just cause shall appear annul the original adjudication and order thereupon made in such case, and shall have the same powers and authorities upon such rehearing as upon any original hearing in pursuance of this Act, and may adjudicate in such matter accordingly: and thereupon, in case the former adjudication in the said matter shall not be confirmed, such order, certificate, and war-

107) enacts—"That every adjudication by such Insolvent Court or Commissioner with respect to any prisoners, and the order thereupon, shall be final and conclusive, and shall not be reviewed by the said court, unless the said court shall thereafter see good and sufficient cause to believe that such adjudication has been made on false evidence, or otherwise improperly made, or fraudulently obtained." Here is a jurisdiction exercised for a century, and there is no precedent to be found of such a replication. The decision of the Commissioner is final, nor can he himself nullify it, unless he sees sufficient cause to believe that such adjudication was fraudulently obtained, or made on false evidence, or otherwise improperly made, and then certain acts must be done in order to annul such adjudication; besides, there could be nothing more unreasonable than to send to a jury to decide whether the judgment of the Insolvent Court was rightly obtained or not. There cannot be shown any precedent where a judgment in case upon a trial has ever been questioned by a jury. [*Monahan, C.J.*—Suppose a judgment of the Court of Queen's Bench, and in an action in this court that judgment be pleaded as having been obtained by fraud; that would be a good plea. What then is there in the Insolvent Act to render its judgments unquestionable?] The 85th section of the Insolvent Act has that effect. A judgment of a common law court is a common law judgment, and courts have allowed such a plea to be put in, but here is a court of competent jurisdiction, and there is no power given to this court, or a jury, to question its decisions.

Walter Bourke, Q. C., in reply.—If this be a sham or false plea, the defendant can set it aside; but if the court admit the opposition now, the plaintiff is prevented from going into error, and thus try-

ing the validity of the adjudication in the Insolvent Court. We have no other way of raising the question.

PER CURIAM.—So far as the point of law is concerned, it is not yet ripe for decision. By the 48th section of the Common Law Procedure Act there can be no further pleading after the defence, except by leave of the court, where they think there is a real question of fact or of law to be tried between the parties. We think the motion ought to stand, with liberty to the party bringing it forward to file an affidavit showing us that there is a question of fact to be tried between the parties; and if there be such a question, it would be hard to stop a party from trying it.

Nor. 25.—*Bourke* mentioned that having seen the affidavit of the defendant he was satisfied, and would not further press the motion.

BERGIN v. BURKE AND WIFE.—*Nov. 10.*

Practice—Married woman defendant—Appearance.

A married woman sued together with her husband cannot demur by attorney, but must, if at all, do so in person when the husband lets judgment go by default.

THE defendants were husband and wife, and during the coverture had made a joint promissory note to the plaintiff. The action was brought to recover the amount of this note, and in the summons and plaint, which had not been settled by counsel, the wife was made a co-defendant, although the note had been signed by her while she was a married woman living with her husband. No appearance was entered by or on behalf of the husband, but an appearance and demurrer was filed on behalf of the wife, purporting to be an appearance and demurrer by attorney.

Sullivan (with him *Sidney*.) moved on behalf of the plaintiff, that the appearance and demurrer filed should be set aside as irregular, on the ground that a married woman cannot appear or demur by attorney, but must do so in person. The summons and plaint is certainly informal in making the wife a co-defendant under the circumstances of this case. Her course was not to demur as she had done, but to have proceeded under s. 90 of 16 & 17 Vic. c. 113, to have the misjoinder amended by application to the court. Judgment is not yet marked against the husband, although the appearance is a nullity. It is clear that a married woman living with her husband, cannot appear by attorney; *Poe v. Jones and Wife* (2 Ir. L. Rep. 379,) nor indeed can she appoint an attorney to act for her; *Oulds v. Sansom*, (3 Taunt. 261); *Walker v. Dwyer*, (4 Ir. L. Rep. 364); Com. Dig. tit. Pleader, B. 4.

Lawson contra.—There was a mistake made in signing the attorney's name at foot of the demurrer but for this it would be a demurrer in person; ss. 80, 90, 91 of 16 & 17 Vic. c. 113, were cited.

PER CURIAM.—The demurrer must be set aside and the parties may amend their proceedings.

Rule accordingly.

KENNEDY v. GRACE.—Nov. 17.

Practice—Married woman sued alone—Appearance by Attorney.

A married woman must not appear by Attorney, although sued as feme sole.

THE action was for money lent, and the sole defendant, Maria Grace, was a married woman. The defence was, that the money was never lent, and "the defendant as to all the alleged causes of action, and every of them, was, and still is, the wife of one Oliver Grace." This defence was signed at foot by "the defendant's attorney."

Armstrong, Q. C. (with him *B. Cox.*) moved to set aside the defence as being signed by attorney and not in person.

S. Ferguson contra.

PER CURIAM.—The defence must be set aside, but the defendant may amend and appear in person, but must take short notice of trial if it should be necessary to do so by reason of the delay.

Rule accordingly.

LAWDER v. LAWDER.—Nov. 22.

Practice—Witness resident in England—17 & 18 Vic., c. 34.

Before the court will grant a subpoena ad testificandum, to compel the attendance of a witness resident out of the jurisdiction, under 17 & 18 Vic. c. 34, s. 2, it must be satisfied by affidavit that the evidence is material, and cannot be proved aliunde.

Carleton, for the plaintiff, moved, under the provisions of 17 & 18 Vic., c. 34, s. 2, for liberty to issue a subpoena ad testificandum directed to Mr. John R. Godly, who resided in London, to compel his attendance at the trial in this case, to be had at the next sittings; he moved on the certificate of counsel, which stated that Mr. Godly was a necessary and material witness.

MONAHAN, C.J.—That is not sufficient; we must be satisfied by affidavit that it is a *bona fide* application, that his evidence is material, and his attendance necessary, in order to prevent the annoyance to him of bringing him over, because he may still be examined under a commission; we must see why it is necessary that we should oblige him to come over.

Nov. 25.—Carleton now renewed the application on an affidavit which stated that Mr. Godly was resident in London, and was a necessary witness to prove his property-qualification to vote at the election for the office of treasurer of the County Leitrim, and also to prove the taking before him, as a magistrate, of the qualifying affidavits of other voters, as required by statute, and which affidavits, being in the custody of the Clerk of the Peace, could not be proved under a commission. [*Ball, J.*—How does that affidavit establish the fact of the materiality of the evidence?] The statute relating to the election of County Treasurers requires the qualifying affidavits to be taken in a particular way. Mr. Godly was one of the magistrates who received those affidavits, and can alone prove that fact. The plaintiff is advised by his leading coun-

sel that this witness's evidence is most important, and he is not bound to disclose on the face of the affidavit the matter which is to be proved.

BALL, J.*—You have not satisfied us that this evidence cannot be proved *aliunde*, nor that it cannot be proved by some other witness, and we must refuse the motion.

Motion refused.

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

DINNEN AND ANOTHER v. JAMES.—Nov. 3 and 4.

Insolvent—Discharge—Schedule—3 & 4 Vic. c. 107.

By the 57th section of the 3 & 4 Vic. c. 107, a prisoner seeking to be discharged as an insolvent shall, after the vesting order has been made, deliver into the Insolvent Court a schedule containing, among other things, "a full and true description of all debts due or growing due from such prisoner at the time of making such order, and of all and every person and persons to whom such prisoner shall be indebted, or who, to his knowledge or belief, shall claim to be his creditors, together with the nature and amount of such debts and claims respectively," &c. The defendant to an action brought by the executor and executrix of J. D., deceased, upon a bill of exchange made by the defendant to the deceased, pleaded a discharge under the Insolvent Act; and in his schedule the following item in reference to the debt in question appeared: "No. 19.—J. D. solicitor, Belfast, executor of J. D. late of Belfast, cattle-dealer, deceased." It was proved that this person was not the executor, but the learned judge who tried the case admitted evidence to show that the defendant had used the best means in his power to ascertain who the personal representatives of J. D. deceased were; and it appeared that he had only received hearsay evidence that J. D., son of the deceased, was his executor; and that although he had employed an attorney to prepare his schedule, and was aware that wills were proved in the Prerogative Court, he had not directed his attorney, or any other person, to search there for the purpose of ascertaining who the personal representative of the testator was. Held, under the circumstances, that the description in the schedule was insufficient.

Seemingly, it is not sufficient for an insolvent to insert in his schedule merely the description of a creditor, without also adding his name; although, in the case of negotiable instruments, some allowance will be made in cases where it is impracticable for the insolvent to ascertain the name of the present holder, provided the name of the holder, last known to the insolvent as such, be correctly given.

THIS was an action upon a bill of exchange brought by James and Mary Dinnen, executor and execu-

* Monahan, C. J., was absent.

trix of John Dinnen, deceased. The first count stated that the bill in question had been made in the lifetime of the testator by the defendant, and directed to a third party, who accepted the same, but did not pay it, and that the defendant promised so to do. The second count stated that the bill had been drawn by the testator, and accepted by the defendant, who promised to pay the same according to the tenor and effect thereof. It also contained the common counts, and alleged a promise by the defendant to the testator in his lifetime, and to the plaintiffs since the testator's death, to pay the amount. To this the defendant pleaded the general issue, and a discharge under the Insolvent Act, to which latter plea the plaintiff replied, that the defendant was not discharged by the said order from the alleged promises. The case came on for trial before Mr. Justice Ball at the Consolidated Nisi Prius Court in Dublin, and at the trial of the second issue the defendant read in evidence a certified copy of his petition in the Insolvent Debtors' Court, and also of the schedule thereto annexed, and of the vesting order made thereon, together with other documentary evidence connected with his discharge. The defendant was also examined at the trial, and stated that the schedule in question had been prepared by Mr. McNally, his attorney; that he did not know, at the time of the preparation of the schedule, who were the executors of the said John Dinnen (the testator); that he had employed a friend to ascertain who were the executors of such of his creditors as had died, and amongst others those of the testator, and was informed by him that John Dinnen, the son of John Dinnen, deceased, was the executor of his late father, and that accordingly he had given instructions to insert in his schedule the description of the plaintiffs' demand, as it at present appeared in it, which was as follows: "No. 19.—John Dinnen, solicitor, Belfast, executor of John Dinnen, late of Belfast, cattle-dealer, deceased." The defendant admitted that he was aware that wills were sometimes proved in the Prerogative Court in Dublin, and that a search in that court might have given him the information requisite as to who were the personal representatives of the deceased J. Dinnen; but that he did not direct his attorney, or any other person, to make such search, as it never occurred to him that the will of the testator was in the Prerogative Court. Evidence to the effect that the defendant had used the best means according to his judgment to ascertain who were the personal representatives of John Dinnen deceased was then offered, and admitted by the learned judge, although objected to by the plaintiffs' counsel. At the close of the defendant's case the plaintiffs' counsel called upon the learned judge to direct a verdict for them, but his Lordship refused to do so, but left the following questions to the jury. Whether the defendant, at the time that he inserted the name of John Dinnen as executor of John Dinnen deceased, knew that the said John Dinnen was not the executor of John Dinnen deceased. Whether the defendant, at the time of the preparation of his schedule, gave all the information that he was possessed of in respect of the plaintiffs' claim. Whether the misde-

scription in the defendant's schedule was done with intent to defraud the plaintiffs. To each of which directions the plaintiffs' counsel then excepted, calling upon the learned judge to tell the jury, that the plaintiffs being creditors of the defendant at the time of the filing of his schedule, and not being named therein, the defendant's discharge was no bar to the action; and that the defendant, not having given any evidence of notice to the plaintiffs of the proceedings relative to his discharge, the jury should find for the plaintiff, and that upon the evidence the defendant's discharge was no bar to the action; which the learned judge having refused to do, the jury found as follows: that the defendant did not know when he inserted the name of John Dinnen as executor of John Dinnen deceased, that the former was not such executor; that the defendant, at the time of making his schedule, gave all the information he possessed as to the claims of the plaintiffs; that the misdescription was not intended to defraud or mislead the executors of John Dinnen deceased, and that it had not that effect; whereupon the learned judge directed a verdict for the plaintiffs on the general issue, and a general verdict for the defendant on the special plea. A bill of exceptions having been brought to this direction,

Fitzgibbon, Q. C., (with him J. P. Lynch,) in support of the exceptions.—The question in this case is, whether the insolvent has given a sufficient description in his schedule of this particular debt and the person entitled to the demand, under 3 & 4 Vic. c. 107, ss. 57 & 65. The former section requires that he should set forth "a full and true description of all debts due or growing due from such prisoner at the time of making such order, and of all and every person and persons to whom such prisoner shall be indebted, or who, to his knowledge or belief, shall claim to be his creditors." This requirement of the statute should be strictly complied with, as, if the description be inaccurate, the prisoner will be enabled to escape opposition to his discharge. In *Lambert v. Smith*, (11 Com. Bench, 358,) this principle is recognised. *Jervis, C. J.*, in giving judgment says: "The question is, upon whom is cast the burthen of proving the want of knowledge;" and *Maule, J.* says: "The spirit of the Insolvent Act I take to be this, that as a condition to his discharge, the insolvent shall name in his schedule all his creditors, and shall truly describe all the debts as to which he seeks to be discharged;" and in another part of his judgment, "There is no reason why the insolvent should be held responsible for his ignorance of that which is inaccessible to him." But in the present case the knowledge was not inaccessible to him, for he admits he could have obviated the error by consulting the records of the Prerogative Court. [*Greene, B.*—In that case *Maule, J.*, lays down that the insolvent should give all the information in his power; but it is another thing to say, that any misdescription will invalidate the discharge, although due diligence be used.] In *Symons v. May*, (6 Exch. 707,) the misdescription was merely in the place of residence of one of the debtors, and yet it was held insufficient.

Johns, (with him J. D. Fitzgerald, Q. C.,) con-

tra.—The only difficulty in the case is, whether or not the insolvent has used due diligence in the preparation of his schedule, and it is submitted that he has done so, under the provision of section 65, which puts negotiable instruments on a different footing from other debts. The insolvent has given the best description in his power of the holder of this bill, and that is sufficient. *Frampton v. Champneys*, (2 Jur. 699,) was an action against the maker of two promissory notes, payable to Frampton, and the defendant pleaded that as to these notes he had obtained a discharge under the Insolvent Act. The description in his schedule was, "No. 112, Messrs. Frampton, attorneys-at-law, £108 13s. 6d," and Denman, C. J., who tried the case, left it to the jury to say whether the description was a full and true one, or calculated or intended to mislead and deceive. It is therefore a proper jury question. In *Forman v. Drew*, (4 B. & C. 20,) the description in the schedule contained the name of only one of the two parties to whom the insolvent was indebted, and yet it was held sufficient upon the principle recognised in *Frampton v. Champneys*, that it was not calculated to mislead. Abbot, C. J., says in his judgment "There being no evidence, therefore, to show that the defendant had any intention to mislead his creditors, and the mode in which the debt is described in the schedule being calculated to notify to the plaintiffs that the defendant sought to be discharged in respect of their debt, I think that the provisions of the Act of Parliament have been complied with, and that the defendant was duly discharged as to that debt." [*Greens, B.*—That was merely the omission of the name of one of two partners.] In the present case there was a correct description of the character of the person that should have been named. It appears that the insolvent employed an attorney, but did not direct him to search in the Prerogative Court; this is the only neglect on the part of the insolvent. However it is not certain that a search in that court would have settled the point, as the will may have been proved elsewhere. It is contended by the other side that the case should have been taken from the jury altogether, but the authorities decide the contrary. The cases cited by the other side are decisions upon different Acts of Parliament; but the general question in all is, whether, under the peculiar circumstances of each case, the insolvent has used "due diligence." In *Wood v. Jowett*, reported in the note to *Forman v. Drew*, (4 B. & C., 20,) where the sufficiency of the description in the schedule was questioned, as in the present case, the question left to the jury was, whether or not the description of the defendant in the schedule was intended to deceive or mislead, or that in fact it had deceived or misled any of the defendants or creditors, and that, if so, they should find for the plaintiff; and the jury having found for the defendant, the direction was upheld by the full court. This distinction as to bills of exchange and promissory notes is thus stated in *Nias v. Nicholson*, (2 Car. & Pay., 120,) by Abbott, C. J.: "The Insolvent Debtors' Act requires the debtor to present a schedule designating the creditors against whose debts he seeks to be discharged; but, as in the case

of bills, they may be indorsed over without his knowledge, and therefore he may not know the actual holders, it is sufficient that he describe the bill so as to show what bill it is, and through whom it passed." This Act should be liberally construed.

Fitzgibbon, Q. C. in reply.—It must not be forgotten that in this case the debtor seeks to be discharged from a just debt. [*Pennefather, B.*—It must be taken for granted in this case that the prisoner was aware that this bill of exchange was in the hands of the personal representative, and the only question is as to the sufficiency of his description of that person.] It was gross neglect not to have looked at the entries in the Prerogative Court, by which all uncertainty would have been removed. If he had merely used the words "the executors of J. Dinnen," &c. it would have been less calculated to mislead, as the Commissioners could then have ascertained who the executors were, and have caused him to be furnished with the requisite notice under section 61; but the present entry was altogether deceptive. [*Pennefather, B.*—The presumption is that the person named in the schedule was served with the notice required by the statute, and that the party really entitled to notice was not served at all.] Besides, there was no duty incumbent upon the person so served to transmit the notice to the proper person: and to uphold such a practice as the present would be to establish a most injurious precedent. [*Pennefather, B.*—The case must be decided upon general principles. We understand that there is no case deciding that the words "executors of, &c." would be a sufficient description.] There will be no hardship to the insolvent in holding the schedule defective, for he may again resort to the same tribunal. It must be considered that the question in the present case is not, whether the prisoner afforded all the information in his power, but whether he made every exertion that he should have made to acquire such information. The name of a creditor must in all cases be inserted, and it is only in the case of negotiable instruments that have been negotiated by transfer, that the insolvent is allowed some latitude in describing the holder; as it may not be possible for him to ascertain the person at present holding the bill, and in such cases he may insert the name of the person who to his knowledge was the last holder of the instrument. [*Pennefather, B.*—It strikes me at present that the Act requires not merely that the creditor is to be pointed out by description, but *named*, and therefore that mere description is not sufficient. Notice is to be served upon the creditors and parties interested, and the insolvent is bound to facilitate the process of the court in every way in his power, and he does not do so by merely describing as "executor" of such a person an individual who may be at the time out of the kingdom. As to the question of diligence, it appears to me that such matters are to be decided upon the peculiar circumstances of each individual case. If a bill of exchange get into the hands of a stranger, that is a different case; but that is a question that does not arise in the present instance, for the bill in this case never was transferred, and the insolvent states that it was in the hands of the personal representative of the first

holder, and therefore I do not think that particular evidence of diligence may be resorted to. *Greene, B.*—I conceive that in the case of a bill of exchange the description "indorsee" alone in that schedule would not be sufficient, but that it would be necessary to name the last indorsee known to the prisoner; at the same time that the prisoner would be allowed some latitude, in case he were absolutely unable to discover who the last indorsee was.]

PENNEFATHER, B.—In the present case I conceive the insertion of the name of a wrong person to be worse than if the insolvent had inserted no name at all, as in the latter case the Commissioners would have made inquiry to ascertain the name of the person answering the description given. We must deal with this case as if the insolvent had named an utter stranger, paying no regard to the casual relationship existing between the parties. We shall look into the authorities and deliver judgment to-morrow.

Nov. 4.—*PENNEFATHER, B.**—We allowed this case to stand over in order to look into the cases. During the argument I fully expressed my opinion as to the rule that should be made in this case, and explained fully the grounds upon which I had formed that opinion, and I see no reason to change it. It is clear from the statement of the defendant that he was aware who the holder of the bill had been, that he was dead, and that the debt at the time of filing the schedule was the property of the personal representative of the deceased. At any rate it is plain that he had a full opportunity of ascertaining who that personal representative was: but without doing so, without expressing any doubt upon the subject, he inserts the name of a person as executor, who in point of fact is not such executor. It is said that this person is the son of the executrix, but it makes no difference whether that be so or whether he was the son of a perfect stranger. We must therefore award a *venire de novo*.

GREENE, B.—It has been very strongly urged upon the court that the item inserted in the schedule was sufficient for the discharge of this debt, but we cannot yield to the argument so urged. The name of the executor is a misdescription; and as the naming of the holder of the bill cannot be regarded as surplusage, we must consider it as insufficient.

Venire de novo.

POWER v. ST. GEORGE.†

Practice—Charging order.—Common Law Procedure Act, ss. 132 & 135.

A judgment had been obtained in the year 1847 by J P against S G. J P died intestate, and administration was granted to H P, who revived the judgment, and by deed of assignment in the year 1852 assigned all benefit in the said judgment to C K, and constituted the latter her attorney to receive the same. C K had obtained a charging order to attach certain funds standing in the name of the Master of the Court of Queen's Bench to the credit of the consor of the judgment, by affidavit stating the above facts, and

craving for C K a charging order. Application to set aside the order so obtained, refused.

THIS was an application to set aside a charging order that had been obtained in the month of May, 1854, attaching the sum of £130 then standing in the name of the Master of the Court of Queen's Bench, to the credit of the cause of *St. George v. Thorngate*. In the year 1847, a judgment for £691 had been obtained by one Thomas Power against *St. George*; the consor died intestate, and administration was granted to his wife *Hannah Power*, who revived the judgment in question, and issued execution thereon. The last revival of the judgment was made in January, 1849; and by deed of assignment made in the year 1852, *Hannah Power* assigned all benefit in the judgment to *Catherine Keogh*, whom she constituted her attorney to receive the same. *Catherine Keogh* had obtained the charging order which it was now sought to set aside upon an affidavit, stating that the sum of £330 was still due and owing to the deponent at foot of the judgment in question. The affidavit of *Catherine Keogh* contained these words "and deponent craves a charging order." No return had been made by the sheriff to the writ of execution issued by *H. Power*.

Fitzgibbon, Q. C., (with him *D. R. Pigot*), in support of the application.—The question involved in the present case is, whether the court can grant a charging order in the name of the personal representative of the person who originally obtained the judgment; and it is submitted that in order to support such a position, the words "personal representative," must be imported into the Act of Parliament. 16 and 17 Vic. c. 113, s. 132, provides, that if any person against whom judgment shall be entered shall have funds, &c., standing in his own name, or the name of any person in trust for him, in any public company in Ireland, it shall be lawful for the court "on the application of the party having recovered such judgment," to make an order to attach such funds, &c.—and section 135, under which the present order was made, refers to section 132, by using the words "such order." The Legislature would have added the word "assignee" or "personal representative," if it intended that orders of this kind should be granted; and it is submitted that this statute is to be construed strictly, as being in derogation of the rights of the subject. [They cited 1 & 2 Vic. c. 110, s. 12; *Wood v. Wood*, (3 Gale & Dav. 532, and 4 Q. B. 397); *Collingridge v. Paxton*, (2 Lown. & P. 654); *Courtoy v. Vincent*, (15 Beav. 486); *Witham v. Lynch*, (1 Exch. 391); *Wallace v. McCann*, (4 Ir. E. Rep. 522.)]

Counsel on the other side was not called upon.

PENNEFATHER, B.—This is an application to set aside an order of the court charging a certain fund in favour of a judgment creditor. The order was obtained in the name of the person who had obtained a revival of the judgment. It has been argued in support of the present application that the clause of the statute conferring this power does not extend to executors or administrators, because they are not named in the Act of Parliament. The clause, however, gives power to any one who has obtained a judgment, to apply for a charging order; and it would be strange if this power would not go to the

* *Pigot, C. B.* and *Richards, B.* were absent.

† *Ex relations.*

person who is legally and beneficially entitled to the judgment as the representative of the person who obtained it. In the next place, it is objected that this application is made by the equitable assignee of the judgment, who has no legal right; but it has been made at the desire of the administratrix of the conusee of the judgment, who has authorized the assignee to take these proceedings in her name, and therefore, according to the terms of the Act, the order will be made out in the name of the person who has obtained the judgment. A question might arise if the judgment had been legally assigned, whether the order could be made in the name of the assignee; but here the assignee is only an equitable one. If we were to grant this application, the effect of an equitable assignment of a judgment would be, to deprive the real creditor of his remedy under the Act. With regard to the argument that the words "such judgment" refer only to a judgment obtained since the passing of the Common Law Procedure Act, we might say that the claim in question is general, and at all events, the word "such" may have rather reference to the 129th, than to the 127th section, and we shall give it that preference. The application must therefore be refused with costs.

RICHARDS and GREENE, B. B., concurred.
Rule accordingly.

PALLISER v. FURLONG.—Nov. 17.

Practice—Amendment—Summons and Plaintiff.

The court will give leave to amend the copy filed of the summons and plaintiff, by inserting the name of the attorney.

Hickey applied for leave to amend the copy of the summons and plaintiff in this case that had been put upon the file, by inserting the name of the attorney. It has been sworn that the original is correct. [Greene, B.—The copy served should be correct in stating the attorney's name.] It is only in the copy filed that this irregularity appears.

GREENE, B.—I will give you leave to amend the copy upon the file by inserting these particulars.
Rule accordingly.

WILLIAMS v. MURPHY.—Nov. 17.

Practice—Sheriff—Return—Nulla bona.

To a writ of execution the sheriff made the following return—that by virtue of a former writ to him directed, and which issued out of the Court of Queen's Bench, tested the 29th of May in the 17th year of the reign, and returnable to the said court on the 7th of June, 1854, he had seized certain chattels of the execution debtor; and that by virtue of another writ of venditioni exponas, which issued out of the Court of Queen's Bench, tested the 22nd day of July, in the 18th year of the reign, and returnable into the said court on the 22nd of August, 1854, to him directed, and also of another writ, (stating the dates as before,) he advertised the sale of said property for the 8th of August, 1854, and that it was set up for sale, but that the sale was adjourned for want of bidders, and that it still remained upon his hands:

and it proceeded as follows: "I further certify that the said G M hath not any more goods and chattels in my bailiwick whereof I can cause to be made the said debt and costs as within I am commanded." Held, that the return should have stated that the execution creditor had not, at the time of the delivery of the writ to the sheriff, or at any time since, any goods, &c., and that it was not sufficient to return that he "hath not" any goods, &c.

Semble, it is also necessary, when the return refers to former writs of execution, to state the parties issuing such writs, and the sums named therein.

THIS was an application that the Sheriff of the County of Kilkenny should be ordered to amend his return. A writ of execution had issued to the Sheriff of the County of Kilkenny reciting, that George Williams had recovered against Gerald Murphy a certain sum of money, and directing that he should levy the same out of the goods of the latter, and an indorsement thereon described several lands and premises, the property of the defendant, setting them out by abutments. To this the sheriff made the following return:—"By virtue of a writ to me directed, which issued out of the Court of Queen's Bench, tested the 29th May, in the 17th year of the reign, and returnable into the said court on the 17th day of June, 1854, I seized an alleged chattel interest of the defendant in the mill and lands of Mount Argula and Pleberstown, and the crops growing thereon of the value of £30, and also an alleged chattel interest in houses, grounds and premises in the Town of Graigue, of no value. I further certify that by virtue of a writ of *venditioni exponas* to me directed, which issued out of the Court of Queen's Bench, tested the 22nd of July, in the 17th year of the reign, and returnable into the said court on the 22nd of August, 1854; and also of a writ to me directed, which issued out of the Court of Exchequer, tested the 15th of May, in the 17th year of the reign, and returnable into the said court on the 27th day of July, 1854, I advertised the sale of said property for the 8th of August, 1854, which was accordingly set up to be sold on said day, but said sale was adjourned to the 19th day of August, 1854, for want of bidders, and said property now remains on hands. I further certify that the said Gerald Murphy hath not any more goods and chattels in my bailiwick whereof I can cause to be made the said debt and costs, as within I am commanded. So answers," &c.

Dowse in support of the application.—The return is insufficient. In *Couper v. Cullinane*, (6 Ir. L. Rep. 98,) the return was, as in the present case, "that the sheriff hath not any goods," &c., and it was held that the practice in this country required that the return should be "that he had not at the time of the delivery of the writ, or at any time since," &c., although the English practice may have been different; also in *Kennedy v. McKillop*, (11 Ir. L. Rep. 293), where the objection to the return was similar, it was held, on the authority of the preceding case, that the practice in this country should be followed in such cases. In *Pearce v. Lord Charleville*, (8 Ir. L. Rep. 223,) the return was as

follows:—"The within-named Earl of Charleville had not, at the delivery of this writ to me, or since, any lands or chattels in my bailiwick that I could distrain, as within I am commanded," and the return was set aside with costs, on the principle that it was not in accordance with the established form. In 1 Steward's Forms, 265, the form of return is as follows:—"The within-named had not at the time of the delivery of the within writ to me directed, or at any time since, any goods or chattels in my bailiwick," &c.; and it is submitted that the present return is defective in respect of not stating that the defendant *had* not any goods at the time of the delivery of the writ to the sheriff, the present return merely referring to the day upon which it was made. The same form of return will be found in Ferguson's Forms, 45, 46. In addition to this defect in the present return there is another, viz., that it does not state at whose suit the other writs, stated in the return, were made, nor what are the several amounts to be levied under them.

M. O'Donnell contra.—Upon service of the notice of this motion the sheriff offered to amend his return as the plaintiff should require. [*Greene, B.* That was a very extraordinary proposal on the part of the sheriff.] He then offered to insert the names of the parties to the other writs of execution set forth in the return, and the sums marked therein, although he believed that the opposite party was aware of these facts. [*Greene, B.*—That was no excuse for a defective return.] As to that part of the application, that requires the sheriff to amend by substituting for the word "hath" the words "had not at the time of delivering the writ, &c. or at any time since," it is submitted that, although such a return may be proper and necessary where there is but one party named in the writ of execution, yet where there are several parties, and several writs of execution affecting the same property, the present form of return is sufficient. In Chit. Forms, p. 172, No. 57, the form of return is given as in the present case, where the return was *feri feci* as to part, and *nulla bona* as to the residue. The words "hath not" must be understood to mean hath not since the time of the delivery of the writ of execution to the sheriff.

Dowse was not called upon to reply.

GREENE, B.—The return must be amended. It is quite impossible to suppose that the court will allow such a return as this to embarrass other parties. The recital of the former writs in this document cannot, as it appears to me, make any difference in the law of the case; as in either case the sheriff should have stated, not merely that the party against whom the execution issued "hath" not goods, &c., but that he had not at the time when the writ came to the hands of the sheriff, nor hath since any goods out of which he could levy the amount. We must, therefore, grant the application.

Rule accordingly.

BAILEY v. MC'CLEARY.—Nov. 21.

Practice—Stamp Duty—Order—Fatality.

Stamp duty upon orders made by the court should be paid at the time that the order is taken out: and

the court will not allow the stamp duty to be subsequently received by the officer, where the omission to pay it has been caused by the mere inadvertence of the party: but the court may, in some cases, grant such permission, when the non-payment has been the result of a casualty or fatality.

Norman, on behalf of the defendant in this case, applied to the court that the officer should be at liberty to receive the stamp duty payable upon an order that had been made upon the 15th of July last. The motion in that case had been for leave to change the venue, and it had been refused, the costs of the motion to be costs in the cause; and the defendant having succeeded in the suit, the order was taken out without payment of the necessary stamp duty. [*Greene, B.*—It is a very loose practice to allow a party to obtain an order without paying the stamp duty upon it; and it is most incorrect to omit the payment of stamp duty at the time of taking out the order, it being a direct fraud upon the revenue. If a case of casualty or fatality were clearly established it would be another thing, but the court will not favour cases of mere inadvertence.] It is submitted that a case of fatality is established in the present case, for it appears that at the time the motion was refused, the brief held by plaintiff's counsel was the one handed in to the officer for the purpose of making out the order; and by the entry in the order book it appears that it is the name of the plaintiff's attorney that is attached to the order: the stamp duty has never been paid through some inadvertence, and this application is now made by the defendant's attorney, who cannot therefore be accused of negligence.

GREENE, B.—The circumstances of this case are peculiar, and I will therefore allow the application; but the observations I have already made as to this practice, I will abide by.

Motion granted.

COURT OF CRIMINAL APPEAL.

MICHAELMAS TERM, 1854.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

[*Coram* LEFROY, C. J., MONAHAN, C. J., TORRENS, BALL, AND JACKSON, J. J.]

R. v. MAHONY.—Nov. 18.

Uttering forged promissory note.

A was indicted for uttering certain promissory notes, with intent to defraud. The prisoner had been pressed for security by a firm to whom he was indebted, and undertook to obtain for their agent B the notes of his mother-in-law, C W, whose Christian name B did not know. A subsequently gave to B two notes, signed by himself and by his wife by the name of A W, (which had been her maiden name,) intimating to B that the signature "A W" was that of his mother-in-law. It subsequently appeared that neither A nor his wife had been authorized by C W to sign the notes on her behalf. A having been convicted of the above offence, Held, that the conviction was right.

THIS was an indictment for forging and uttering two several forged promissory notes. The prisoner

was tried and convicted at the last City of Kilkenny Assizes before Monahan, C. J., who stated the following case for the opinion of the Court of Criminal Appeal: "Patrick Mahony was tried before me at the last Assizes for the County of the City of Kilkenny for forging and uttering knowing to be forged two promissory notes. A copy of the indictment is annexed to this case; the notes are accurately set forth in the first and second counts thereof. The first witness for the prosecution was Robt. Moore, who, being duly sworn, stated that he was the travelling agent of the mercantile firm of James Brown, Sons & Co., English merchants carrying on business at Manchester; that in the month of January last the prisoner Mahony was indebted to the said firm in a balance of £68 18s. 10d.; that he (witness) being then in the City of Kilkenny, where the prisoner carried on business, pressed for payment of said balance, and threatened law proceedings unless the amount were paid or secured; that witness had previously ascertained that Mrs. Watters, the mother-in-law of the prisoner Mahony, was a solvent person; she also carried on business in the City of Kilkenny. Witness was not at that time aware of Mrs. Watters Christian name, but had since ascertained that her name is Catherine. After some negotiation with Mahony, witness offered to give him time for the payment of the debt if he got his mother-in-law, Mrs. Watters, to join him in notes to the amount. This Mahony agreed to do; and accordingly in Mahony's presence witness drew the body of the two promissory notes now produced, and the prisoner Mahony signed his name to both. This took place in the Hotel of the City of Kilkenny, where witness was then staying. Mahony retained the two notes, saying that he would go to his mother-in-law, Mrs. Watters, and get her to sign them, and that he would return with them in a short time. Mahony accordingly took away the two notes, and returned in about an hour to the hotel, where witness remained, and handed witness the two notes signed as they now are, saying, "Here are the notes; they will be paid before they arrive at maturity." Witness took the notes from Mahony, believing that they had been executed by his mother-in-law, Mrs. Watters, and continued under that impression until after the notes had arrived at maturity; when Mrs. Watters, on being applied to for payment, denied all knowledge of the notes. They are still unpaid. When witness received the notes from Mahony he believed the name "A. Watters" to the two notes was the name and handwriting of Mrs. Watters, the mother-in-law of Mahony; but, as before stated, witness had not heard nor was he then aware what Mrs. Watters' Christian name was. The next witness for the prosecution was Mrs. Catherine Watters, the mother-in-law of Mahony, who stated that Mahony was married to her daughter Anne, that she had not authorised any one to affix her name to the notes produced, nor had she done so herself, that she had not been asked to do so, that she had never heard of the notes nor was she aware of their existence till applied to for the amount after they became due. Mr. Harris was counsel for the prisoner, and examined two witnesses who deposed that the name "A. Watters" subscribed to

the two notes was in the handwriting of prisoner's wife, that they were well acquainted with her handwriting, and that same was in her usual character, that she sometimes in signing her name wrote the name in full "Anne," sometimes merely the initial "A," more frequently only the initial "A." Mr. Harris for the prisoner submitted that as Mrs. Watters name was Catherine, and that as the name affixed to the notes was A. Watters, which he contended was or stood for the name of the prisoner's wife, that there was no case to sustain the indictment. I thought differently, and charged the jury that if the prisoner got *his wife to affix* the name "A. Watters" to the notes, he at the time intending to pass them as the notes of his mother-in-law, Mrs. Catherine Watters, and that he afterwards passed them to Mr. Moore for Messrs. Browne, Son and Company, as the notes of Mrs. Watters his mother-in-law, that the indictment would be sustained. The jury found him guilty, being of opinion that he got his wife to affix the signature "A. Watters," he at the time intending to pass them to Mr. Moore for Messrs. Browne and Co., as the genuine notes of his mother-in-law Mrs. Watters, and that he did in fact afterwards pass them as her notes, but recommended him to mercy on account of his previous good character—one of the jurors having been examined and having deposed to his previous character. I respited the sentence and allowed the prisoner to remain out on bail, he and two sureties having entered into recognizance to attend at the next Assizes to receive the sentence of the court; and have reserved for the consideration of the Court of Criminal Appeal the question, whether the fact of the prisoner having *got his wife to affix the signature* "A. Watters," to the notes mentioned in the case, *intending* at the time to pass them to the agents of the Messrs. Browns, as the genuine notes of his mother-in-law Mrs. Catherine Watters, and his afterwards passing them as such genuine notes to Mr. Moore, their agent on their behalf as stated, were sufficient to sustain the indictment."

"JAMES HENRY MONAHAN."

J. D. Fitzgerald, Q. C. (with whom was *T. Harris*,) for the prisoner.—The facts of the case do not sustain a charge of forgery. According to the legal definition of the crime, forgery is the fraudulent making of an instrument in the name of an existing person without his authority, or of one not existing and fictitious. In this case the name appended to the note was the real name of the party signing, as the fact of its having been her maiden name, made no difference, and the act of the prisoner therefore consisted not in the uttering of a forged note, but in making a false representation respecting the maker of a genuine note. It will be said that this case falls within the authority of *R. v. Mitchell*, (1 Den. C. C. 282, n.) where the prisoner was indicted for uttering a forged acceptance of one John Cooper, and the evidence was, that upon negotiating the bill he represented the acceptor as "a respectable Leeds merchant of the name of Cooper, attending Huddersfield market;" and it appeared that the real acceptor was a stable boy of that name, who had been in the habit of accepting bills for the accommodation of the prisoner. Sometime afterwards the

prisoner brought a second bill accepted as before, and with a similar representation. Cresswell, J., told the jury that with respect to the first bill they must be satisfied that the prisoner got John Cooper to put his name to the bill for the purpose of passing it as that of Cooper, the Leeds merchant as of a non-existing person; and likewise with respect to the second bill, they should find that he got it with a similar intention, and if they found in the affirmative of either of these events, the prisoner was guilty of forgery. That case conflicts with the earlier authorities. In *R. v. Webb*, (3 Brod. and Bing. 228, s.c. Russ. and Ryan, 405,) the prisoner was indicted for forging the signature of Thomas Bowden, the bill having been directed to "Mr. Thomas Bowden, Bridge Manufacturer, Romford, Essex." It was proved that the handwriting was that of one Thomas Bowden, who did not answer to the description of the party to whom the bill purported to have been directed. Mr. Justice Best left it to the jury, in the first place, to consider whether there was such a person as Thomas Bowden; and if there was, whether the acceptance was his: and that if there was no such person, or the acceptance was not his, and that the prisoner at the time he offered the bill to the prosecutor knew that there was no such person or that the acceptance was not his, they should find him guilty. The jury convicted the prisoner, but the judge being of opinion from the evidence, that there was such a person as Bowden in existence, and that the acceptance was his handwriting, reserved the point for the twelve judges, whether the prisoner, assuming that to have been the case, by uttering the bill with a false description of Bowden on its face with intent to defraud, brought himself within any of the counts of the indictment, and a majority of the judges held the conviction to be wrong. Now, this case is much stronger in the prisoner's favour than there, inasmuch as there a false description of the acceptor was put on the face of the bill with intent to deceive; but there is no such, nor was there at the time of uttering the note, any statement of the prisoner that it was the signature of Catherine Watters. In the case of *R. v. Parkes and Browns*, (2 Leach's Crim. Cas. 775,) and cited in (2 East. P.C. 963; 2 Russell's Criminal Law, 324,) the prisoners were indicted for forging a note purporting to be made by "Thomas Brown." The note was proved to have been filled up in the hand-writing of Parkes, and the signature was that of Brown. The prisoner Brown passed this note to a shoemaker named Hulls, representing it to be that of a Thomas Brown of Rington, in Shropshire, who had £15,000 lodged with certain bankers named Down and Co. The prisoners were proved to have been connected together, and no such person as that described as the maker appeared to have existed. The prisoners were convicted, and the conviction was afterwards upheld as to Brown. Grose, J., who delivered the opinion of the judges, observed "that the definition of forgery was, the false making of a note or other instrument with intent to defraud; which might be done by using the name of one who did not exist, or of one who did exist, without his consent. That this was of the former description, being uttered by

the prisoner as the note of his brother, no such person as his brother of that name appearing to exist; and that the circumstance of its having been made in the same name as his own could not make any difference, being uttered as the note of another and not as his own." That case is no authority against the prisoner here, inasmuch as it was decided upon the ground of Brown having used the name of a non-existing person, and that although it was signed by a Thomas Brown it was not signed by the Thomas Brown, who was the supposed acceptor. However, that case does not appear ever to have been considered satisfactory. *Hevey's Case*, (2 Russ. Crim. Law, 326,) was ruled in opposition to the last case. Upon an indictment for forging an indorsement of a bill in the name of Barnard M'Carty, it appeared that at the time of the negotiating of the bill by the prisoner, he passed himself off as the Barnard M'Carty who was the payee in the bill, which had in fact been indorsed by a person of that name. The prisoner having been convicted, the point was submitted to the twelve judges who held the conviction wrong, on the ground that it did not amount to forgery, there having been no false indorsement, and the jury having found that the indorsement had been truly made, by a real person, whose name it purported to be. Again, in *R. v. Watts*, (3 Brod. & Bing. 197; s.c. Rus. & Ry. 436,) the bill was addressed to "Messrs. Williams & Co., Bankers, Birchin-lane, London." The prisoner at the time of passing it intimated that the acceptor was "Williams, Birch and Co.," and it was proved not to have been their acceptance. There were no known bankers using the style of Williams and Co. except the latter, but at No. 3, Birchin-lane the name of "Williams and Co." was on the door, and some bills addressed to such a firm had been accepted payable at No. 3, and paid there. No evidence having been adduced to disprove the existence of such a firm, the conviction was declared to have been right. [Monahan, C. J.—No issue was sent to the jury as to whether, at the time of making those bills, the names were inserted with intent to pass them as the bills of a different person, but in this case the finding of the jury was that the prisoner got his wife to put her name on the notes, so as to make them pass as the notes of another person.] In the case of *R. v. Rogers*, (8 Car. & P. 620,) the prisoner having been indicted for uttering a forged acceptance, the bill purporting to have been accepted by "Nicholson and Co.," and it appearing that there was no such firm, although the bill was in fact signed by a Thomas Nicholson, Bosanquet, J., in summing up said, "My opinion is that if this acceptance were written by Nicholson to represent a fictitious firm, and with intent to defraud, it would amount to a forged acceptance." [Monahan, C. J.—There was evidence to go to the jury that the prisoner got the notes from his wife for the purpose of uttering them as the notes of his mother-in-law. Therefore the crime of forgery was complete when the name "Anne Watters" was put on them. I do not quite feel the force of your argument as to the absence of false statement at the time of uttering.] This is not the fraudulent making of the name of an existing person. [Monahan,

C. J.—The result of your argument would be that in case there was a well-known person of the name of John Brown, for whose bill it is intended to pass, a party cannot be convicted if he puts James instead of John, because putting a false name is no forgery.] Suppose that the wife of the prisoner had signed the notes as "Anne Mahony," this case would come precisely within *R. v. Webb*. The agent did not know Mrs. Watters' Christian name. The fact that she used her maiden name makes no difference, because it is the custom in many places for a woman to be known by one name as well as another. [*Monahan, C. J.*—It does not occur to me that it is of the slightest importance that this note was made by the wife, except that she was an innocent party. The only reason for which I reserved the case was this, to ascertain whether, in case the prisoner had, with his own handwriting, put the name "Anne Watters" upon this instrument, intending to pass it as the note of his mother-in-law, Anne Watters, that would have amounted to a forgery, inasmuch as it was not her real name, the note having been made with the intention of passing it ultimately.] That would bring the present case within the authority of *R. v. Mitchell*, if that case be law. The only difference between that case and the present is, that here the name signed in fact represents no party at all. That case, however, is very unsatisfactory. It was a case on Circuit, and the prisoner was not assisted by counsel.

Lynch, Q. C. and *Lawson* contra.—It is conceded that if the signature affixed to an instrument be that of a real individual of that name, a false representation relative to that person at the time of passing it does not make the instrument a forgery, but constitutes another crime. It must in fact be a false instrument in its inception. A note of another bank would not be a forgery, if it were merely passed as a note of the Bank of Ireland, but if it had been fabricated for the purpose of being passed as a note of the Bank of Ireland. The latest case on this subject is that of *R. v. Nisbett*, (6 Cox, C.C. 320,) in which it was held that putting off the bill of an existing person as that of a fictitious person is a felonious uttering of the bill of a fictitious drawer; and in *R. v. Blenkinsop*, (1 Den. C. C. 278; s. c. 2 Cox, C. C. 420,) it was held by all the judges present that putting an address to the name of a drawer of a bill of exchange, while the bill is in course of completion, with the intent to make the acceptance appear that of a different existing person, is forgery. That is what was done here, as the prisoner got his wife to sign her name, with a view of passing it as that of her mother-in-law. *Blenkinsop's case* is a very strong authority in favour of the proposition, which we urge. Here the fraud was entered into at the time of making the note. It was not in fact signed by an existing person, as Anne Watters was not the real name of the maker. A wife's signature to a bill is a mere nullity in law. [*Monahan, C. J.*—The strength of Mr. Fitzgerald's argument is this—if this be forgery at all, it was a forgery of the name of the mother-in-law, and it was not a forged bill of a non-existing person, for it was, in words, passed as the bill of Catherine Watters, and the difficulty is, that it had another's

name to it. What distinguishes this case from any of those cases of forgery of the names of non-existing persons, there was always there a correspondence with the name of some existing person? The indictment here, according to the recent practice, only sets out a copy of the bill. It was forging the bill, to make it purport to be the bill of Mrs. Watters. I consider that to be the same as if he did this with his own hand, and that it makes no difference what his wife's name was, for it was just as if he had written the name in his own handwriting, inasmuch as he intended that the man with whom he was dealing should take this as the bill of Catherine Watters.] There is another case, *R. v. Fitzgerald*, (1 Leach, C. C. 20,) where it was held that signing a wrong Christian name of the person whose bill a false instrument purports to be, is a forgery. The opinion of the judges in that case was not publicly given, but the prisoners were exempted.

Harris in reply.—*R. v. Blenkinsop* is not *ad idem* with the present, as there was an addition to the drawee's added by the prisoner on the face of the instrument. *R. v. Fitzgerald* is distinguishable, as the will purported to be signed by a marksman, and the words "John Perry," instead of "Peter Perry," which was the real name, were merely appended to the mark, and did not purport to have been written by the marksman. *R. v. Watts* was the case relied upon at the trial, and is not to be distinguished from this case, as the prisoner there represented that the signature was that of an existing firm of "Williams, Birch and Co." The case of *R. v. Mitchell* was merely one on Circuit, and was pronounced soon after the promotion of the learned judge to the bench, and is not, therefore, to be put in competition with the earlier and well-considered cases of *R. v. Webb* and *R. v. Watts*.

LEFROY, C. J.—We are unanimously of opinion that we ought to rule in favour of this conviction. We do not differ with respect to the general rule as to what constitutes forgery. The cases may differ respecting its application, but the rule itself is well-settled, and we shall act upon it. That is, that forgery must consist of the false making of a written instrument with the view to defraud, either in the name of a non-existing person or of an existing person without his consent. Here it was evident that the purpose of the prisoner was not to make a representation with respect to a fictitious maker of the note, but concerning a real person, namely, his mother-in-law, which was not calculated to put the person with whom he was dealing on his guard. He gets his wife's name to the note to the extent he had professed to the agent; and, though he used the name Anne instead of Catherine, he cannot evade the consequences of law by the variation from the proper name of that party. He did enough colourably to meet the undertaking which he had given. Whether the affixing of that name was his own personal act or done through the agency of another party, it does not make any difference. This was substantially the forging of the name of an existing person, without the authority of that person.

Conviction affirmed.

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at Law.]

STAUNTON v. DONOGHOE.—Nov. 3.

Production of documents—Admission in answering affidavit.

A cause petition was filed, praying the sale of certain lands for payment of a judgment. One of the respondents, in her affidavit filed by way of answer, admitted that part of the lands were conveyed to her by a deed of the 25th of May, 1853, which was in her possession; that by an account stated and settled, dated the 28th of June, 1853, to which respondent refers, it was found that £3609 12s. 6d. was due to her; and that, by a deed of the same date, the other lands were mortgaged to her for the amount, but did not state that the deed was in her possession, nor refer to it. On a motion by the petitioner for the inspection of these documents, it was Held, that the respondent had so referred to the account stated, that she was bound to produce it, but that she was not bound to produce the mortgage deed.

THE petitioner in this case had obtained a judgment at law against the respondent, J. M. Donoghoe, and had duly registered it under the provisions of 14 Vic., cap. 29, against the respondent's lands. A cause petition was then filed making the said J. M. Donoghoe, Mary Donoghoe, and Honora Donoghoe, respondents, praying a sale of the lands for the payment of the judgment. The petitioner stated that it appeared from the registry of deeds that since the respondent became indebted to the petitioner the respondent had executed three deeds whereby he disposed of his property to his sisters. One of said deeds purporting to bear date the 25th May, 1853, another the 28th June, 1853, whereby he assigned all his estate in the lands, and all his household furniture and goods, to his sister, M. Donoghoe, by way of mortgage, and that these deeds were in the possession of M. Donoghoe. The petitioner submitted that these deeds were only a valid security for so much money as was actually due by the said respondent to the said Mary Donoghoe, and that except for such amount that they were void against the petitioner. The respondent, Mary Donoghoe, filed an answering affidavit, in which she admitted that the respondent, J. M. Donoghoe, had, by a deed bearing date the 25th May, 1853, conveyed to her for valuable consideration the lands of Dysart, being part of his (respondent's) lands, and that the deed was in her possession. And further she admitted—"That by an account stated and settled between said J. M. Donoghoe and the respondent, bearing date the 28th June, 1853, to which respondent refers, it was found that the advances made by respondent to or for the use of the said J. M. Donoghoe, up to the said last-mentioned day, amounted to the sum of £3609 12s. 6d." "And accordingly by deed bearing date the 28th June, 1853, made between the said J. M. Donoghoe, of the one part, and the respondent of the other part;" and the affidavit then set out the purport of the deed which was to mortgage all his interest in the remainder of the lands, and in certain personal ef-

fects, to the said Mary Donoghoe, with a provision for redemption, but did not state that the deed was in deponent's possession, nor did not refer to it. The affidavit of Mary Donoghoe further stated that the stock had been sold to her for the sum of £765 8s. 6d., part of it "in payment of a sum of £200 and interest due by the said J. M. Donoghoe to respondent upon his I O U, dated 17th October, 1852, as by said receipts and I O U, and said accounts, and valuation of said stock settled and signed by the said J. M. Donoghoe on the 22nd January, 1853, to which respondent refers, may appear." The petitioner's solicitor then called on the respondent by notice, upon his being paid the scrivinery fees, to furnish copies, and to produce the originals for inspection of the following documents:—The deed of 28th June, 1853; the account stated and settled of the same date; the I O U and accounts; and the valuation of the stock, and some other deeds. The respondents by notice declined to produce the documents mentioned, but consented to produce the others.

H. Smythe now moved, pursuant to notice, for an inspection of the documents referred to in respondent's affidavit; and in case the court should not be of opinion that the petitioner was entitled to the production of the mortgage of the 28th of June, 1853, by reason of the respondent's affidavit not distinctly admitting it to be in her custody, then for liberty to amend the petition by adding a statement at foot, that the said mortgage was in the possession or procurement of the said Mary Donoghoe, and to annex an interrogatory whether the said mortgage was in the possession or procurement of the said Mary Donoghoe; and submitted that petitioner was entitled to the production of these documents upon the authority of *Phelan v. Hamilton*, (9 I. E. Rep. 264.) That case was this: the plaintiff sought a renewal of a lease not in his possession, defendant's answer denied his right to the renewal, inasmuch as he was convinced from documents in his possession, to which he will hereafter more particularly refer, that no such lease was executed; that it was manifest from a certain deed and schedule that the renewal, if obtained, was fraudulent. The defendant was held to have referred to the deed and schedule in such a way as to make it part of *his answer*, and was bound to produce it. This was a case before your Lordship, and in the judgment your Lordship observed that in the case of *Hardman v. Ellames*, Sir L. Shadwell, says: "It appears, upon a review of the cases, to be perfectly settled that when a defendant in his answer states shortly and partially, and for greater caution refers to the document; in such case the court will order the document to be produced. It was said that the document ought not to be produced, because it *only refers to the defendant's title*; but the answer to this is, that it may by possibility do something more than merely manifest the defendant's title. It would be a strange thing to say that defendant should, at the hearing, have the advantage of other parts of the deed." In the case of *Adams v. Fisher*, (3 My. & Cr. 526,) Lord Cottenham thus observes on the foregoing: "It was certainly no new decision. I was much surprised to hear any one treat it as such. When

a party has thought proper to put his defence upon a particular document, he cannot be permitted to make any representation of it, however unfounded. The plaintiff is entitled to see whether the defendant has rightly stated it. The principle is, that a defendant shall not avail himself of that mode of concealing his defence."

Drury opposed the motion on two grounds.—First, the security is a mortgage, and it has always been the rule of the court with regard to mortgages, that the mortgagee is not bound to produce his deed until the mortgagor appears with the money ready to pay him; and this, even though the mortgagor or his assignee or devisee may be ignorant of the amount of interest payable on the mortgage, and of the rate of interest and all the particulars; *Postlethwaite v. Blythe*, (2 Swan. 256); *Brown v. Lockhart*, (10 Sim. 425); *Greenwood v. Rothwell*, (7 Beav. 291); *Crisp v. Platel*, (8 Beav. 62); *Jones v. Jones*, (Kay's Rep. Ap. 6.) This rule holds even though the validity of the mortgage deed should be questioned, as in the case of *Crisp v. Platel*. The second ground on which this motion is resisted is, that the plaintiff has not, as is necessary, shown that he had an interest in the document or some right to it; he must, at least, show that he has such an interest in it as to make it necessary for his case. In the case of *The Attorney General v. Thompson*, (8 Hare, 112,) the question was very fully discussed, and the Vice-Chancellor there says: "The plaintiff must show that he has an interest in the document, the production of which he seeks. What is the meaning of the term interest thus applied? it is not interest in the nature of property. If the right were thus limited, the production would be very rarely obtained. It is sufficient that he be so far interested in the document as to stand in need of its production for the legitimate purposes of the litigation in which he is engaged with the defendant for the purposes of the suit. He must show that it is or may be evidence which may prove or lead to or assist in proving his case at the hearing of the cause, and this interest he must make out from the answer of the defendant. It must be shown that the document is of a character that it will or may give a discovery of the case or a portion of the case, without proof of which the plaintiff cannot have a decree." [He cited *Coombe v. The Corporation of London*, (1 Y. & C. 650); *Swift v. M'Tieran*, (13 Ir. E. Rep. 119.)

H. Smythe in reply.—Our interest in the document is, to ascertain how much was due to Mary Donoghoe. We offer evidence of fraud, as these large interests were transferred without consideration, and the rule does not apply where the mortgagor imputes fraud in the deeds. *Welford v. Stainthorpe*, (2 Beav. 587.)

MASTER OF THE ROLLS.—The case of *Hardman v. Ellames* is applicable here so far as the account, the production of which is sought; but independent of the rule, a party is bound to produce any document which applies to both the plaintiff's and defendant's case; but then the mortgagee is not called on to produce the document which is her title, until the mortgagor comes with the money ready to pay him. I cannot make any order as to

the mortgage, for as to it he has no right. If nothing appeared as to the account in the affidavit, it might have been withheld, but it has been mentioned in such a way by the defendant that the plaintiff has a right to see it.

The following order was made:

Nov. 4—Let the respondent, Mary Donoghoe, produce for the inspection of the petitioner or his solicitor, on receiving forty-eight hours' notice in writing for that purpose, the account settled between John Mitchell Donoghoe and said Mary Donoghoe, bearing date the 28th June, 1853, and let the said petitioner or his solicitor be allowed to take a copy of said documents, and let the solicitor for the respondent furnish such copy to the petitioner's solicitor on payment of the usual scrivenery fees, and let the costs of the motion be costs in the cause.

WOODHOUSE v. MOLONY.—*Nov. 13.*

Supplemental Petition—Setting aside Deed.

The Master, on a cause petition under the 15th section, appointed a receiver over certain lands for the payment of a judgment debt. A third person claimed to be entitled to the rents under a lease made subsequent to the judgment. The court gave leave to file a supplemental petition to set aside the lease, but offered no opinion as to whether it was the proper course.

A petition had been filed in this matter under the 15th section of the Court of Chancery Regulation Act, for the purpose of raising the amount due to the petitioner on foot of several judgments of the years 1842, 1843, and 1847, obtained against the respondent Croasdale Molony, the elder. The matter of the petition had been referred by a decretal order to Master Henn, who made an order referring it to Master Lyle, the Receiver Master, to appoint a receiver over the lands of Kilnacromly. By an order of June, 1853, a receiver was duly appointed over the lands. When the receiver proceeded to serve the usual notices on the tenants, he was prevented from doing so and from receiving the rents, by Mr. Croasdale Molony, who served notices on the tenants, cautioning them not to pay the rent and served a notice on the receiver's solicitor, claiming to be the immediate tenant of the lands under an indenture of the 1st of June, 1847, for the term of thirty-one years, and cautioning him against taking any proceedings against the sub-tenants of the lands, as they did not hold the same from the respondent, over whose interest the receiver had been appointed. A summons was then issued to re-settle the rental, when the lease of 1847 was produced, and the Master said he had no jurisdiction, and that the rental should be settled at one shilling a-year, being the rent reserved in said lease of 1847, though the value of the lands was £100 a-year, and there was no other fund out of which to pay the said judgments.

Darley now applied for liberty to file a supplemental petition. The lease which is set up was made subsequent to the date of the judgments. *Stamer v. Nesbitt*, (3 J. & L. 447.)

MASTER OF THE ROLLS.—There is likely to be some difficulty in the course you are adopting, for you will require to have your supplemental petition heard before the Lord Chancellor, whereas the original petition was before the Master under the 15th section; thus you may have half the cause heard before the Lord Chancellor and the other half of it before the Master. It differs in this respect from a supplemental bill; however, I will give you leave to file the supplemental petition, but offer no opinion as to whether it is the proper course to adopt.

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1854.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

LOCKWOOD v. LINDSEY AND ANOTHER.—Nov. 6.

Practice—Security for Costs.

In an application for security for costs on the part of one of several defendants, the statement in his affidavit that he had a good and valid defence on the merits, without referring to his co-defendants, was held to be sufficient to enable him to succeed upon the motion.

J. A. Phillips, on behalf of one of the defendants, moved that the plaintiff should give security for costs. The affidavit stated "that the defendant is advised and believes he has a good and valid defence on the merits."

D. C. Heron, for the plaintiff, submitted that the affidavit did not come within the ruling of Mr. Justice Crampton in *Spencer v. Campion*, (3 Ir. C. L. R. 231,) and the court ought to abide strictly by that ruling. Besides, the affidavit was made by only one defendant, and did not aver a defence on the merits to the action by all. [*Lefroy, C. J.*—Your argument amounts to this, that a man ought not to defend himself because his opponent has a remedy against another party.] The decision in *Spencer v. Campion* had been overruled by the Court of Exchequer in *Pordage v. Carter*, (6 Ir. Jur. 236,) and in the Court of Common Pleas *Spencer v. Campion*, (2 Ir. C. L. R. 231, n.) The affidavit of merits had not been served with the preliminary twenty-four hours' notice.

PER CURIAM*.—This court will abide by the ruling in *Spencer v. Campion*. The affidavit is sufficient. No costs on the motion, as the affidavit of merits was not served with the preliminary notice.

Order granted without costs.

BARRETT v. WILSON.—Nov. 8.

Practice—Amendment—Variance between original writ and copy—16 & 17 Vic. c. 118.

D. C. Heron moved for liberty to amend the copy of the writ served, by inserting the words "Queen's Bench," at the head thereof, the same having been improperly inserted at the foot. The original as filed was correct; and the court had now, for the first time, under the provisions of the Common Law Procedure Act, section 16, jurisdiction to amend the copy. The defendant's attorney had served no-

tice cautioning the plaintiff against marking judgment. The time for pleading had expired.

PER CURIAM*.—Take the order. Let the defendant have four days to plead from the time of the service of this order upon his attorney.

M'NAMARA v. HIGGINS AND OTHERS.—Nov. 7, 10.
Easement—Custom—Prescription—Pleading.

To an action of trespass for breaking and entering plaintiff's close, and carrying away the soil therefrom, the defendants pleaded with regard to breaking and entering, &c. so much of the lands as lay between high and low water mark, that the lands were the soil and freehold of the Queen, and not of the plaintiff; that the defendants were the occupiers of land in the borough of C, in the county of C, and as such occupiers they and all previous occupiers from time to time, whereof the memory of man was not to the contrary, had of right used to enjoy the power, liberty, privilege, and easement as often as they pleased, for the purpose of taking sand for manure, to enter into so much of said lands as lie between high and low water mark of ordinary tides, being the soil and freehold of the Queen, and to dig for and raise the soil, and carry same away for the purpose of manure, and that the supposed trespass was committed in the exercise of the supposed right. Held, on general demurrer, that the plea was bad, inasmuch as the right contended for was not merely an easement, but a profit a prendre, and could only be claimed in the lands of another by prescription, and not by custom, according to the principle established in Gateward's case, (6 Rep. 53, b.)

Held also, that, even assuming a distinction in this respect between lands vested in the Crown, pro bono publico, and those of the subject, a custom for the inhabitants of maritime districts to have an exclusive right to the use of the sea shore, would be unreasonable.

THIS was an action of trespass. The writ of summons and plaint alleged that the defendants on the 21st of December, 1853, and on divers other days subsequent thereto, broke and entered certain lands of the plaintiff, called the sea shore of Ballyellery, extending to low water mark at ordinary tides, and took and carried away off the said lands large quantities of the sand and soil thereof, &c. The defendants, O'Connor and Mullins, pleaded, fifthly, as to breaking and entering so much of the lands in question as lies between the high and low water mark, and taking sand and soil therefrom, that the said last mentioned part of said lands was before, and at the said several times when, and so forth, and now is the soil and freehold of Her Majesty the Queen, and not of the said plaintiff, and that before and at the said several times when, and so forth, they, the said defendants, were occupiers of land in the Barony of Corcamroe, and County of Clare, and that the said defendants as such occupiers, they and all of them, who from time to time have been before them, and who were now occupiers of land in said barony from time to time, whereof the memory of man is not to the contrary,

* Moore, J., was absent.

* Perrin, J., *solus*.

have had and used, and have been accustomed to have had and used, and the defendants as such occupiers at the several times when, and so forth, of right have used and enjoyed, and of right ought to use and enjoy the power, liberty, privilege, benefit and easement as often as they pleased, for the purpose of taking sand for manure, to enter into and upon so much of the said lands in the said plaint mentioned as lies between high and low water mark of ordinary tides, the soil and freehold as aforesaid of her said Majesty the Queen, and then and there to dig for and raise the soil and sand thereof, and take and carry away the same for the purpose of manure, and that in use and exercise of the said right and privilege, they, the said defendants, did break and enter the part of the said lands in said plaint mentioned that lies between high and low water mark of ordinary tides, and did take and carry away the soil and sand thereof for the purpose of manure. To this the plaintiff demurred, on the grounds that the power to enjoy the easement in question should have been pleaded by way of prescription, and not as an easement: and because the defendants in the defence treated and relied upon the said alleged power and benefit as an easement over the said lands, whereas the same should be pleaded as a right to a profit *a prender* out of said lands.

R. Griffin, (with whom was *Brereton, Q. C.*) in support of the demurrer.—The question which is raised by the demurrer to this defence is, whether the defendants have a right to allege a local custom to take a profit *a prender* in the lands of another, instead of pleading the same by way of prescription in a *que* estate. The leading authority on this subject is *Gateward's case*, (6 Rep. 59, *b.*) where it was held that there cannot be a custom for inhabitants, as such, to have a profit *a prender* in the soil of another; but there may be a custom for every inhabitant to have a discharge in his own land or an easement in the land of another. In *Hall on the Sea Shore* it is said, (p. 237,) "It is said in *Vin. Ab. tit. Prescription, A.* that 'inhabitants, unless incorporated, cannot prescribe to have any profit in the soil of another, but in matters of easements only, as in a way, &c. but not in matters of interest.'" *Cro. Jac.* 152, and *Gateward's case* are cited. *Grimstead v. Marlowe*, (4 T. R. 717,) followed the decision in *Gateward's case*. There it was held that a custom for every inhabitant occupying an ancient messuage within the parish of Leatherhead to have common of pasturage for a certain part of the year was bad. Lord Kenyon, C. J. says, "There may be a custom for an easement as a right of way, in *alieno solo*; but a profit *a prender*, the party must prescribe as in *que* estate." Ashurst, J.—"I have always understood it to be clear that a defendant cannot plead such a right, but that he must prescribe in a *que* estate for a profit *a prender*," and Buller, J., cited a note of *Hardy v. Hollyday*, which he said was Lord Chief Justice King's manuscript to the same effect. Mr. Hall observes with reference to these cases, "It would seem, therefore, that every one who would claim a local custom or usage to dig marl or sand, &c. in inland marshes must (on ac-

count of its being a profit *a prender*,) plead in the *que* estate, i. e. in respect of his interest in the tenement which he holds, which prescription, however, must be laid in the person of him who is seized in *fee simple*, and not in the person of him who holds any lesser interest; who is not in the eye of the law owner of the estate. But tenant for life, for years, or at will, may prescribe in his own estate for the reasons given in *Gateward's case*." That is in the case of a copyholder, it is allowed for necessity's sake; for the lord cannot claim common in his own soil, and therefore of necessity such custom ought to be alleged. In *Mellor v. Spateman*, (1 Saun. 340, *b.*, *n.* 3,) it is said, "It cannot be claimed by custom that every tenant, inhabitant, or occupier of any messuage within the borough has been used to have common; and one chief objection against claiming such a right by custom is, that it cannot be released, whereas, if it be annexed to the fee, it may." The right which is here claimed by the defendants of digging and carrying away sand out of the soil of the Crown, is not an easement, but is a profit *a prender*. A similar custom was alleged on the part of the defendant in *Bludd v. Tregonning*, (3 Ad. & El. 554,) namely, for the occupiers of certain lands to enter a close at all seasonable times, and to take therefrom quantities of sea sand as had drifted, for the purpose of manuring their lands, and the custom, as alleged, was held to be too vague, and that it also was void on the ground that the sand upon it drifted became parcel of the adjoining land, and thus a profit in *alieno solo* was claimed. It cannot be alleged that the defendants were exercising a common law right, as *Howe v. Starvell*, (Al. & Nap. 348,) decides that the public have not at common law a general right of entering on the sea shore for the purpose of taking sea weed; and the claim to dig for sand would rest upon the same foundation. The other side will probably rely upon the ancient statute, 7 Jac. 1, cap. 18, which is an Act solely applicable to the Counties of Devon and Cornwall. That, after reciting that "the seasand by long trial and experience hath been found to be very profitable for the bettering of land, and especially for the increase of corn and tillage within the Counties of Devon and Cornwall, where the most part of the inhabitants have not used any other matter for the bettering of their arable grounds and pastures; notwithstanding, divers having lands adjoining to the sea coast there, have of late interrupted the *bargemen* and such others as have used of their free wills and pleasures to fetch the said sand, to take the same under the full sea-mark, as they have hitherto used to do." It then confirms the rights of "all persons whatsoever resident and dwelling within the said Counties of Devon and Cornwall, to fetch and take the sea sand at all places under the full sea mark, &c. Lord Hale in his treatise *De Jure Maris*, p. 26, observes: that it appeared by this statute that the inhabitants could not have had the sea sand previously. In *Bagott v. Orr*, (2 Bos. and Pul. 479,) it was held that *prima facie* every subject has a right to take fish upon the sea shore between high and low water mark; but the court observed that "as no authority had been cited to support the plaintiff's claim to take shells,

they should pause before they established a general right of that kind."

T. R. Henn and Sir C. O'Loghlen, Q. C. contra. The defence raised by this plea is not, as contended for at the other side, a claim to take a profit *a prender in alieno solo*, which we admit must be prescribed for in a *que* estate; but it is founded upon the immemorial customary right, which we contend the inhabitants of the barony enjoy, of making use of the sand of the sea shore, the soil of which is vested in the Crown as a royal trustee. *Res habet proprietatem sed populus usum necessariam.* We do not deny any proposition stated at the opposite side, except the construction of the statute of Jac. 1, which clearly recognised the antecedent right of the subjects, inhabiting the maritime Counties of Devon and Cornwall, to make use of the sand of the sea shore, and confirmed that right. This common law right, so far as relates to the fish on the sea shore, was recognised in *Bagott v. Orr*. In *Howe v. Stawell* the court, referring to that case, gave their opinion that the liberty of taking sea weed may in many situations, and under many circumstances, be very reasonable and beneficial, and may be established by local custom, but can only be legally claimed for all the things, subjects, or any portion of them, by virtue of such local custom, and not by reason of the common law." The case here differs altogether from one where a party seeks to allege or sustain to take a profit *a prender* on the estate of a private individual, and the authorities cited to establish the latter doctrine have no bearing upon this. The right which we claim is one which is restricted to the inhabitants of maritime districts, as it would be against reason that the inhabitants of midland districts should share this privilege. *Blundell v. Catterall*, (5 B. & A. 268,) shows that this right must be claimed by virtue of a particular custom and not at common law. In that case it was held that the subject had no common law right of bathing. This right is somewhat analogous to that of a tenant, who has a right to take a profit in his lord's waste, and who can do so by custom and without prescribing in a *que* estate. *Tyson v. Smith*, (9 Ad. & El. 406.) In the case of *Oxenden v. Palmer*, (2 B. & Ad. 236,) which was an action brought to try the validity of the custom of taking shingles from the beach for the repair of a highway, though it was a collateral point which was decided, no question was raised with respect to the validity of the custom. The point decided in *Bluett v. Tregonning* really amounted to this, that such a custom as the present could not be claimed above high water mark, which is not now disputed.

Brereton in reply.—If this claim is to be supported by custom, that custom should be a reasonable one, and its use should have been uninterrupted. Now, the Statute of Jac. 1, was not only an enacting law, but it recognized the fact of an interruption; which, without its protection, would have gone on. Lord Denman in *Bluett v. Tregonning*, said with regard to the nature of the custom claimed, "The sand, the article claimed, is a part of the soil and inseparable from it." So the inhabitants here might remove the whole of the sea sand and leave a space for the sea to encroach on the adjoining lands.

Littledale, J., also said in the case of *Bluett v. Tregonning*: "The right as here claimed, is, at anyrate, attended with great uncertainty. It would apply to many places, which are not separated from the sea shore by hedges, and where all the soil has been thrown up from the sea shore by hedges; and in such cases the custom, as alleged, might go the length of taking the whole away." This plea has been framed for the purpose of doing away with the necessity of setting up a prescription. The claim here is not one, as in *Blundell v. Catterall*, which was put forward on behalf of the whole body of the public. That would not suit the purpose of the defendant. As to the argument that this is analogous to the case of the claimants in *Tyson v. Smith*, (9 Ad. & El. 425); it would appear by the judgment of Tindal, C. J., that there was one other case besides that of copyholders, in which a similar exception was made, and that was in the case of the right of certain victuallers to erect booths in a fair on the lands of another, for which a custom might be pleaded. Tindal, C. J., in giving judgment, said, "The distinction between that custom and others to which reference was made is, that it gives a certain profit to the owner of the soil for the use of the same, and whether that is a full compensation or not is not the question." "At the early time at which this custom originated, it may have been a profit to the lord, and, at all events, it may have been an object to him with respect to the profits of his fair to give encouragement to those who would erect booths and stalls for the entertainment of strangers coming to his fair." In *Rogers v. Brenton*, (10 Q. B. 60,) Lord Denman, C. J., after alluding to the doctrine which was affirmed in *Bluett v. Tregonning*, and stating that that "which is matter of interest, as the taking of profit from the soil, must for its existence have some person in whom it is; and a flux body, which has no entirety at permanence, cannot take that interest which, by the supposition, is immemorial and permanent, because from its nature it cannot prescribe for any thing. Necessity, however, will control this; the case of common exemplifies both the rule and the exception: in itself it is an interest; it is the taking a profit from the soil; it is properly matter of prescription; if the copyholders of one common will claim it in the waste of another, they must, because they can do so by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate, has such a permanence as enables him to prescribe; but if they claim it in *his* wastes, they cannot prescribe in their own names and rights, by reason of the want of permanence, nor can they in their lord's name, for he cannot claim common in his own land; they are, therefore, from necessity allowed to claim it by custom." He then proceeds to state that that necessity grows out of the original compact, whereby they received a right of common on their lord's waste, as a reward for services as tenants. Now, can it be said in this case that there was any such original compact between the Crown and the occupiers of land in the Barony of Corcamroe? There is no possible analogy between the cases.

LEFROY, C. J.—The defence which has been

pleaded in this case has been framed with much ingenuity, but we are not disposed to make it a precedent. If we look to the nature of the custom which has been contended for, in addition to the other grounds relied on, the defence would be on that ground open to objection, if it were necessary to go into that part of the case; but this case lies in a very narrow compass. It has been attempted to support the plea, by taking a distinction between the soil of a private person and that of the Crown. Now, with respect to the claim of a profit in the soil of another, it has been decided in *Gateward's case*, that such cannot be supported by reason of a custom, and that case which has been recognized at various intervals since as undoubted law, negatives to the full extent the right of the occupier of adjoining lands to such easements by custom. Lord Kenyon, than whom there can be no higher authority, recognized that case in *Grimstead v. Marlowe*, (4 T. R. 717,) and during the whole of the subsequent period not only has that case not been overruled, but never even called in question. Then we find the opinion of Lord Denman expressed with the most admirable accuracy, stating the exception to this general rule, and the reason of that exception: namely, in the instance of copyholders, where, as between landlord and tenant, it is a matter of necessity that such a claim should be alleged by custom. There is, however, no question raised here that a claim by custom of profit in *alieno solo* is bad; but a distinction has been attempted to be taken, and it has been contended that the rule of *Gateward's case*, does not apply to the property of the Crown. It might be enough to say that no authority whatever has been cited in support of that distinction; but is it possible to suggest a reasonable distinction with regard to the property vested in the Crown? The general rule as between the Crown and subject is, that the preference should be given in favour of the Crown, and not in favour of the subject; and that, not to put the Crown in competition with the subject, but for the good of all. Hence, this prerogative is conceded for the good of the community in preference to that of the individual. Now, if the Crown be a royal trustee of the sea shore, for the purpose of giving to the whole of the subjects of the realm the benefit of taking sea sand from thence, how can it be held to be for the good of *all* to abridge that right and to reduce it by custom in favour of a few? Why should the inhabitants of all the neighbouring districts be deprived of it, and the right to take it be confined by custom to a few? Therefore, the very reason of the thing is agreeable to the entire absence of authority, as to the existence of any such distinction with respect to the soil vested in the Crown. The several cases which have been referred to in argument, and which have been reviewed with so much accuracy and ability by the learned counsel who has just concluded, show that there is no ground whatever to support such a distinction. Whatever is established by these cases is perfectly consistent with the rule in *Gateward's case*, and whatever apparent exception there may be engrafted upon that rule, with respect to a profit in *alieno solo*, is founded on necessity. Upon the whole, therefore, we say that there is no reason for allowing this novel distinction

that there is no precedent for it, and that the reason of the thing is against it. With respect to the argument attempted to be deduced from the Statute of Jac. 1, that is literally *felo de se*, inasmuch as that Statute is an enacting law, and is utterly at variance with the supposition that it is a recognition of any such custom. If it recognize anything, it is a common law right, but the right here contended for is not at common law, but by virtue of a custom limited to a few. We are, therefore, of opinion that this demurrer must be allowed.

Judgment for plaintiff.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

BERGIN v. WRAPPER.—Nov. 23.

Pleading—Replication—16 & 17 Vic. c. 113.

A replication to a plea of set-off, amounting to the general issue, is bad.

J. A. Phillips moved to set aside a replication to a plea of set-off as amounting to the general issue. The replication was in these terms: "and the said plaintiff as to the plea of the defendant says, that he was not nor is he indebted to the defendant in manner and form as above therein pleaded." This is in effect a replication of *nil debet*, and bad under the 69th section of 16 & 17 Vic. c. 113.

Garvey contra.—The 69th section of the Common Law Procedure Act abolishes the plea of the general issue as a defence to the plaint, but is silent with respect to the replication, and though this would be bad as a defence to the plaint, amounting to the general issue, it is good as a replication, as the prohibition contained in the Act does not extend to replications.

Phillips in reply, referred to section 49, which enacted that every replication and subsequent pleading should be pleaded in a similar manner to that prescribed in respect to the defence.

MONAHAN, C. J.—A case similar to the present came before me in chamber to settle the issues, and I adjourned it and consulted with the judges on the point, who all agreed that a replication amounting to the general issue was bad.

Motion granted with liberty to amend.

SAVAGE v. KELLY.—Nov. 25.

Privilege from Arrest—Detainer.

A party coming to the petty sessions court, in pursuance of his recognizance to answer a criminal charge, is privileged from arrest.

It appeared that the defendant had been arrested under a civil bill decree, and being charged with a rescue from that custody, a warrant was issued for his arrest, under which he was brought up and bound in his own recognizance to appear at the ensuing petty sessions. On his way to the petty sessions court to appear in discharge of his recognizance, he was arrested by the coroner under a *ca. sa.* in this cause, who accompanied him to the petty sessions court and kept him in custody until the case there was disposed of. The coroner then

lodged him in gaol. A detainer was subsequently lodged against him at the suit of the civil bill creditor.

Bagot in support of the motion for his discharge. The defendant is entitled to be discharged as privileged in the same manner as a witness or suitor. *Callan v. Sherry*, (2 Glasc. 202); *Kelly v. Barnwall*, (Cook & Alc. 94); *Sharplin v. Hunter*, (6 D. P. C. 622.) A party out on bail, on a criminal charge, is differently circumstanced from a party in custody on a similar charge; and a party out on bail coming forward to answer his recognizance and aid the ends of justice, is privileged from arrest, per Pennefather, B., in *Buckmaster v. Cox*, (2 I. L. Rep. 101.) The cases of *Hare v. Hyde*, (16 Q. B. 394,) and *Buckmaster v. Cox* do not apply; in the former case the party had been acquitted and was remaining in the court as a spectator, and in the latter case was in actual custody and no charge against him, and they could not therefore in any way aid or defeat the ends of justice. With respect to the detainer, he must also be discharged from it, as its legality depended upon the legality of the previous arrest. [He cited *Ex parte Hawkins*, (4 Ves. 691); *Barrett v. Price*, (2 Moore, 634); *Brabazon v. Teynham*, (5 Ir. Jur. 74.)

Blakeney, contra, contended that the defendant was not entitled to be discharged, and that no person under a criminal charge had any privilege. This rule had been held in *Jacobs v. Jacobs*, (3 Dowl. P. C. 675); *Anonymous*, (1 Dowl. P. C.); all which cases, together with the Irish cases, have been lately discussed before the Court of Queen's Bench in England in the case of *Hare v. Hyde*, (16 Q. B. R. 394,) where Lord Campbell, in his judgment, expressly dissented from the judgment of the Irish Court of Queen's Bench in the case of *Callan v. Sherry*. [*Torrens, J.*—These cases only show that where a person was in custody he had no privilege from a detainer or arrest under civil process; in this case it appears Mr. Kelly was going to attend the court under a recognizance to do so.] All the cases only go to show the party was either in custody, or returning; but in the case of *Johnston v. M'Donnell*, (5 Ir. L. R. 594,) the Irish Court of Queen's Bench refused to discharge the defendant, who was returning from a police office, where he had attended pursuant to a summons; and that if the court would not protect a party *redendo*, it should not protect him *eundo*, and that is the present case. [He also cited *Buckmaster v. Cox*, (2 I. L. R. 101.)]

Cur. adv. vult.

Nov. 27.—PER CURIAM.—In this case we are of opinion that the party must be discharged from custody under the execution and civil bill detainer. He was going to perform a duty in aid of the law, and in such case must be protected. If there be any other detainers save that on the civil bill, we shall leave him to apply to the court from which the process issues.

Rule accordingly.

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

THE RIGHT HON. SIDNEY HERBERT v. KENNAN.
Nov. 17.

Ejectment for non-payment of rent—Eviction by title paramount—Condition—"Thing demised"—Re-entry—Right of way—Easement—County surveyor—Road.

Certain premises had been demised by lease to the defendant for building purposes, and at the time of the execution of the lease there existed a public passage through the lands so demised unknown to the lessee. The latter proceeded to build upon this public passage (having been informed by the landlord's agent that he might do so), but the county surveyor interposed, and obtained and executed an order made by the Justices of the Peace, to remove the erections made by the defendant, and to preserve the passage open for the use of the public. An action of ejectment for non-payment of rent having been brought by the plaintiff to recover possession of the demised premises, and it being contended, on behalf of the defendant, that the condition of re-entry for non-payment of the rent reserved had been defeated by eviction of a portion of the demised premises by title paramount; Held, that the occupation of this portion of the demiser' premises by the county surveyor amounted merely to the assertion of a right of easement on behalf of the public, and did not constitute an eviction of any part of the premises by title paramount.

Where a public road is closed up by presentment, the possession of the soil reverts to the owner of the land, discharged of the easement, and no proceedings at law are necessary for the purpose of re-vesting the right.

THIS was an action of ejectment for non-payment of rent of certain premises in Irishtown, in the County of Dublin. The defendant pleaded, that the action had been brought by virtue of an alleged condition of re-entry for non-payment of rent, contained in a lease made in the year 1847 by the plaintiff to the defendant; that the defendant entered and became possessed of the premises under the lease in question, and while he was so possessed, and before the bringing of this action, or before any rent had become due out of the premises, that the defendant had been evicted by title paramount from a considerable portion of the premises, in this manner: that one R. Hampton, a district county surveyor for the County of Dublin, and for and in behalf of the public, and by due warrant of law, had lawfully entered upon the said premises, and expelled the defendant from a portion of them, and that thereby the condition of re-entry had been defeated. Two issues had been directed to be tried, viz.: whether the county surveyor, in assertion of a public right, had entered upon the premises, and evicted the defendant from a part of them, and when; secondly, whether the alleged amount of rent, or any portion of it was due from the defendant to the plaintiff. The case was tried

before the Chief Baron at the Nisi Prius Sittings after last Hilary Term, and it appeared upon the evidence that the plaintiff had demised the premises in question to the defendant for building ground; that there was a passage leading through the demised premises, and that the defendant had been told by the plaintiff's agent that he might close it, and accordingly that he proceeded to build a wall across it; that the county surveyor interfered, and eventually procured an order from the Justices of the Peace, under which he proceeded to pull down the wall built by the defendant, and that the passage has since continued a public road. The learned judge then directed the jury to find for the defendant on the first issue; and counsel for the plaintiff objected, that no eviction by the act of the plaintiff or his agent, or any one in privity with him, had taken place, which could defeat the condition of re-entry in the lease, and that an eviction of part of the premises, even if proved, would only entitle the defendant to an apportionment of the rent, and would not furnish him with any valid ground of defence in an action of ejectment; contending that the making of a public road through a man's property by presentment would not affect the owner's estate in the lands, but only gives an easement of passage over the lands to the public, and for which compensation might have been obtained under the Grand Jury Act. The jury accordingly found a verdict for the defendant on the first issue; and upon the second, that the sum of £210 was due to the plaintiff by the defendant for rent out of the demised premises; but his Lordship reserved leave to the plaintiff to apply to the court above that the verdict so found for the defendant should be changed into a verdict for the plaintiff. A conditional order having been obtained for that purpose,

Whiteside, Q.C., showed cause.—The question in this case is, whether an ejectment for nonpayment of rent can be sustained where there has been an eviction of portion of the premises by title paramount; the effect of such a proceeding being to defeat the condition of re entry contained in the lease. It is not contended that the plaintiff may not have his remedy to recover rent in such cases; but whenever there is an apportionment of the rent as in the present case, the condition of re-entry not being apportionable, ceases. In *Swift v. Allanson*, (Batty, 326, n.) which was an action of ejectment for non-payment of rent, the lessor of the plaintiff proved a letting of the premises sought to be evicted at a lump rent; and the defendant proved an eviction of part by title paramount, and it was held that the rent being thereby apportioned, the Ejectment Statutes did not apply. Bushe, C. J., in delivering judgment says: "How could a landlord, in case of judgment by default, swear to any specific sum as a year's rent? or conscientiously swear to any precise sum as being due; or if a landlord claimed too much, how could the court set him right? This shows that the Legislature could never have intended that the statute should apply to such a case?" [*Pennefather, B.*—I have always understood that where the premises have been let at a lump rent, and there has been an eviction of part by title paramount, the land-

lord's remedy was by an action of debt, or by replevin, and that the Ejectment Statutes did not apply.] In *Delap v. Leonard*, (2 Jebb. & Symes, 700,) the tenant held under a lease, and by parol agreement between the parties, the landlord received back a portion of the demised premises, making an abatement in the rent; and it was held that the right of re-entry for non-payment of rent being gone, the case did not come within the Ejectment Statutes. The same principle is recognized in the old authorities—*Moodie v. Gurnance*, (3 Bulstr. 153.) The only remaining question therefore is, whether or not there has been an eviction by title paramount in this case. It will be urged by the other side, that the occupation of the land by the county surveyor was merely to establish the public claim to a right of way over the lands, and that this is a mere easement, the property in the soil continuing in the owner in fee; but in the first place, this plot of ground was in the possession of the public long before the defendant obtained his lease of it: and therefore, he could not, as in ordinary cases, be awarded compensation for his loss of possession; and secondly, it was let to him specifically for building ground; as such he is entitled to hold it, and an easement of way in such ground amounts to a total eviction. Compensation was, doubtless, awarded to the plaintiff when the ground was originally occupied for the use of the public, and he had therefore no right to demise it for building—6 & 7 W. 4, c. 116, s. 134.

Fitagibbon, Q. C. (with him *Woodroffe*), contra. It has not even been proved in the present case that there was a regular presentment to establish the public right. [*Greene, B.*—I think that Lord Mansfield states it to be the law in such cases, that the subject is only entitled to an easement over the land.] Such is the law; and in building-leases of land lying at either side of a public road, it is usual to demise one half of the road itself with each adjacent lot. No case has been cited establishing this, that if a man lease lands, and a third person succeed in proving an easement to exist over them, the right of ejectment under the lease is thereby defeated. It is not denied that the public has a right of way over these lands, but the defendant is not thereby removed from the possession of them, he having a right of way as well as the rest of her Majesty's subjects. As to the right of property in the lands, that still continues in the plaintiff, and in case this road should be closed up hereafter by presentment, as frequently occurs, he will be reinstated in possession as fully as before the easement was created. [*Pennefather, B.*—The soil and minerals remain in the inheritor.] As to the first issue found by the jury, viz. that the defendant was evicted by title paramount; it is submitted that such was a question of law, and therefore not competent to be decided by a jury. [*Pennefather, B.*—It is open to you to argue that matter, only admitting that the county surveyor took possession in the regular way.] The sole question is, whether or not the condition of re-entry is gone; it is admitted that the condition is single, and cannot be apportioned by act of the parties, although it may in some cases by act of law; and therefore any

hardship that may exist, either with regard to the landlord or tenant, is not to be taken into account, this being a pure question of law. Eviction by title paramount means, by a title paramount to both parties. *Neale v. Mackenzie*, (1 M. & W. 747,) and the question therefore is, whether or not in the present case, the county surveyor, or the public in general, could sustain an ejectment against the present plaintiff. *The Mayor of Poole v. Whitt*, (15 M. & W. 571). The case alluded to by Mr. Baron Greene, is *Goodtitle v. Alker and Elmes*, (1 Burr. 133,) in which Lord Mansfield in giving judgment says, p. 143: "1 Roll. Abr. 392, B. pl. 1. is express, That the king has *nothing but the passage* for himself and his people; but the freehold and all profits belong to the owner of the soil. So do all the trees upon it, and mines under it (which may be extremely valuable.) The owner may carry water in pipes under it. The owner may get his soil discharged of this servitude or easement of a way over it, by a writ of *ad quod damnum*." If the defendant be damaged by the alleged misrepresentation of the plaintiff, he may obtain satisfaction by an action of deceit. If the public was, at the time of the letting of the land, entitled to a right of way over the land, the plaintiff will recover exactly what he demised, viz., the land subject to the easement; and if, on the other hand, the presentment passed subsequent to the making of the lease, the easement being by act of law, the plaintiff should not be thereby damaged.

R. Armstrong, Q. C., in reply.—The passage in question was proved to have existed before the lease was made, and that since the right of way has been enforced, the lands are not worth half their former value. [*Pennefather, B.*—We cannot try this case on the merits.] The case of public roads is analogous; and it is submitted that to all intents and purposes, the county surveyor has a title to the soil. The defence does not merely state that the defendant was evicted by title paramount, but it proceeds to aver the act of expulsion by the county surveyor; and his act is to be regarded as the act of the public. This possession is as valid as that of any person claiming by title paramount. Suppose the entire demised premises consisted of a public road, would the present argument be maintained by the other side, and it is to be remembered that the defendant in this case stipulated for an exclusive possession, which, at the time of the demise, did not exist in the lessor.

*PENNEFATHER, B.**—We are of opinion that the interest of the county surveyor in the piece of ground, of expulsion from which the defendant complains, is not such as to amount to an eviction by title paramount. The soil of this portion of the premises, and the right to all mines and minerals under the surface still remains in the landlord. An easement of way is granted to the public over the surface, and that is all that the county surveyor is entitled to, but this does not amount to a legal estate in the land. We cannot distinguish the present lease from the ordinary case of a demise by the landlord of a road that may happen to pass through a

part of the demised premises. In many cases such a passage is a convenience and benefit to the rest of the lands, but in the present case it appears to be otherwise. The county surveyor has a right to keep such a passage in repair, and the public are entitled to use it as such, but no further. The right to the soil, and the freehold and title, continues in the landlord, and if it should happen that at any time the passage should be closed up, the right to the possession of the surface will then be re-vested in him, and nothing need be done to him as regards the public or the grand jury for the purpose of re-establishing that right. That is a very different case from what is understood by eviction by title paramount. The decisions show that in a case like the present the property in the soil remains in the landlord, subject to an easement. In thus deciding, we do not deprive the tenant of any right he may have of seeking redress for the injury he may have suffered at the hands of his landlord; we merely decide that there has been no eviction by title paramount in the present case, and therefore so far we must see that the finding of the jury be amended, and a verdict entered for the plaintiff in pursuance of the leave reserved.

RICHARDS, B.—I fully concur in the judgment of my brother Pennefather as regards the general law of the case, at the same time that it appears to me to press hardly upon the tenant, as the lease made in the present case appears to have purported to be a demise of building ground, and as it was not apparent, upon inspection of the premises at the time that the tenant entered into possession, that this portion of the ground had been already occupied for the use of the public. I think that the tenant may have been led into a mistake at the time that he took the lease. It would, therefore, be a hardship upon the part of the landlord to insist upon the terms of the lease; and it would be reasonable for him to make an abatement in the amount of the rent reserved. However, that is a matter for the landlord to consider. It is clear that if such be the state of the case, the tenant would be entitled to redress, but we cannot mix up the jurisdiction of two distinct courts so as to afford him that redress.

GREENE, B.—An eviction by title paramount of part of "the thing demised" means an eviction of part of the lands demised, but the matter which we are at present considering is a mere incorporeal hereditament, and therefore does not come before us in the present proceeding. The tenant, if he conceives himself aggrieved, must therefore seek for redress in another court.

Rule accordingly.

CARTER v. DUNNE.

Practice—Substitution of Service—Time for Appearance.

An application for substitution of service of the writ of summons, or that the service had should be deemed sufficient, ought not to be made until the period allowed by the statute for appearance has expired.

Coates, moved that the service of the writ of sum-

* Pigot, C. B. was absent.

mons and plaint in this case, should be deemed sufficient: or that some mode of substitution should be directed. He stated that the process server had made several abortive attempts to effect service. [Greene, B.—When was the attempt at service made?] Only six days ago.

GREENE, B.—This application should not be made until the time for appearance has expired; as, *non constat* that this motion will be necessary. I shall therefore make no order; but counsel shall be at liberty to renew the application, if necessary, when the proper time has expired.

No rule.

SEYMOUR v. A. PATERSON (WIDOW) AND
OTHERS.—Nov. 18.

Practice—Appearance in person—Feme covert—Defence—Irregularity—Residence of defendant—16 & 17 Vic., c. 113, s. 39.

In a defence to an action of ejectment, the defendant pleaded as follows: "A P, defendant, in person, appears and takes defence, &c., and therefore she defends this action."—(Signed) J C M, attorney for the said A P, No. 46, Hardwicke-street, Dublin. Application to set aside the defence for irregularity, granted.

THIS was an action of ejectment for nonpayment of rent. One of the defendants, Anne Paterson, a widow, filed the following defence: "Anne Paterson, defendant in person, appears, and takes defence, and says, that she, the said defendant, before and at the time of the said supposed tenancy in the said lands and tenements in the said summons and plaint in that behalf mentioned, was and still is the wife of one W. Paterson," &c., "and therefore she defends the action." The defence was signed as follows:—"John Callaghan Murray, attorney for the said Anne Paterson, No. 47, Hardwicke-street, Dublin." It also bore the signature of counsel.

R. R. Warren, applied to set aside the defence. The Common Law Procedure Act, s. 39, requires that every defence "shall contain at foot the name and registered residence of the defendant's attorney, where the same is pleaded by attorney, and where it is pleaded in person, the residence of the defendant; and, in case such residence shall not be in the City of Dublin, shall specify by the name of the street and number of the house some place within the said city whereat all notices and papers relating to the suit may be served and delivered for the defendant." The present defence purports to be in person, but does not comply with the Act as to giving the residence or office of the defendant. [Richards, B.—But the defence is signed by her attorney, which may raise a question as to her power to make an attorney.] The defence is clearly a defence in person, and therefore the signature of the attorney at foot must be regarded as surplusage, and, regarding it as such, the defence is irregular. [Greene, B.—This is a most embarrassing mode of taking defence, as it does not clearly appear whether the defendant intended to defend in person or by attorney.]

Musgrave (with him Mackey) contra.

GREENE, B.—It is impossible to allow such a document as this to stand upon the files of the court.

RICHARDS, B.—It is impossible for any one to tell whether this defendant intends to file a defence in person or by attorney; and if the opposite party should hereafter treat it as a defence by attorney, the defendant might come forward to show that it was a defence in person. The pleading must, therefore, be set aside.

Musgrave applied for leave to amend.

GREENE, B.—The pleading must be taken off the file, and the defendant will then be at liberty to file another defence.

Rule accordingly.

WILSON v. ARMSTRONG.—Nov. 25.

Practice—Pleading double matter—Verifying Affidavit—16 & 17 Vic. c. 113, s. 57.

To an action for slander the defendant applied for leave to plead, first, a traverse of the uttering and publication of the alleged words; second, that the words then used were not used in a defamatory sense; third, privileged communication. Held, that a verifying affidavit was requisite in support of the application.

Quære, as to the nature of such affidavit.

Semble, an affidavit verifying a plea in confession and avoidance, need not in all cases admit the truth of the allegation in the plaint to which the plea is a defence.

Ormsby applied for leave to plead the following defences to an action for slander, for stating that the plaintiff was not worthy of credit upon his oath: First, a denial of the uttering and publication of the alleged defamatory matter; secondly, an allegation that the words spoken were not used in a defamatory sense; thirdly, a plea of privileged communication. [Richards, B.—Do you produce the necessary affidavit?] If the court grant the application the affidavit will be produced to the officer.

PENNEFATHER, B.—That is not sufficient, as the court must judge as to the satisfactory nature of the affidavit.

Ormsby renewed the application, producing a verifying affidavit. The cause of action in this case arose in a Petty Sessions Court, in which the defendant was examined as a witness in a suit between the plaintiff and a third party. The affidavit now filed in support of this application stated, that the defendant being summoned as a witness in a case between the plaintiff and a third party in a Petty Sessions Court, and having been asked by the magistrate presiding whether or not the present plaintiff was entitled to credit upon his oath in a court of justice, he declined to answer that question, and that then he was asked whether he would believe the plaintiff upon his oath, to which he replied that he would not. The affidavit proceeded to allege that the defendant could not state that the matter sought to be pleaded in confession and avoidance was true in substance and fact, he not having stated the actual words alleged in the summons and plaint, which stated that the defendant had proved and

published that the plaintiff was not worthy of credit upon his oath. It also contained an *inuendo* that the defendant had meant to state that the plaintiff had perjured himself upon that occasion, in reference to which the plaintiff's affidavit stated that he had never intended by his evidence to state anything of the sort, knowing nothing of that particular case. It is submitted that the Act does not require a positive admission of the truth of the matter confessed in a plea of confession and avoidance; but that it is sufficient in cases of this nature to swear to the truth of the matter of avoidance, otherwise defendants will be frequently deprived of the benefit of this provision of the Legislature.

PENNEFATHER, B.—Take the order.

Rule accordingly.

SMITH v. GILROY.

Practice—Ejectment—Indorsement—Defence—Irregularity—16 & 17 Vic. c. 113, s. 198.

A defence to an action of ejectment for nonpayment of rent, stating that the defendant had paid all the rent due to the plaintiff, but having no indorsement of the sums alleged to have been paid or the times of payment, will be set aside for irregularity.

J. C. Lowry applied for leave to set aside the defence that had been filed in this case as irregular. This is an action of ejectment for nonpayment of rent, and the defendant has pleaded that the rent is not in arrear, and that he has paid all that was due to the plaintiff; but the defence contains no indorsement, as required by the Common Law Procedure Act, of the amount of rent alleged to have been paid by the defendant, or the time or times when such payments were made. 16 & 17 Vic. c. 113, s. 193; Form in Schedule, No. 17.

Driscoll contra.—The statute provides that the indorsement "may" be according to the form given in the schedule. [Richards, B.—That is to say, it may be in the form, but it must be in substance as required by the Act.]

PENNEFATHER, B.—Let the defence be set aside with costs.

Rule accordingly.

[Coram PENNEFATHER, B., IN CHAMBER.]

FOOT v. BARKER.—Dec. 1.

Practice—Taxation of costs—Issues found for an unsuccessful party—16 & 17 Vic. c. 113, s. 60.

In an action for the price of two horses, the plaintiff, in the summons and plaint, stated that the contract had been made subject to a condition that the horses in question should be submitted to the opinion of a certain veterinary surgeon, as to their soundness. The defendant pleaded that the plaintiff warranted the horses to be sound; and the following issue (amongst others) was sent down for trial: "Whether there was a general warranty by the plaintiff that the said two horses were sound, and whether they were in fact sound or

unsound." The jury found that the plaintiff gave no general warranty as to the soundness of the horses, but that they were in fact unsound; and a general verdict was found for the plaintiff. Application that the defendant should be allowed to set off the costs incurred by him in sustaining this issue against the general costs in the action, refused.

THIS was an application that the Taxing Master should be directed to tax the costs furnished by the defendant's attorney in this case, and incurred by him in maintaining the issue found in his favour, and that the defendant should be at liberty to set off the costs so taxed against the plaintiff's costs in the action. The action in this case was brought to recover the price of two horses sold by the plaintiff to the defendant, and the summons and plaint alleged that the defendant had purchased the horses in question for the sum claimed, and that the contract was, that the horses in question should be sold, subject to the opinion of Mr. Watson, a veterinary surgeon, that the horses were sound. The defendant stated, in his defence, that such was not the contract between the parties, but that the horses had been warranted by the plaintiff to be in fact sound; the contract in the defence being altogether different from that stated in the summons and plaint. The parties not being able to agree as to the proper issues to be tried, went before Baron Greene for that purpose, and five issues were then settled, the third of which, the only one material upon the present motion, being as follows: "Whether there was a general warranty by the plaintiff that the said two horses were sound, and whether they were in fact sound or unsound." The case was tried before the Chief Baron and a special jury, and upon the above issue the jury found that there was no general warranty by the plaintiff that the said two horses were sound, but that the said two horses were in fact unsound.

M. Barry in support of the motion.—The general verdict in this case was found for the plaintiff, but it is submitted that the defendant is entitled to have his costs taxed upon the third issue. The finding of the unsoundness of the horses was clearly a finding for the defendant, although the other portion of the issue may have been found in favour of the other party. The greater portion of the evidence at the trial was in reference to this issue. The object of the Legislature in providing that the costs of issues found for the defendant should be set off against those found for the plaintiff was for the purpose of preventing the record being filled with immaterial issues. The defendant complains that he has been compelled to sustain an immaterial issue. [Pennefather, B.—Before considering the policy of the Act, we must see what are the words used; and it becomes, therefore, necessary to ascertain whether the Act provides for half issues of this kind.] It is submitted that there are two distinct issues under one head. [Pennefather, B.—There is only one in point of form; and, if you objected to its form, you should have applied to have had it amended or struck out.] This Act, being remedial, should be liberally construed. [Penne-

father, B.—The words of the Act are these, “the costs of every issue, whether in law or fact, shall follow the finding or judgment upon such issue;” but it cannot be said in the present case that an issue has been found for the defendant.]

Battersby, Q. C. (with him *E. C. Tuthill*), contra. The third issue is single, although composed of several parts. The defendant sets up a single defence, although composed of several parts, namely, that the plaintiff warranted that the horses were sound, and that they were unsound. Such a pleading, even under the old authorities, was never considered as double. [*Pennefather, B.*—It is plain that if the defendant had only pleaded that the plaintiff had warranted the horses to be sound, without a further allegation that they were unsound, it would have been no defence.]

Sidney in reply.—This issue must be regarded as having been found for both parties.

PENNEFATHER, B.—I cannot yield to this application. The statute provides that when an issue is found for one of the parties, the general verdict being found for the other, the costs of the issue so found shall be given in his favour, and are to be deducted from the general costs that he may have to pay. If there be no issue so found, there is no ground for such an application; and it cannot be said that this issue has been found for the defendant. We must therefore refuse this application.

No rule.

[*Coram PENNEFATHER, B., IN CHAMBER.*]

WADE v. FOX.—Dec. 1.

Practice—Subpoena ad testificandum—*Witness residing abroad*—17 & 18 Vic., c. 34.*

* Section 1, after reciting the inconvenience arising from the absence of a power to compel the attendance of witnesses residing in a different part of the United Kingdom, and that the method of examination by commission is insufficient, provides, that “If in any action or suit, now or at any time hereafter depending in any of her Majesty’s Superior Courts of Common Law at Westminster or Dublin, and the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court be not sitting, to any judge of any of the

An affidavit, supporting an application for leave to subpoena a witness residing abroad, under the provisions of 17 & 18 Vic., cap. 34, should state not merely that the defendant is advised and believes that the witness can give material evidence at the trial, but that the person sought to be subpoenaed is a necessary witness, and that the party’s case cannot be proved without his testimony.

THIS was an application for an order to subpoena witnesses residing abroad under the provisions of 17 & 18 Vic., cap. 34. The affidavit upon which this motion was founded was made by the plaintiff’s attorney, and stated that the parties whom it was sought to subpoena resided in England, out of the jurisdiction of this court, specifying their residences in that country, and proceeded to aver that the deponent was advised and believed that these persons could give material evidence on behalf of the plaintiff at the approaching trial of the case at Nisi Prius. [*Pennefather, B.*—I have been informed that the Court of Common Pleas requires the affidavit to state something more conclusive than that the parties sought to be subpoenaed can give material evidence, and I conceive that the affidavit should go on to state that they are necessary witnesses, and that the matter in question cannot be proved without them.] The Act gives to the court very extensive powers in reference to such orders.

PENNEFATHER, B.—That is an additional reason why the court should see clearly that it is necessary that these parties should be brought over from England, and that these parties should not be exposed to unnecessary inconvenience.

said courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ, called a writ of *subpoena ad testificandum*, or of *subpoena duces tecum*, or warrant of citation, shall issue in special form, commanding such witness to attend such trial whenever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if same had been served within the jurisdiction of the court from which it issues.”

COURT OF CHANCERY.

COOPER v. COOPER.*—November 7.

Vendor and Purchaser—Misrepresentation—Eviction—Compensation—Transfer of Funds.

A receiver was appointed over certain lands in the cause of C v. C; a portion of these lands was sold, and A became the purchaser; A was afterwards evicted from a small part by title paramount, there having been a misrepresentation as to the boundaries. Meanwhile a bill was filed by another party, E, against the defendant, C, to recover the amount of certain claims. The bill prayed that E might have the benefit of the proceedings in the cause of C v. C. The purchase-money of the lands sold had been all allocated in the cause of C v. C, but there remained in court some of the rents of the unsold lands, and these had been transferred to the cause of E v. C. Held, confirming the decision of the Master of the Rolls, that the purchaser should not be left to his action on the covenant, but was entitled to compensation, and that the funds liable to this claim in one cause, were liable to it in the other, after the transfer.

Held also, overruling the decision of the Master of the Rolls' decision, that the fund which had been transferred from the cause of C v. C, and which was in court in the cause of E v. C, though no part of the purchase-money, was yet liable to the purchaser's claim for compensation.

THIS case came before the court by way of appeal from an order of the Right Hon. the Master of the Rolls, bearing date the 29th June, inst., (see ante vol. 6, p. 404, where all the facts of the case will be found fully stated). The arguments of counsel were the same as those on the Rolls' motion.

Christian, Sergt., (with whom was Martley, Q.C., and E. Kelly,) for the purchaser, cited *Carr v. Carr*, (3 Sim. 477); *Hackett v. Donnelly*, (1 Ir. Eq. Rep. 31); *Gillespie v. Alexander*, (3 Rus. 136); *Grey v. Somerville*, (1 Rus. & My. 338); *Hill v. Buckley*, (17 Ves. 401); *Taylor v. Gorman*, (4 Ir. Eq. Rep. 550); *Birch v. Alt*, (1 Ir. Eq. Rep. 228.)

O'Brien, Sergeant, and Wm. Smith, contra, cited *Thomas v. Powell*, (2 Cox, 394); *Carter v. Pembroke*, (2 B. C. C. 288); *Sugden's Ven. and Pur.* 411, last ed.; *McCassan v. O'Farrell*, (1 Hog. 411.)

Wall, Q.C., for the defendant, J. T. Cooper.

LORD CHANCELLOR.—Some very important questions in reference to sales are involved in the case now before me. It is the application of a bona fide purchaser who paid his money, took his conveyance, entered into possession of certain lands under the control of the court, which were represented to him to contain a certain quantity, and was afterwards met by an assertion that a certain portion of the land so conveyed was not under the control of the vendors. Though there is no doubt that both parties acted with good faith, still, the fact occurred, and Mr. Wills was deprived of a part of his estate; he immediately applied for

compensation out of the funds in court which were applicable to that purpose. In ordinary cases a simple reference as to title, and as to what funds, if any were liable, would answer; but the points in this case have been so fully argued both at the Rolls and here, that it would be useless to make a general reference. Several difficulties, no doubt, stand in the way of the petitioner; in the first place it is said that he is not entitled to any compensation, but must rely upon his action at law for breach of covenant; secondly, that even if he should be entitled to compensation, there is no fund in existence on which the claim can be sustained, the funds that were paid by him having been distributed in the cause of *Cooper v. Cooper*, and no other being applicable. The latter objection resolves itself into two; first, that the funds were never applicable to the purchaser's claim; and, secondly, that if they were, they ceased to be so when transferred to the cause of *Ellard v. Cooper*. These were the principal questions argued, and the Master of the Rolls came to two conclusions—one that the purchaser was entitled to make a claim for compensation, and the other that if the funds in *Cooper v. Cooper* were liable, they had not been prejudiced by the transfer that had taken place. It appears clear that part of the estate belonged to other denominations than those represented to Mr. Wills, and he, therefore, complained that the elaborate representation made to him was incorrect. Under such a state of facts I cannot conceive that the purchaser is to be debarred from obtaining relief except by an action in covenant, and am of opinion that it is a fair case for compensation. The next question that arises is, what fund is applicable to make this compensation? The only fund remaining is in the cause of *Ellard v. Cooper*, being a fund created by rents received from lands that were under the control of the court in the cause of *Cooper v. Cooper*, and applicable to satisfy demands payable in that cause. It would, therefore, be strange to say that funds such as these should not be liable to be recalled again to the cause of *Cooper v. Cooper*, in order to satisfy claims of parties who would undoubtedly be entitled if the cause of *Ellard v. Cooper* had never existed. Here there are funds, not yet appropriated, still under the control of the court, and liable to be recalled from the cause of *Ellard v. Cooper* to satisfy claims in *Cooper v. Cooper*. Therefore, I am of opinion that the Master of the Rolls is right in respect of the *status* of the funds, and that liable in one cause, they are liable in another—*Hackett v. Donnelly*. The only remaining question is one in which the Master of the Rolls has given an opinion adverse to the purchaser, namely, "That as the funds now in court have arisen from other lands, and not from the lands purchased, the purchaser would have no right to be reimbursed out of them, even if he had brought forward his claim the very day after the execution of the conveyance,"—a decision, in my mind, destitute of any principle of rational justice. This purchaser gave his money to satisfy demands in the cause of *Cooper v. Cooper*, which, if not satisfied, would attach upon the pro-

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* Ex relatione.

duce of the other lands; which produce is more enhanced in value, and has become available to the payment of puisne creditors by so much the more as the purchase money paid in by Mr. Wills amounts to. To deny this to him is contrary to ordinary equity, and to all justice and rational right. There are but few authorities in the books to assist in forming an opinion, but the case may be taken by analogy to that of a purchaser discharged from defective title; and there the practice is to consider the claim as a lien on the estate. But the purchaser might stand upon a higher ground than this. He complains that a misrepresentation was made to him by the court, and complains of personal loss thereby, and it is only natural justice that the victim of these misrepresentations should have a claim upon the funds which were realized from the lands which formed their subject. The principles of natural justice are in favour of this purchaser; there is no authority against him, nor any authority to uphold the doctrine that, under such circumstances, only one particular fund is applicable to his demand, and that the court is to be debarred from doing him justice. I will, therefore, make the ordinary order of reference to the Master to inquire and report if the purchaser is entitled to any and what compensation for the lands taken from him, and for the costs incurred, also what funds are applicable thereto. The court, at the same time, declaring that the funds standing to the credit of the cause of *Ellard v. Cooper*, to the amount of the funds which were transferred from the cause of *Cooper v. Cooper* to the cause of *Ellard v. Cooper*, are properly applicable to the payment of such compensation. And let the purchaser abide his own costs of this appeal. Reserve the question as to the rest of the costs.

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at Law.]

MOLLOY'S TRUSTS.—Nov. 4.

Amending order of the court—Changing date—Stamping.

An order was made under the Trustee Act, 1850, appointing new trustees and vesting the trust funds in them, and the order not having been got out of the office in time to be stamped the court allowed it to be re-issued, as of the date of the application.

AN order had been made in July by the Right Hon. the Master of the Rolls appointing new trustees under the Trustee Act, 1850, pursuant to the certificate of the Master given for that purpose, and vesting the trust funds in them. The parties could not obtain the order from the office to have it stamped, as required by the Act, within the time allowed for that purpose by the Stamp Act, and it could not now be stamped without paying the penalty required by the Stamp Act.

B. Stevens applied for liberty to amend the order by altering the date from July, when it was made, to November 4, so that it might now be stamped.

MASTER OF THE ROLLS.—Let the order be re-issued as of this date.

MASTER HENN'S OFFICE.

ASHTON v. POLLOCK AND OTHERS.—Nov. 16.

Practice—Jurisdiction of Master—Guardian ad litem.

The Masters have jurisdiction in cause petitions under the 15th section of the Chancery Regulation Act, to appoint a guardian ad litem for a lunatic respondent.

A CAUSE petition under the 15th section of the Chancery Regulation Act was filed in this matter, for the purpose of foreclosing a mortgage, and the usual order of reference was made. There was an affidavit stating that one of the respondents was a lunatic confined in a madhouse, and had been there served with notice of the filing of the cause petition.

James Kift now applied to the Master to appoint a guardian *ad litem* to the lunatic, and submitted that under the general powers given to the Masters by the 16th section of the Chancery Regulation Act, with regard to summary petitions, that they had power to appoint a guardian *ad litem* to lunatics or infants, in the same way as the court would have done in suit.

MASTER HENN stated, that from the provisions of the 21st section of the Act, he at first apprehended there might be some doubt whether the Masters had jurisdiction under the Act to appoint a guardian *ad litem* for a lunatic. For, by the 21st section power is expressly given to the Masters to appoint guardians for infants, but for infants only; and then, upon the principle that, *expressio unius est exclusio alterius*, it might be doubted whether it was intended to give the Masters power to appoint guardians of lunatics. However, he was of opinion that the 21st section was meant to refer only to cases not referred to the Masters under the 15th section; and that having the same powers as the court, with regard to petitions under the 15th section, to appoint guardians *ad litem* both for infants and lunatics, it was intended by the 21st section to give the additional powers of appointing guardians for infants in general cause petitions not coming under the 15th section. The Master further stated, that having consulted the other Masters on the subject, they all concurred in this view; and he made the order accordingly.

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1854.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

LEANE v. LEANE.—Nov. 25.

Practice—Ejectment for non-payment of rent—Taxation of costs of judgment for defendant after payment of money into court—9 & 10 Vic. c. 111.

In an action of ejectment for non-payment of rent, the defendant paid money into court, under the 9th & 10th Vic. c. 111, s. 2, and afterwards had

a verdict and judgment in his favour. Held, upon a motion to review taxation of costs, that, the defendant was only entitled to recover against plaintiff his costs of suit from the time of the lodgment of the money in court.

Held also, that the practice in cases similar to the above depends solely upon the construction of section 2 of the foregoing statute, and is wholly independent of that respecting lodgments in court, after action brought in personal actions, under the 16th & 17th Vic. c. 113.

Rogers moved that the Taxing Master be directed to review his taxation of costs. This was an action of ejectment for non-payment of rent, and the defendant had lodged a sum of money in court under the second section of the 9 & 10 Vic. c. 111, after which the action proceeded and the defendant had a verdict. Upon taxation of costs the Taxing Officer refused to allow the defendant his costs against the plaintiff from the commencement of the action down to the time of the payment of the money into court. The second section enacts, that "it shall be lawful for the defendant in any action of ejectment for non-payment of rent in any Superior Court, against whom judgment shall not have been obtained upon such ejectment, by leave of such court or of a judge of such court, at any time before notice of trial shall have been served upon a side bar rule obtained for that purpose, or in such manner or according to such course of practice as the judges of the Superior Courts of Law or any eight or more of them, of which the chiefs of each of the said courts shall be three, shall prescribe, as herein-after mentioned, to pay into court a sum of money for rent, with liberty to the plaintiff to proceed further in the action at his peril, the defendant by such rule undertaking to pay the costs theretofore incurred, to be taxed by the proper officer, &c.; and when such sum of money shall be so paid into court for rent, if the plaintiff or his lessor shall not accept thereof, with costs to be taxed by the proper officer, in full discharge of the action, then upon the trial of the issue in such cause, if it shall appear upon the evidence that no greater sum was due for rent from the defendant to the lessor of the plaintiff at the time of the service of such ejectment, than the sum so paid into court, the verdict shall be entered for the defendant." The only difficulty which this section creates in our way is, that which speaks of the defendant undertaking to pay costs up to the time of lodgment. A clause similar to that existed in the Rules of 1834, relative to payment of money in personal actions, and received a construction similar to what we here contend for, namely, that that undertaking is conditional upon the acceptance of the amount lodged in bar of the action. The General Rule of 1834, No. 34, provides that "on payment of money into court, the defendant shall undertake, by the rule, to pay the costs, and in case of non-payment," &c. *Kershaw v. Lindsay*, (12 Ir. C. L. R. 355, s. c. 1 Ir. Jur. 31,) puts the construction upon this rule, which was worded similarly to the present, that by going to trial the plaintiff lost the costs incurred prior to the time of lodgment. An addition was directed to be made in the rule of 1834, to make it

more explicit. A similar decision had been made previously by the Court of Exchequer in *Darcy v. Furlong*, (cited in *Stewarts Law Forms*, 2623.) By the 74th of the General Rules of 1850, it is expressly provided that "the plaintiff shall, notwithstanding such verdict, be entitled to the costs of the action up to the time of the lodgment, to be taxed by the proper officer." This action, however, was commenced since the Common Law Procedure Act came into operation, section 78 of which provides, that "in case the plaintiff declines to accept the sum paid into court, &c., the sufficiency of the payment shall be tried upon the issue raised for that purpose by the said defence, and in case of such issue being found for the defendant, the defendant shall be entitled to judgment and his costs of suit." The "costs of suit," must mean the entire costs, and there is nothing to restrict the generality of the claim or to confine it to personal actions.

Sullivan contra.—The Common Law Procedure Act has nothing to do with this case, as the section which has been referred to applies only to personal actions, and there is no provision therein for the lodgment of money applicable to the case of ejectments. The question altogether depends upon the 9 & 10 Vic. c. 111, s. 2. Among the schedules annexed to the Common Law Procedure Act, there is one of Acts and parts of Acts which are to be repealed, but the 9 & 10 Vic. c. 111, s. 2, is not referred to, and hence remains in full force. There is nothing to diminish the force of the undertaking which must accompany the lodgment of the money. The new rules are wholly silent with respect to the lodgment of money in court; and the former rules are to apply to cases left unprovided for. [*Lefroy, C. J.*—You are not driven to argue with respect to the construction of the Procedure Act.] There are no words in the second section which operate to make the undertaking conditional upon the acceptance of the money lodged in court in satisfaction of the rent, for the non-payment of which the action has been brought.

Rogers replied.

LEFROY, C. J.—Mr. Sullivan has argued this case with great precision and accuracy, and has shown that this must be decided under the 9th and 10th Vic. cap. 111, sec. 2, upon the construction whereof the question turns. I always have considered that in construing an Act of Parliament we should give effect not only to portions of it, but to every word. It is not for us to interpolate words into it, in order to vary the plain provisions of the Act, and to defeat the justice of the case, which is, that the defendant having admitted a part of the plaintiff's demand should be allowed to pay that into court and deny the residue, and if the plaintiff then persevere he should do so at the peril of paying costs for the rest of the action. But there is a provision in the Act that the defendant shall undertake to pay the costs due at the time of the lodgment, and if he do not perform that he will be subject to an attachment. Are we to say that these words are a nullity? The defendant is bound to undertake indefinitely. No time is fixed. Are we to strike these words out of the Act and so to defeat the just claim of the plaintiff to the costs previously incurred. It is impossi-

ble to give such a construction to this Act of Parliament, and we entertain no doubt as to the propriety of refusing this application.

Motion refused.

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

GUINANE v. THE HOPE MUTUAL LIFE ASSURANCE AND HONESTY GUARANTEE SOCIETY.—Nov. 4.

*Pleading—Insurance—Policy—Demurrer—
“Palpably fraudulent and untrue.”*

In an action upon a policy of insurance the plaintiff in his summons and plaint alleged that by the said policy it was provided that in case any “palpably fraudulent or untrue” allegation was contained in the declaration, or any of the testimonials or documents addressed to the society in relation to the assurance, or in case any material information was omitted, the policy should be void; averring that no “palpably fraudulent or untrue” allegation was contained in any of these documents, and that no material information had been omitted, &c. The defendants pleaded several defences, alleging in each that the plaintiff had stated some particular matter of fact “which was untrue,” inasmuch as the contrary was the fact, and setting forth the particular fact constituting the alleged untruth. Demurrer, upon the grounds that the defendants did not allege the facts stated as matter of defence to be palpably untrue, but simply untrue, allowed.

THIS was an action upon a policy of insurance. The summons and plaint stated that the plaintiff had effected a policy of insurance bearing date the 2nd of March, 1853, and made under the corporate seal of the defendants, and after reciting that he had proposed to the defendants to effect an insurance with them in the sum of £100 sterling on the life of one Daniel O’Grady, and had made and delivered to the defendants a declaration or statement in writing touching the age, state of health, and habits of the said D. O’Grady, whereby it was declared, amongst other things, that he had not withheld any material circumstance touching the age, health, and habits of the said D. O’Grady, with which the defendants should have been made acquainted; and that the said declaration should be the basis of the said assurance, and that he had paid a premium for such assurance, and alleging that the defendants promised to the plaintiff that if the said D. O’Grady should die before a day therein mentioned, or that in case he should survive that day and die subsequently, and the plaintiff should continue to pay the premium, then, upon satisfactory proof made to the defendants of the death of the said D. O’Grady, they would pay to the plaintiff within two calendar months the sum of £100; and that by the said policy it was “provided that in case any palpably fraudulent or untrue allegation was contained in said statement or declaration, or in any part of the testimonials or documents addressed to or deposited with the said society in relation to the said assurance, or any

material information omitted which ought to have been communicated, then the said policy should be void,” and all money paid as premiums forfeited; setting forth the conditions indorsed upon the policy, and averred “that no palpably fraudulent or untrue allegation was contained in the said statement or declaration, or in any of the testimonials or documents addressed to or deposited with the said society in relation to the said assurance, nor any material information omitted which ought to have been communicated,” and that all other necessary conditions were performed by the plaintiff; stating the death of D. O’Grady, and the requisite notice given to the defendants, yet that they had not paid the said sum of £100 to the plaintiff. To this the defendants pleaded several defences, alleging in each of them that the plaintiff had made some particular statement in his declaration in reference to the party insured “which was untrue,” inasmuch as the contrary was the fact; and setting forth each particular fact constituting the alleged untruth. To these defences the plaintiff demurred, upon the grounds that they did not disclose any defence good in substance, inasmuch as no breach of the proviso in the policies was stated as set forth in the summons and plaint, whereby the policy was to have become void in the several events mentioned in the several defences by reason of the facts therein respectively stated having been *palpably untrue*, or any material information omitted which ought to have been communicated, and because the above-mentioned defences varied from and were inconsistent with the contract contained in the policy.

R. Griffin in support of the demurrer.—“False statements” in an action upon a policy of insurance mean statements actually, and not morally false, that is to say, false in point of fact, and not merely false within the knowledge of the party making them. *Anderson v. Fitzgerald*, (21 Law Times, 245.) [*Pennefather, B.*—The court is at present with you, we shall therefore call upon the other side.]

C. Barry (with him *Deasy, Q. C.*) contra.—In this case it must be considered, upon the face of the pleadings, that the plaintiff has entered into an express warranty under the declaration, and therefore a case of logical falsehood, or in other words, the statement being only false in fact, though not so to the knowledge of the party, will be sufficient. The strict rules of pleading have been modified by the late Act, 16 & 17 Vic. c. 113, ss. 80, 81, and it is now sufficient if the pleading shall, “with reasonable clearness and distinctness,” state all such matters of fact as are necessary to ground the action, defence or reply, as the case may be, the object of the statute being, to prevent parties demurring to their adversary’s pleadings, except where no denial of fact can raise the issue to be decided between them. In order to support the present demurrer it will be necessary for the other side to establish that the expression “palpably” applies to “untrue” as well as to “fraudulent,” which it is submitted cannot be the obvious meaning of the sentence. [*Pennefather, B.*—Whenever there be an ambiguity of this nature the law directs that it is to be taken *fortius contra proferentem*.] Even

supposing that the word "palpably" is to be connected with "untrue," it is submitted that it has no effect in qualifying the latter expression; palpably means plainly, and therefore if the thing in question be proved to be untrue, such an expletive is merely superfluous. It was pleaded that the person assured was in jaundice, when it was asserted that he was in perfect health, and this was palpable falsehood. [*Pennefather, B.*—Why did the company insert such a word in their policy if it had not been for some purpose?] Supposing that this word had some force, it is submitted that the defence is nevertheless sufficient, for it does not merely aver that the statement is untrue, but it proceeds to particularize the alleged falsehood, stating individual instances. The omission of certain words is matter of special demurrer, but not when a particular instance is stated in the pleadings. [*Greene, B.*—The question is, what do you traverse?] Suppose we had struck out the allegation in the defence that the document was untrue, and merely stated the particular instance of falsehood, it would have been sufficient. [*Pennefather, B.*—I do not think that the Legislature ever intended to allow a party by ambiguous words to vary the effect of a contract.] But it intended that such cases as the present should be met by an issue in fact, and not by demurrer. [*Greene, B.*—I do not think that this is a case of ambiguity; the defence states a matter of pure logical untruth, but is that the proper issue to be tendered? If it can be shown that the word "palpably" had no meaning, the omission of it can do no harm in the defence; but if, on the other hand, it was material, the omission was fatal. [*Pennefather, B.*—I do not think that this Act ever intended that such loose defences should be set up; for although it allows the plaintiff to state his case very generally, yet it compels defendants to state their matter of defence very strictly.] The object of the Act in doing so was for the purpose of affording the plaintiff a clear intimation of the facts relied upon as a defence, and this has been done in the present case by stating the particular cases of falsehood. There is a great latitude allowed in pleading under the recent practice—*Forsyth v. Bristow*, (17 Jur. 46); and the proper course for the other side to have adopted was not to demur, but to apply to the court to set aside the defence as tending to embarrass, under section 83 of the Common Law Procedure Act. [*Greene, B.*—It is impossible to suppose that the court will overrule a demurrer for no other reason than that.] There may be degrees of fraud, and therefore the word "palpably" may be applicable to that, but it cannot apply to untruths, there being no degrees of untruth; everything in the declaration was made matter of warranty; and, therefore, a simple statement of a fact, controverting the truth of that document, was sufficient; and when that required that the person assured should be in good health, it was sufficient to aver that he had the jaundice. [*Pennefather, B.*—And that it was known to the party making the statement that he was in bad health. He may have been in bad health, and yet it may not have been palpably untrue for the other party not to state so.] [They also cited *Feise v. Parkinson*, (4 Taunton, 640); *Scanlan v. Scales*, (6 Ir. L. R. 367.)]

Brereton, Q. C. was not called upon to reply.
PER CURIAM.—Allow the demurrer.

Demurrer allowed.

BROWNE AND PAYNE v. THE CITY OF DUBLIN
STEAM PACKET COMPANY.—Nov. 22.

*Common Carrier—Limitation of Action—Steam
Packet Company—Act of Parliament—Demur-
rer*—6 & 7 W. 4, c. C*—5 & 6 Vic. c. 97.†

To an action brought by the plaintiffs for the loss of goods shipped on board the defendants' vessel, and lost through their negligence, the defendants pleaded, that by a certain Act of Parliament (6 & 7 W. 4, c. C, s. 4) it was enacted that no action should be brought against the defendants for any act done by them in their trade, unless such action be brought within twelve calendar months after the act complained of happened, and that the act complained of occurred more than twelve months before the commencement of the action. Demurrer, upon the grounds that the 6 & 7 W. 4, c. C, s. 8, had been repealed as to the time of limitation by 5 & 6 Vic. c. 97, s. 5, which enacts that the time for bringing any action for anything done "under the authority or in pursuance" of the 6 & 7 W. 4, c. C (amongst others) should be extended to two years, overruled.

THE summons and plaint in this case stated that the defendants were owners and proprietors of a certain steam vessel named the Queen Victoria, and that on the 14th of February, 1854, the plaintiffs shipped on board of her a quantity of goods to be safely carried by the defendants to the port of Dub-

* 6 & 7 W. 4, c. C, s. 8, (public local and personal,) enacts, "That no action in any of his Majesty's Courts of Law, to which the said company shall be liable in respect of any damage, injury, or trespass alleged to be done, committed, or occasioned to or against any ship, lighter, barge, craft, wherry, or any kind of vessel, on the high seas, or in any river, port, or harbour, or to or against any passenger on board any steam-vessel of the said company, or the owner, shipper, or consignee of any goods, merchandize, or baggage shipped on board thereof, or to or against any person or persons' property, goods, or effects whatsoever, shall be brought, commenced, or prosecuted against the said company, unless one calendar month's previous notice in writing shall have been given by the party or parties commencing such action to the said company, such notice to be given or left at the head or principal office of the said company, nor unless such action shall be brought or commenced within twelve calendar months next after the cause or causes of action shall have arisen, in respect of which such action shall be brought or commenced."

† 5 & 6 Vic. cap. 97, s. 5.—"And whereas divers Acts, commonly called public local and personal, or local and personal Acts, and divers other Acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of such acts respectively, and whereas the periods of such limitation vary very much, and it is expedient that there should be one period of limitation only; be it therefore enacted, That, from and after the passing of this Act, the period within which any action may be brought for anything done under the authority or in pursuance of any such Act or Acts shall be two years, or in case of continuing damage, then within one year after such damage shall have ceased; and that so much of any clause, provision, or enactment by which any other time or period of limitation is appointed or enacted, shall be and the same is hereby repealed."

lin, and there delivered in good order and condition (saving the perils of the sea) for a certain freight and reward; that the goods in question were received by the defendants on board their vessel, and although it was the duty of the defendants to have used proper care and precaution, and to provide that their vessel should be properly steered and navigated, in order that the plaintiffs should not lose or be deprived of the goods so placed on board their vessel; yet, that the defendants not regarding their duty in that behalf, omitted to use due care and precaution, and that they, by means of their servants, did take such bad care in and about the conveying of the plaintiffs' goods, and did so improperly and carelessly steer and navigate the said vessel, that she did run upon certain rocks, whereby the goods of the plaintiff were lost and destroyed. The defendants by their defence alleged that they were not liable to the plaintiffs, because the action in this case was one to which the company were liable in respect of damage alleged to have been done to the plaintiffs as owners and shippers or consignees of the goods mentioned, and alleged to have been lost by the misconduct of the defendants; and that by a certain Act of Parliament made and passed in the 6th and 7th years of the reign of King William the Fourth, and entitled "An Act to authorise the City of Dublin Steam Packet Company to apply a portion of certain monies already subscribed, in fulfilment of their contract for building six additional steam vessels, and to legalise such subscription," it was enacted that all actions in any Court of Law to which the said company should become liable in respect of any damage, injury, or trespass, alleged to be done to or against any passenger or owner or consignee of any goods or merchandize shipped on board thereof, should be brought or commenced against the said company within twelve calendar months next after the cause of action should have arisen, in respect of which such action shall be brought; and that the matters alleged in the summons and plaint or cause of action, occurred on the 13th Feb. 1853, and that the present action was not commenced until the 11th Oct. 1854. To this defence the plaintiffs demurred, on the grounds that the provisions of the Act of Parliament set forth as to the period of limitation within which actions were to be brought against the company, have been repealed by an Act of Parliament of the 5 & 6 Vic. c. 97, s. 5, entitled "An Act to amend the law relating to double costs, notices of action, limitation of actions, and pleas of the general issue under certain Acts of Parliament," and that the period of limitation in the present case was thereby extended to two years from the arising of the cause of action.

B. Stephens in support of the demurrer.—The plea of the defendants is in fact a plea of provisional limitation; and the only question in the case is, whether or not the statute 6 & 7 W. 4, c. C. s. 8, is repealed, and its provisions re-enacted by 5 & 6 Vic. c. 97, s. 5. The latter Act treats of actions brought in respect of anything done under the authority or in pursuance of the former Act, and it is submitted that such a provision applies to the matter which is the subject of this action. An act of negligence done by a railway company is altoge-

ther different in this respect, for railway companies are common carriers, and an act of negligence on their part is therefore only a breach of their common law duty as such, for their act of incorporation only enables, and does not compel them to carry passengers, it only compels them to construct a line for the purposes of transport; and therefore in such a case, a provision similar to that in 5 & 6 Vic. c. 97, would not apply. This distinction is well founded. *Palmer v. The Grand Junction Railway Company*, (4 M. & W. 749); *Carpus v. The London and Brighton Railway Company*, (5 Q. B. 747.) But in this case the defendants are constituted common carriers by their act of incorporation, and they could not act as such unless under its provisions. Section 8, clearly shows that such was the intention of the Legislature; and it further appears from the provisions of 3 & 4 W. 4, c. 115, that they are compelled to construct vessels and carry on the passenger trade. Under the Railway Acts it has been held that when such powers are given to a company in derogation of their common law right, they are compellable by *mandamus* to perform these acts. [*Pennefather, B.*—They are compellable to make the line; for in such cases they have obtained leave and undertaken to make a railway, and it would be a fraud upon the public if they abandoned the project: and therefore they are not at liberty to do so, or to leave the line incomplete, but in the case of common carriers, the common law compels them to carry goods, and therefore the Legislature need not, and does not interfere. Therefore in the present case the question is, whether this act is "anything done in pursuance or under the authority" of the Act in question.] This company could not convey goods or passengers unless under the provisions of this Act, at least in the manner in which they do so; and therefore the act complained of rests on the foundation of this statute.

Fitzgibbon, Q.C. (with him *J. F. Townsend, LL.D.*) contra.—This statute does not direct the company to do the Act complained of, it merely gives them certain powers for the purpose of facilitating their mode of traffic. [*Pennefather, B.*—I can easily understand provisions in such Acts applicable to railway companies, which could not be applied to a company of this nature; for instance, railway companies have frequently to take lands, and commit acts which otherwise would amount to trespass, and therefore such provisions are intelligible; but in the case of steam packet companies the sea is open, and all persons can pass over it, which is not the case with the lands of a private person. If the company found it necessary to take lands for docks, there might be an analogy.] The statute in question was merely for the purpose of legalizing and increasing the powers that had been already conferred and was not intended to affect them as to their dealings with the public as carriers, but in their corporate capacity as a company. They were common carriers before the Act was passed, and they are so still, and their powers as such are facilitated by this Act. If, as in the case suggested by Mr. Baron Pennefather, they had taken lands for docks, that would have been an act done under the authority of the statute; but it is to be observed

that there are no such words as "done in pursuance of this Act" in 6 & 7 W. 4, c. C. [*Pennefather, B.*—It appears to me that the latter statute, which is the subject of the defence in this case, contains a clause passed for the purpose of protecting the company in reference to what they may do or have done as such, not limiting them to anything done under the provisions of the Act at all.] It cannot be alleged that an act of negligence is an act done under the authority of this Act. The reason of limiting the time within which actions are to be brought against companies of this kind for acts of negligence committed by their servants is, because of the difficulty that may arise in the defence of such suits, in producing evidence after a length of time, arising from the fact of their servants being compelled to go abroad. The court will not stretch the meaning of the words of a repealing Act.

J. D. Fitzgerald, Q. C., in reply.—The object of the Legislature in passing 5 & 6 Vic. c. 97, s. 5, was, to assimilate the period of limitation in such cases; and not to compel the public to search through the statute book in order to ascertain within what period such actions must be brought, as will appear from the recital. It must be considered that the 3 & 4 W. 4, c. CXV, s. 3, is incorporated with 6 & 7 W. 4, c. C. It may be urged that this company traded before the passing of this Act, but if they did so, it was not as a corporate body.

*PENNEFATHER, B.**—Upon the argument of the present demurrer, the consideration of two Acts of Parliament is presented to the court, one of them a local and personal Act, and the other one of the general statutes of the realm. Under the provisions of 6 & 7 W. 4, c. C, I will assume that the City of Dublin Steam Packet Company, the defendants in the present case, were incorporated; they existed before, but under that statute they obtained several additional privileges: it was provided that no action should be brought against the company for any act done, it does not say under the authority or in pursuance of the provisions of that Act, but done, committed, or occasioned to any ship or passenger or goods whatsoever, unless one calendar month's previous notice in writing shall have been given to the defendants by the party commencing such action, nor unless such action shall be commenced within twelve calendar months from the time that the cause of action arose. The provisions of this Act are clear and intelligible, and it is admitted by both sides that if this statute stood alone, it would afford the company a sufficient defence to the present action; because it was brought after the time limited by that Act. But it is contended that it has been repealed by a general statute of the 5 & 6 Vic. It is certainly most important and is matter of great consequence to the public, that all kinds of actions brought against certain bodies should be subject to the same regulations, and we accordingly find that the latter Act, 5 & 6 Vic. c. 97, s. 5, provides that divers local and personal Acts relating to the time of limitation of actions brought for anything done in pursuance of those Acts, should be repealed. The Legislature uses unequivocal language; but it

is contended that the Legislature have thereby impliedly repealed the section of the former Act, by which they were entitled to have actions brought against them within a period of twelve months after the act occurred. It was optional for the Legislature to have used words that would, beyond all question, have settled the dispute in the present case, but instead of using words of this kind, the latter statute provides that all such actions brought against the company for anything done "under the authority or in pursuance of any such Act or Acts" shall be brought within two years after the damage has ceased; therefore the question in the present case is, what is the meaning of the words so used, viz., "any act done 'under the authority or in pursuance' of any such Act or Acts;" and can it be contended that where these persons are charged with so negligently conducting the management of this steam-vessel, whereby the plaintiff has sustained a certain loss, that act was done in pursuance and under the authority of the latter Act of Parliament. But let me state the case in a different manner. Suppose the statute of 6 & 7 Wm. 4 had been altogether silent as to any period of limitation in reference to actions of this nature, and that the company were not protected by any clause in that statute, and that such a loss, as in the present case, had occurred, and that such an action as the present had been brought to recover compensation after a period of two years had elapsed since the loss had been sustained, could the defendants protect themselves by contending that they had been acting in pursuance and under the provisions of this Act? It is clear that a person under such circumstances sustaining a loss through the negligence of the company, should not lose his right of bringing an action within six years. Certain decisions upon railway cases have been cited during the argument, and it appears to me that they are not inapplicable to the present case. Railway companies are corporations; they are not bound to transport the public in their carriages under their act of incorporation, but if they did not, railways would be of little use, and therefore they do carry persons in their carriages; but can it be said that such is an act done under the authority of the Act, although it is an act for the proper performance of which they will be held responsible in consequence of their common law capacity as common carriers. Let us apply this view to the present case. If the Legislature have thought it proper that all actions of this nature, whether for torts, or founded upon contract, should be brought within a limited time, and that the right of the public is to be interfered with, in one case curtailed, and in another enlarged, let the Legislature say so; let them say that carriers acting under the provisions of this Act regulating the Dublin Steam Packet Company, shall be subject to a different rule of law from common carriers, if they think fit; but as to the question of the policy of putting these carriers upon a different footing from other common carriers, it would be a clear act of injustice to the public. I conceive that what the Legislature meant by the words "acts done under the authority or in pursuance of these Acts" were,

* Pigot, C. B. was absent.

such acts as these, the taking of lands for the purposes of the railway, the necessary acts of trespass they must commit, and things of that nature; and if they do an injury in the exercise of such powers as these given by the Act, they become liable, as is stated in this statute, for things done professedly under the authority of the Act, (not literally under its authority, for if these acts were literally under the authority of the Act, they would be protected,) and in cases of this nature they would be entitled to rely upon the time of limitation specified in the Act. We are bound to construe this Act according to its legal meaning and signification. It is alleged that this is a remedial Act, and therefore that it should be construed liberally, but we cannot go beyond its clear signification; and this rule applies the more especially in modern statutes, in which the Legislature are peculiarly bound to use words according to their legal signification.

GREENE, B.—I fully concur in the judgment of the court as to the construction of 5 & 6 Vic. c. 97; and I am of opinion that it does not repeal the provisions of the former statute limiting the period for bringing all actions against this company to twelve months. At the time of the passing of 5 & 6 Vic. c. 97, there were several local and personal Acts in force, containing clauses providing for the limitation of the bringing of actions on account of anything done in pursuance of these Acts. We know that there are several cases of this nature arising under the provisions of these Acts, and therefore, the Legislature made use of the words "done under the authority or in pursuance of" these Acts; and as to such matters, it was considered proper that a different period of limitation should be binding, and the statute of 5 & 6 Vic. c. 97, therefore provides that so far these statutes shall be repealed: and the meaning of these words was, to repeal these clauses only so far as related to acts done in pursuance of or according to the provisions of these Acts. This period of limitation contemplated by the 6 & 7 W. 4, c. C, does not refer to such acts as these, but to all other acts done by the company as such, out of which an action may arise; and therefore, we cannot hold that this latter Act is affected in this respect by the statute 5 & 6 Vic. c. 97.

Demurrer overruled.

COURT OF EXCHEQUER CHAMBER.

REGISTRY APPEALS.

MICHAELMAS TERM, 1854.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

[*Coram* CRAMPTON, BALL, JACKSON, AND MOORE, J. J.]

NOLAN'S CASE.—Nov. 30, Dec. 2.

Registry—Borough Franchise—Rated Occupier of several tenements—13 & 14 Vic. cap. 69.

A was the rated occupier of several tenements, the valuation of each whereof was under £8, but which in the aggregate exceeded that amount. A was returned by the clerk of the union to the officer acting as town clerk of the borough of B, and was

by him inserted in the list of persons entitled to vote as rated occupiers for the said borough. The name of A having been objected to, was retained as duly qualified. Held, on appeal, that A was duly qualified within the 13 & 14 Vic. c. 69, s. 5.

THE following case was stated by W. M'Dermott, Esq., Assistant Barrister for Kerry from the Revision Court for the Borough of Tralee: "John Nolan, who was returned upon the town clerk's list of persons entitled to vote in the election of a member for the borough of Tralee as being rated in the last rate at the net annual value of £8, or upwards, was objected to by Edward Murphy on the list of voters for said borough. It appeared in evidence that the said John Nolan was rated for two distinct tenements in the original rate-book, one of said tenements being rated at £6 10s., the other at £3 15s. annually, but was returned in the clerk of the union's list, transmitted to the town-clerk, and also in the list published by the town-clerk, as rated in the sum of £10 5s., being the aggregate of both ratings of £6 10s. and £3 15s. It was contended upon the part of the appellant that the said John Nolan, in order to enable him to be retained upon the list of voters should be rated for *one* tenement in the full sum of £8; and that as he was not rated in the original rate-book for any one tenement to the amount of £8, he could not bring to his aid the rate made on the second tenement. But, on reading the fifth section of the 13th & 14th Vic. c. 69, as also the 32nd and 33rd sections, and also the forms Nos. 6 and 7 in the Schedule B to the Act annexed, I was of opinion that the objection of the appellant was not sustainable in law, and I admitted the name of the said John Nolan to remain upon the list of voters. If the court shall be of opinion that the said John Nolan was, under the circumstances aforesaid, a rated occupier of lands, tenements, or hereditaments within the said borough, rated at the net annual value of £8, his name is to remain upon the list of voters; if the court shall be of a contrary opinion, his name is to be expunged from said list."

Napier, Q. C., Lane, Q. C., and W. Hickson on behalf of the appellant.—The several rated tenements cannot be consolidated in order to make a qualification within the 5th section of the Act. It will be said that the words "any" in section 5 are distributive, but the same words occur in section 1 with respect to the county qualification, and yet it is clear from sec. 17 and 18, where the words "lands," &c. occur without "any" prefixed, in the directions to the clerk of the union for returning the list of rate-payers that separate tenements in counties will not qualify. [*Moore, J.*—The words in section 5 appear to me to be large enough to include the case of separate tenements; the schedules, referring to both county and borough qualification, speak of the lands, &c. as "rated separately or together."] That only applies to the case, which may sometimes occur, of adjoining houses, being in the occupation of the same person, and where there is no difficulty in putting him down in the list of rated occupiers as holding both premises; but in the case before the court, where the premises lie detached, there is no machinery provided by the Act for enabling the clerk of the union to return the party. In the Re-

form Act, 2 & 3 W. 4, c. 88, s. 5, the same words are used with relation to freehold qualifications, but then it is declared by section 64 that separate freeholds shall be counted as one, if the aggregate shall amount to the qualification. No such clause as this occurs in the present Act, and this omission leads to the inference that separate ratings will not qualify. In *Gadsby v. Barrow*, (1 Lutw. 142,) it was held that to entitle an occupying tenant to vote for knights of the shire under 2 W. 4, c. 45, s. 20, he must be liable to a single yearly rent of not less than £50 payable in respect of lands under one landlord. The words in that section are "who shall occupy as tenant, any lands or tenements for which he shall be *bona fide* liable to a yearly rent of not less than £50." In *Dewhurst v. Fielden*, (7 M. & G. 184; s. c. 1 Lutw. 274,) it was held that under the 2 W. 4, c. 25, s. 27, separate buildings cannot be joined to make up the required value. The 110th section of the present Act allows a party who has been improperly omitted from the rate-book to claim to have his name inserted, but it does not reach the present case, as there is no remedy for the case where a party is upon the rate-book for one set of premises and has been omitted for another. Suppose that each of the premises which are put together to make up the £8 qualification, were rated under £4, for which the immediate lessor would be liable, what right would that party have to be put on the register?

Sir C. O'Loughlen, Q. C. and J. C. Neligan, contra, for the respondent.—*Gadsby v. Barrow* does not apply to this case, as that section of the English Reform Act creates a franchise altogether different from the present. There the test of qualification was the rent; here it is the rate. Again, in *Dewhurst v. Fielden*, the words are in the singular, "any house, warehouse," &c., which distinguishes the case from the present. The word "tenement" has been decided to be a *nomen collectionum* in *R. v. Tadcaster*, (4 B. & Ad. 703); *R. v. Wootton*, (1 A. & E. 236); *R. v. North Cottingham*, (1 B. & C. 578). The 64th section, with respect to the putting together separate freeholds to make a single qualification of the value prescribed, is declaratory as well as enacting. The argument drawn from the 116th section is fallacious, because it is only when the property occupied by an individual is rated, in the whole, at less than £4 per annum, and in which he has not an interest greater than a tenant from year, or which he holds under a lease or agreement made after the passing of the 6 & 7 Vic. c. 92. Whatever might be the machinery provided by the Act for enabling the clerk of the union to return parties circumstanced like the respondent here, it is clear that here he has actually done so, the fact of the identity of the party being within his knowledge. There is nothing in the 110th section to prevent a party whose name has been omitted from the rate-book with respect to particular premises claiming in respect of those premises.

Cur. adv. vult.

Dec. 2.—*CRAMPTON, J.*, delivered judgment.—We have arrived at an unanimous opinion upon the question which has come before us, and which must be decided upon grounds resting

altogether upon the construction of the 13 & 14 Victoria, c. 69. The qualification which the appellant relies on, as the ground of being put on the register, is a new qualification; not one of those created by the Reform Act, but one which is for the first time provided by the amending Act, and, therefore, the Reform Act itself is not an enactment which bears directly upon the question. The facts upon which this case arises are these:—The appellant, Mr. Nolan, was returned as a person having the new qualification of an occupier rated to the relief of the poor in respect of lands, &c., of the value of £8 or upwards, and in having been returned by the clerk of the union as qualified, pursuant to the Act of Parliament, as an occupier of several premises rated in the whole at £10 5s. This return by the clerk of the union was made to the town-clerk, and who thereupon returned him on the list of rated occupiers, as holding premises rated at £10 5s. *Prima facie* he is qualified, and, in the absence of objection, he would remain on the list as a rated occupier at that amount. Then the objector comes in and produces the rate-book, and shows that in the rate-book the respondent is not rated for one single tenement of the value of £8, but, in point of fact, for two several tenements, one of the value of £8 15s. and the other of £6 10s., and the objector says that, in order to entitle the respondent to the franchise, he should appear to be rated for a single tenement rated at £8 or upwards. If that position be true, the objection will be well founded; but if the true construction of the Act be that the same person may be returned as the occupier of different tenements in the same borough, the rating of each of which may be under £8, provided the whole of them taken together be equal to it, then the respondent is entitled to be returned. It, in short, resolves itself into a question of the construction of the new Act. Now, in order to solve this question, various statutes have been referred to, rules laid down and cases cited, but they have thrown no light on the case, except, perhaps, that one of *Dewhurst v. Fielden*, (7 M. & Gr. 184,) which I shall briefly after observe upon. I have considered the construction of the recent Act. I take it that the best rule for the construction of an Act of Parliament is to look at it, and to take the grammatical meaning of the words, and to exercise your common sense in arriving at the true meaning of the Legislature, and that no imaginary policy ought to be taken as operating to contract the sense of words seemingly too large, or to narrow that of words not sufficiently large. I shall read the words of the Act which confer this new qualification. Those words are large and wide. Are they large and wide enough to include the case now before the court? The fifth section provides that "in addition to those now qualified by law to register and vote at any election of a member or members to serve in Parliament for any city, town or borough in Ireland, in virtue of any qualification not requiring occupation, every male person of full age," &c. Then come the material words "who shall occupy as tenant or owner, within any city, town or borough, &c. in Ireland, any lands, tenements, or hereditaments, and shall be rated under the last rate, &c. as occu-

pier of such respective lands, &c. at a net annual value of £8 or upwards" shall be entitled to be registered as a voter. Can any one deny that these words are large enough to apply to this case? There are two ingredients required. One is that the party in question should be in the actual occupation of the premises, and the other is that those premises should be rated at £8 or upwards in the last poor-rate. There is nothing in that portion of the Act of Parliament which confines this qualification to a single tenement. In order to sustain the objector's case here, we should limit the extent of the words by the insertion of a qualification according to which the party should not only show, in order to entitle himself to register, that he had lands, tenements, and hereditaments, but that the rating was one in respect of a single tenement at £8 or upwards. Various other sections of the Act have been referred to as throwing some light upon this question. We need not stop to consider the force of the 7th section with respect to successive occupation. The Assistant Barrister relied on the 32nd section, where the machinery provided by the Act is put in motion to carry out the new qualification. The clerk of the union by that section is to make out and transmit to the town-clerk a list of every male person of full age, who shall be rated in the then last rate, &c. as the occupier of *any* lands, tenements, or hereditaments, situate within such city, town, or borough of a net annual value of £8 or upwards." We are called upon to add the words "not consisting of more than a single tenement" to the preceding words "any lands," &c. The section then goes on to provide for the case of joint occupiers. The 33rd section shows the duty of the town-clerk, who is to make out a list of every such male person of full age as shall appear in the list transmitted to him by the clerk of the union in such respective year as the rated occupier or one of several such rated joint occupiers, of lands, tenements and hereditaments situate within such city, town, or borough of the net annual value of £8 or upwards." In passing I may observe that the argument pressed so strongly upon the court was that the duties of the poor-law officers were those of mere copyists; but these officers are bound to make inquiry; and if they choose, they may have assistance of the rate collectors; and if they do not discharge their duties according to the Act, they not only subject themselves to the penalties assigned by the Act, but to an action at the suit of the party injured by that default, and these duties they cannot properly discharge but after inquiry, and they must verify their returns upon oath. Now, if we turn to Schedule B of the Act, and look at Form No. 6, (the forms are declared to be part of the Act of Parliament,) it runs thus: "List of male persons rated in the last rate under the Acts for the Relief of the Destitute Poor, as the occupiers of lands, tenements, &c. *rated separately or together* at the net annual value of £8 or upwards, and situate," &c. What was the meaning of the preceding words in the 5th, 32nd, and 33rd sections, and of adding to them, to avoid misconception, the words "*rated separately or together?*" There may be cases in which, pursuant to the Poor Law Acts, each tenement must be se-

parately rated, and this form contemplates that being the case. I do not see that any rational construction can be given to this, except upon the supposition that an aggregate rating of several tenements, which individually may be under £8, ought to satisfy the requirements of the statute. That observation is applicable to the list furnished by the clerk of the union. Then the list published by the town-clerk is nearly in the same terms, namely, "List of male persons entitled to vote in the election of a member, &c. as being persons rated in the last rate under the Acts, &c. as the occupiers of lands, tenements, &c. *rated separately or together* at the net annual value of £8," &c. There the word is not "tenement" but "*tenements,*" &c., in the plural, rated either separately or together. There is a margin for objections to be entered in certain cases, and the town clerk is bound in such cases, provided they come within his own knowledge, to enter objections. It would be very improbable that such a notice as this should apply to the case of adjacent premises merely detached from each other, and not to those where they are each situated remotely. Throughout the whole of the Act, it appears to us that the case of the applicant here distinctly comes within its terms, and that he is to be considered to be a rated occupier of lands, &c., rated at £8 or upwards. I was struck by the argument pressed most forcibly upon us, on the part of the appellant, that whatever might be the case with respect to the duty of the town clerk correcting the return of the clerk of the union, if the rates were severally struck upon separate tenements, no machinery exists for the clerk of the union to carry a statement into his list that such a party was rated at £8 or upwards. Let us, however, see what the clerk of the union is bound to do? He finds, suppose in the rate book, John Smith rated at £3; again the same name for £3 9s., and again for £6 15s. There may probably be several John Smiths, but what the Act of Parliament requires him to do is to make inquiry of the collectors and to satisfy himself as to the identity of these several John Smiths. If this name do not apply to the same individual, then he must pass it by, but if it refer to the same, he must add the several amounts together, and if the result be the amount required, he must return the individual to the town clerk. Then the town clerk is to publish the names in the list presented to him, and among them he must publish the name, marking objections against every name, which has been pointed out in the first place by the clerk of the union. The latter must inquire who are living and who are dead. He is bound by his oath to make that inquiry, and he gives that list to the town clerk. *Prima facie* when that list is published, the party is entitled to be put on the register, but an objector may come in. But suppose the case of the name having been left out of the list by the clerk of the union. In that case John Smith must put in his claim, and in that claim he must state the nature of his qualification. That comes to be considered, and that is the subject-matter for the production of evidence. The 110th section gives him the option to come in and have the rate amended, in case there be an omission, and so he has an opportunity of

putting his name upon the register. The objector may say that there are several John Smiths, and that the claimant is not the John Smith in question. The Assistant Barrister must decide on that as a question of fact; and if a question of law arises he may decide that also; as in this case, where a question of law has been mooted, namely, as to the applicant being rated, as the Act requires. The Assistant Barrister is called upon to pronounce his judgment upon the matter of law, which he does, and an appeal from that lies to this court. The second objection, which was strongly urged against the making up the *quantum* of the rate by putting together a number of separate hereditaments, where the aggregate was above the required value, but each separately below it, was founded upon the authority of *Dewhurst v. Fielden*, (7 M. & Gr. 184.) That case, however, was not *ad idem* with the present. That case was not one of a separate rating, but it was founded on the 27th section of the English Reform Act, 2 W. 4, c. 45, which allows a man to be registered "in respect of any house, warehouse, counting house, shop, or other building; being, either separately or jointly within any land within said city, &c., occupied by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than £10." In that particular case, the party sought to register out of "a joiner's shop, warehouse, and land in Thunder and Back-lane, in the said borough." One only of those denominations, taken separately, was within the view of the Act of Parliament. The Revising Barrister having decided that the claimant was entitled to be registered, that decision was overruled by the Court of Common Pleas. The distinction is, that by that Act it is provided that *any one* of the several denominations shall entitle the party, but are you not to join them together? But here, in the late Act, not only nothing is said against joining them; but the words apparently comprise *any lands, &c.*, within the borough in respect of which the party is a rated occupier. I did at first think that the Legislature meant a single rating here, but I have satisfied my mind that the unity intended by the Legislature was not in the making of the rate, but in respect of the occupation; and the argument arising from the mischief which Chief Justice Tindall and the other judges point out in *Dewhurst v. Fielden*, will be avoided by our taking that view of the Act. The party must, however, be in actual occupation of the premises which are the subject of rating. The houses may be in separate parts of the town, but still there is a unity of occupation. Here the premises might have been adjoining or they might have been in different parts of the town, but still the occupation thereof must in point of law and fact, be the occupation of the same person. An argument has been advanced on the part of the appellant with respect to the omission in the Act of Parliament of a clause in the Reform Act, (sec. 64,) whereby separate freeholds might have been put together to make up the aggregate value; the omission of which, in the present case, is contended to show the view of the Legislature to be the other way. But that clause refers only to freeholds and is not required here,

for there is a new qualification, and the Legislature have employed large terms to create it. And if, on the whole, the rateable value is sufficient to make up the value required by the Act, the claimant is substantially a rated occupier to that amount. We are therefore of opinion that the decision of the Assistant Barrister in favour of the respondent should be affirmed.

Judgment affirmed.

MOORE'S CASE.—Nov. 30.

Borough Franchise—Rated Occupier—Evidence of Qualification—13 & 14 Vic. c. 69.

Where the name of A appeared on the Parliamentary Register of the borough of J as a registered voter in respect of an £8 tenement, a notice of objection had been served to the retention of his name upon the town clerk's list for the ensuing year, and at the Revision Court a copy of the above register was produced, and evidence was given by the clerk of the union's return that A had paid the poor-rates in respect of the premises as required by the 13 & 14 Vic. cap. 69, sec. 5, but no further evidence of occupation was given; Held, that that was sufficient prima facie evidence to sustain the claim, and that it lay upon the objector to meet the same with proof of disqualification.

THE following case was likewise stated by Mr. McDermott for the opinion of this court: "John Moore, of Bridge-street, Tralee, was returned upon the town-clerk's list of persons entitled to vote in the election of a member for the borough of Tralee, as being rated in the last rate at the net annual value of £8 and upwards. He was objected to by Chas. Chute on the list of voters for said borough. The said John Moore then produced the list of registered voters, or the copy of the register for the present year, and his name appeared thereon. He also produced the list or return transmitted by the clerk of the union to the town-clerk, whereby it appeared that the said John Moore was a rated occupier of lands, tenements, and hereditaments within the borough of the net annual value of £8 and upwards on the 20th day of July last, and that all poor-rates payable by him to enable him to be placed on such list had been paid, and the Act of the 13th and 14th Vic. cap. 69, s. 55, having made the evidence so produced by the said John Moore *prima facie* evidence of his right to have his name inserted on the register for the next ensuing year, and the said Charles Chute having declined to produce evidence to sustain his objection, although called on so to do, I allowed the name of the said John Moore to remain on the list, I having held that under the circumstances aforesaid the *onus* of proving the disqualification of the said John Moore lay upon the objector. If I decided rightly in holding that the *onus* of proving the disqualification lay upon the objector, the name of the said John Moore is to remain upon the list. If, on the contrary, the *onus* of further proving his qualification lay upon the said John Moore, his name is to be expunged from said list."

Napier, Q. C., Lane, Q. C., and W. Hickson for the appellant.

Sir Colman O'Loughlin, Q. C., and J. C. Neligan, for the respondents.

CRAMPTON, J.—This appears to us to be a clear case. Two documents have been given in evidence, each of which for its own purpose is *prima facie* evidence. Neither of these documents *per se* would establish a *prima facie* case of the respondent's right to be placed upon the register, but the concurrence of both would make such a case. Unless we arrive at the conclusion which we are not at liberty to do, that this party has gone out of possession of the premises between the years 1853 and 1854, he appears to have a substantial claim. The proviso in the 55th section does not affect this case, inasmuch as the exception therein excludes the case of rated occupiers. This party's name must be retained.

Judgment affirmed.

MORONEY'S CASE.—Nov. 30.

Misnomer in rate-book—Power of Revising Barrister to rectify mistakes—13 & 14 Vic. c. 69, s. 55.

Where a party has been erroneously designated in the rate-book as John M., and it was proved to the satisfaction of the Revising Barrister that no such person as "John M." in fact existed, but that the premises in question were and had for a long period been occupied by "James M." and had been rated in that name, until the making of the rate immediately preceding. Held, that, under these circumstances, he was justified in retaining the name of "James M." on the list, the error in the rate being a technical one within the 13 & 14 Vic. c. 69, s. 108.*

* 13 & 14 Vic. c. 69, s. 108, enacts "That for the purposes of this Act, the said rate-books, or a compared copy thereof or any part thereof, shall be *prima facie* evidence of the several matters entered or stated therein; but that it shall be lawful for any person who shall have duly served a notice of claim or objection, pursuant to the provisions herein-before contained, to prove by evidence that any of the entries or statements therein is untrue or incorrect, except the statements or entries in such rate-books of the value of any lands, tenements, or hereditaments, as to which the same are hereby declared to be conclusive for the purposes of this Act."

Sec. 115, enacts, "That no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this Act annexed, or in any rate, list,

THE following case was also stated from Tralee Revision Court: "James Moroney who claimed to be inserted upon the list of persons entitled to vote in the election of a member for the Borough of Tralee, as being a rated occupier of lands, tenements, and hereditaments in said borough of the nett annual value of £8, was objected to by George Raymond on the list of voters for said borough. It appeared in evidence that John Moroney was the person whose name appeared in the rate book as rated for premises in the square, namely, a house, office, and yard, at the annual yearly value of £24. That there was no such person as John Moroney, rated as occupying a house or other premises in the Square of Tralee, or at all in the Borough of Tralee; and that James Moroney had occupied the house, office, and yard, in the Square of Tralee for upwards of ten years, and had always been rated for same until the last rate was struck, when the name of 'John' seemed to have been inserted in mistake for 'James.' I considered that under the 115th section of the 13th and 14th Vic. chap. 69, I had power to admit him on the list of voters, and I inserted his name thereon. If I decided rightly in thus inserting his name, the name is to remain on the list; if, on the contrary I was not warranted in law in inserting the name on the list, it is to be expunged therefrom."

Napier, Q. C., Lane, Q. C. and W. Hickson for the appellant.

Sir C. O'Loughlin and J. C. Neligan for the respondent.

CRAMPTON, J. (after stating the facts as set forth in the case.)—It has been argued that under section 115 the Revising Barrister has no power to amend. If he had no power to go outside the rate-book, that would be so, but the 108th section enables a party to supply the defect by evidence; and then by section 115 where the rate is good in substance, that is to be sufficient, and a verbal or technical error will not invalidate, provided that the matter shall be sufficiently understood in the opinion of the Assistant Barrister, who has here arrived at that conclusion.

Judgment affirmed.

or copy of register of voters, or in any notice required by this Act, shall in anywise prevent or abridge the operation of this Act with respect to such person, place, or thing: provided that such person, place, or thing, shall be so denominated in such schedule, rate, list, copy of register of notice, as to be commonly understood."

COURT OF CHANCERY.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq., Barrister-at-Law.]

IN THE MATTER OF THE RENEWABLE LEASEHOLD CONVERSION ACT.—THACKWELL v. JENKINS.—
Nov. 11 and 18.

Renewable Leasehold Conversion Act—Compensation for loss of Reversion—Covenant in gross—
Mines and Minerals—12 & 13 Vic. c. 105, s. 5.

A lease for lives renewable for ever was sought to be converted into a fee-farm grant under the provisions of 12 & 13 Vic. c. 105. The original lease contained several covenants in gross, such as doing service at a certain manor court, bringing corn to certain mills, and upholding and preserving the trees upon the premises; but, by indorsement upon the lease and all its renewals, the property in the timber on the estate was vested in the petitioner. An order having been made by the Master of the Rolls declaring the petitioner entitled to a fee-farm grant, and directing a reference to the Master to ascertain the amount of compensation to which the respondent was entitled under the 5th section of the above Act, for the loss he would sustain in the marketable value of the land, arising from the conversion of the lease into a fee-farm grant, Held, (reversing the order of the Master of the Rolls so far as it related to the matter of compensation,) that the respondent under the circumstances, was not entitled to compensation for the loss of the reversion.

Mines, minerals, and royalties, are not devested out of the reversioner by the grant of a fee-farm estate under this Act.

In re Lawless, (7 Ir. Jur. 13,) approved of.

THIS case came before the court upon appeal from the order of the Master of the Rolls of the 14th of July, 1854, whereby it was referred to the Master to report what amount of compensation the respondent was entitled to, under the provisions of 12 & 13 Vic. c. 105, sec. 5, for loss sustained by him in the marketable value of the lands of Cherrymount and Ballyrussel, in the County of Waterford, by means of the conversion of the leases of those lands, which were for lives renewable for ever, into fee farm leases under the provisions of the Act above referred to. The lease of the lands of Cherrymount was made in the year 1749, by John, Earl of Grandison, to Joseph Freeman, his heirs and assigns, for lives renewable for ever, "reserving to the said Earl, his heirs and assigns, all woods and underwoods, timber and timber trees, and all mines, minerals, and other royalties," with rights of hunting, hawking, fishing and fowling; but by deed indorsed upon this lease, and of the same date, the lessor granted to the lessee, his heirs and assigns, all the timber and trees then growing, or which should hereafter grow upon the demised lands. By mesne assignments the reversion upon this lease became vested in the present respondent, and the interest in the lease, timber and trees, became vested in the petitioner. The last renewal was made by the respondent to the petitioner, by indenture bearing date the 25th of February, 1854, and by an express pro-

viso in this renewal it was made subject to the petitioner's right to timber and trees, and an indorsement was executed upon the latter lease similar to that originally executed upon the deed of 1749. The original lease of the lands of Ballyrussel was made in the year 1769, whereby Hugh Swaine demised these lands to John Parker, his heirs and assigns, for lives renewable for ever, excepting thereout to the grantor, his heirs and assigns, "all mines, minerals and royalties whatsoever, (save all timber and trees, same being thereby granted to the said John Parker, his heirs and assigns,)" with power of ingress and egress in reference to the same, and rights of hunting, hawking, fishing and fowling. The estate in the latter lease and the reversion therein became vested in the same parties as the former; and the last renewal of the latter lease was also made by the respondent to the petitioner in the year 1854. Both the respondent and petitioner became owners of their respective estates in these lands by conveyance from the Commissioners of the Incumbered Estates Court. There were several covenants in gross in these leases, and their renewals, in reference to preserving trees; doing service at a certain Manor Court; bringing corn to certain mills, &c., which had been inserted in the drafts of the fee farm grants. The order of the Master of the Rolls was as follows:—"It is ordered and declared by the Right Hon. the Master of the Rolls that the petitioner is entitled under the provisions of the Renewable Leasehold Conversion Act, to fee farm grants from the respondent, Thomas Lotwon Jenkins, of the messuages, lands, and tenements respectively demised by the said leases of the 3rd October, 1749, and the 2nd August, 1769, in the petition mentioned; and let it be, and it is hereby referred to the Master of this court in rotation, to inquire and report the amount of compensation to which the said respondent is entitled, under the 5th section of the said Act, for the loss which will take place in the marketable value of the said respondent's estate and interest in the said messuages, lands, and tenements demised by the said leases respectively, by the conversion of his estate in the reversion in the said messuages, lands, and tenements demised by each such lease unto an estate in fee farm rent, and let it be hereby further referred to the said Master to inquire and report, in case the petitioner and respondent shall differ about the same, as to the amount of the fee farm rents to be made payable by such grants respectively, and whether any fines or interest thereon, or fees are payable by the petitioner to the respondent before the execution of the said respective grants in fee farm; and whether, and what arrear of the rents reserved by the said leases respectively is due by the petitioner to the respondent, and let the said Master settle and approve of the drafts of the said fee farm grants, if the petitioner and respondent shall differ about the same, and the court doth reserve further order and the question of costs."

Deasy, Q.C., for the respondent, cited In re Lawless, owner, Campion, petitioner, (7 Ir. Jur. 13.)

Christian, Serjt., (with him Hughes, Q.C.) contra.—The order of the Master of the Rolls merely

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states that the petitioner is entitled to a fee-farm grant, directing the Master to ascertain whether or not he is entitled to compensation. The principal question of compensation will be in reference to a quantity of underwood, which is not included in the indorsement. It is of great value, as affording cover for game, and the respondent will lose the benefit of it unless compensation be awarded. The other question is in reference to the covenants in gross, which appear in the leases sought to be converted into a fee-farm grant. Under these leases, and their renewals, the respondent was entitled to a renewal of these covenants, which was necessary, these covenants not running with the land; but under this grant they will cease, and therefore compensation should be awarded. These are proper matters for the consideration of the Master in reference to compensation.

J. S. Townsend in reply.—It appears from section 4 of the Leasehold Conversion Act that certain rights of the reversioner may be commuted by consent, and the grant so far modified that royalties, mines, timber, and the like, may be disposed of, but the respondent has not thought it necessary to avail himself of that provision. The only property of that nature, of any importance in the present case, was the timber; and as to that all controversy is removed by the indorsement on the lease, and therefore the reversioner is not entitled to compensation for what he did not lose; nor is he asked to abandon anything. The order in the present case is precisely similar to that made in *Ex parte Knox*, (2 Ir. Ch. Rep. 60,) in which case the Master of the Rolls clearly expressed his opinion that it was for the loss of the reversion alone that the reversioner was entitled to compensation, and the converse of that proposition has since been decided by the Privy Council in the case alluded to. As to the alleged loss that may arise to the reversioner in reference to the underwood, as cover for game, it does not appear that such rights existed in the year 1749, when the original lease was made, or at all events that they were of any value. This case is similar to, and to be ruled by the decision of the Privy Council.

LORD CHANCELLOR.—The only difficulty I feel in this case is, not as to the question of compensation, but how this fee-farm grant is to be framed. The effect of the indorsement upon the original lease, and the renewals under it, is to nullify the question as to any right of the reversioner to compensation for timber. It is a singular mode of disposing of the timber, but it appears to have been adopted in all the renewals. As to the question whether or not the landlord is entitled to compensation for the mere conversion of the estate, I am bound to follow the decision that has already been pronounced by the Privy Council—a decision in which I fully concur. The remaining question, therefore, is, whether there is anything further in the case entitling the landlord to compensation. The affidavits do not allege any certain loss; and I do not think that any valuator could say whether there was one farthing difference in value between what the reversioner's estate has been under the lease, and is to be under the fee-farm grant. As

to section 4, it provides that where certain rights exist in the landlord, the parties may agree to vary the amount of the fee-farm rent to be paid accordingly: that section, therefore, implies that, except as to such rights, the parties shall stand in *statu quo* as under the former leases; but I do not think it follows from that section that, in case the parties shall not agree as to those rights, that there is to be compensation awarded to the landlord. I shall look into the Act of Parliament, and the documents connected with the case before I frame the order. As to the covenants in gross, I conceive that the statutes remove all right to compensation as to them, but in the present case it would be exceedingly hard to say what is the value of the right of renewal of these covenants. I do not think it probable that this case will be a precedent for the future, as an indorsement, such as appears upon the original lease, is not likely to be met with in other cases.

Nov. 18.—LORD CHANCELLOR.—When this case was at the hearing, I stated what I conceived my order would be, and, after having considered the provisions of the Act and the documents connected with the case, I see no reason for changing the opinion I then formed, as I can discover nothing to warrant such a reference as the petitioner seeks by his present application. The Judicial Committee of the Privy Council have decided that the mere destruction of the reversion by the conversion of the renewable leasehold into a fee-farm, is not such an element for compensation as can be at all appreciated, and that section 5 of the Renewable Leasehold Conversion Act does not warrant any such idea, inasmuch as that Act does not contemplate any inquiry as to the mere value of the reversion. That being so, as to the ordinary parts of the lease, it has been further suggested that there were also special provisions in reference to timber, the preservation of which was protected by covenants; the latter being covenants in gross, which would not come within the provisions of the Act, as it only provides for covenants running with the land as between landlord and tenant; and therefore, that after any alienation of the land they would cease to affect it, at least in the way of any legal remedy. But it is to be remembered that these covenants were covenants in gross before the proposed fee-farm grant, and therefore, were in the same position as they will be in after the conversion, with this difference, that a new tenant might become personally bound by them if it became necessary for him to renew the lease; but I cannot find in the Act anything as to affixing a value to such a possible incidental advantage. I do not know even how a value could be affixed to the difference between a covenant in gross, and one running with the lands, and still more difficult would it be to assign the value of such an occasional renewal of a covenant in gross; indeed it is most probable that few of those persons employed for the purposes of valuation, could comprehend the distinction between a covenant in gross and one running with the land. With respect to royalties, the portion of the Act now under consideration does not deal with cases of this nature, the 9th section having expressly provided for all such

questions to the fullest extent, and the conversion will in no way diminish any such rights as those claimed by the respondent. Therefore, it appears to me that there is nothing in the present case to entitle the landlord to compensation, there being no sound distinction between the present case and that already adjudicated upon by the Privy Council. The portion of the order therefore, which directs a reference as to compensation, must be struck out.

Rule accordingly.

BYRNE v. COLEMAN.—Dec. 2.

Practice—Cause petition—Verifying affidavit—Chancery Regulation Act, section 15.

Application for a reference under the 15th section of the Chancery Regulation Act, where the petition was verified not by the petitioner, but by his solicitor, whose affidavit stated that he was aware of the circumstances of the case, and had prepared the mortgage deed (the petition being to foreclose), and that he was also a relessee to uses thereunder, granted.

J. Kernon applied for an order under the 15th section of the Chancery Regulation Act.—The only peculiarity in this case is, that the petitioner, who is resident at Toulouse, has not been able to verify the contents of the cause petition, but it is verified by his solicitor. The prayer of the petitioner is for an order to raise the amount of a sum mortgaged or for foreclosure; and the solicitor states that he is acquainted with the circumstances of the case, and the contents of the petition, which he verifies, having been the party who prepared the mortgage deed in question, under which he is also a relessee to uses.

The LORD CHANCELLOR made the order sought.
Order granted.

ROLLS COURT.

[Reported by G. O. MALLER, Esq. Barrister-at-Law.]

SAUNDERS v. SAUNDERS.—Dec. 9.

Setting down Cause Petition—18th and 27th General Orders—Service.

Where notice of a cause petition was sent to a solicitor, supposed to be the general solicitor of respondents, on the 18th of March, and he on the 22nd acknowledged its receipt, and undertook to appear on receiving a copy of the petition, and same having been sent as required on the 23rd, the solicitor entered an appearance for the defendants on the 25th of March, and the registrar refused to set down the petition in Michaelmas Term, on the ground that two whole Terms had elapsed under the 27th General Order, from the time when it might have been set down for hearing, and that therefore the petition stood dismissed. Held, the registrar was right in so deciding, as the service was to be deemed as effected on the 18th, but the court directed the petition to be reinstated under the special circumstances of the case.

O'Riordan, for the plaintiff, moved that the registrar of this court do set down for hearing, as of Saturday, the 25th day of November last, the cause

petition in this matter, and that same should be deemed and taken as if set down on that day, or that the petition be reinstated. The petition was filed on the 16th of March, the notice was not served on either of the respondents, one of them being resident in England. The solicitor for the petitioner hearing that a Mr. Dalton had acted in some matters as solicitor for the respondents, he, on the 18th of March, enclosed copies of the notice of filing the petition in a letter, asking him (Mr. Dalton) to appear for the respondent, in order to obviate the necessity of sending a process-server for the purpose of serving them. On the 22nd of March Mr. Dalton answered that letter, stating he would appear for the respondents if petitioner would lend him a copy of the petition. On the next day (the 23rd) petitioner's solicitor sent a copy of the petition, and on the 25th Mr. Dalton appeared for both respondents, and on the 1st of May he filed an affidavit on behalf of one of the respondents. On petitioner's solicitor applying at the office on the 25th of November to set down the cause petition, the registrar refused, on the ground that it stood dismissed under the 17th and 27th General Orders, not having been set down for hearing within two whole Terms after the time it might have been set down under the 18th General Order. Counsel contended that, counting the 21 days from the 18th of March, the 21 days, *exclusive of Sundays*, did not expire until the 13th of April; and, as the 15th was the first day of the next subsequent Term, two whole Terms only could be considered as elapsing, on the presumption that the service counted from the 18th. [The Master of the Rolls dissented from the computation of the time, as assumed by counsel, to be exclusive of Sundays.] Then, computing the time from the 25th, when the solicitor appeared for the respondents, and thereby recognized the service, the time would not expire until after the first day of the then ensuing Term.

B. Stephens contra.—The first part of the application—that the registrar should be directed to set down the cause petition, cannot be sustained, as the registrar was clearly right in his construction of the General Orders. As to the second branch of the application, there are no special circumstances in this case. If the registrar was justified in refusing to set down the petition, that is the result of petitioner's own laches. At all events, if the court should be of opinion that the petition should be reinstated, the respondents should have copies of several affidavits in reply, which have been filed on the day before the cause was attempted to be set down, and also further time to answer them.

MASTER OF THE ROLLS.—I have no doubt upon my mind that the registrar was correct in considering that this petition stood dismissed under the General Orders. The service on the solicitor on the 18th was a substitution of service, which was afterwards adopted; the respondents must, therefore, be considered as having been served from that date, and if so, the petition might have been set down in three weeks from the 18th. But, under the special circumstances of the case, I will reinstate the petition, petitioner to pay £4, the costs of this motion, the respondents to have three weeks to answer the affi-

davits filed by the petitioner, who is to furnish copies.

NOTE.—As to the practice in reinstating petitions, see *Cassan v. Carr*, (2 Ir. Ch. Rep. 577); and as to bills, 1 Dan. Ch. Pr. 784.—*Rep.*

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1854.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

DIXON v. FRANKS.—November 11.

Practice—Setting aside pleas.

In an action against a justice of the peace for false imprisonment of the plaintiff, an infant of tender years, pleas justifying the trespass on the ground that the defendant, by command of the Queen, apprehended and detained the plaintiff with his own free will, in order that he might not be tampered with in respect to a prosecution against his father for felony, in which he was a material witness, was set aside by the court on a motion under 16 & 17 Vic. cap. 113, s. 83, without putting the plaintiff to demur.

M'Donagh, Q.C., (and D. C. Heron,) on behalf of the plaintiff, moved to set aside the defendant's pleas under the 83rd section of the Common Law Procedure Act as being embarrassing, or for liberty to demur, and at the same time, under the 59th section, to file a replication to the effect that the provisions of the 14 & 15 Vic. cap. 93, s. 13, as to the compulsory attendance of witnesses before justices, had not been complied with by the defendant, and that the authority of the Crown for the arrest of the plaintiff had not been exercised according to the known laws of the realm. The action was brought for the false imprisonment of the plaintiff, and the plaint averred that "the defendant arrested the plaintiff, and imprisoned him for one month in the Maryborough gaol." To this the defendant pleaded: "that whilst the said F. B. Dixon stood charged with a felony of conspiracy to murder one T. Brophy, and before the trial of the said felony, it appeared to our sovereign lady the Queen that the said Frank Edward Dixon being then an infant of tender years and under the age of seven years, would be a material and important witness to be thereafter examined upon the prosecution of the said Frederick Beverly Dixon on the charge aforesaid, and in support of the charges, and accordingly the said defendant being then a magistrate and justice of the peace for the Queen's County, by command of our lady the Queen to him for that purpose given, and as her servant, and on her behalf, caused the said Frank Edward Dixon with his own free will to be brought before him and detained, to the end that the said Frank Edward Dixon might not be tampered with or interfered with by the said Frederick Beverly Dixon, and that the said Frank Edward Dixon might be duly and properly instructed in the religion professed by his father and in the nature of an oath, and that he might be forthcoming for the ends of justice." Another plea to the same effect at considerable length, detailed the whole of the proceedings below, terminating with the acquittal of Frederick Beverly

Dixon at the Spring Assizes for the Queen's County, 1854. It is now contended that it was impossible for the plaintiff to take any certain issue on these pleas. The consent of the child as averred amounted to the plea of leave and licence, which could not be pleaded to false imprisonment, which was *contra pacem*. It was not shown how it appeared to the Crown that the plaintiff was a material witness. No warrant for his arrest had been issued. Nor could the authority of the Sovereign be a justification for the magistrate, unless it were exercised according to the law of the land. *Magna Charta*, 9 Hen. 3, c. 29. The plaintiff was, however, willing to demur and reply, as the truth of the facts pleaded were denied on affidavit. *Lumley v. Gye*, (22 L. J. Ex. 9); *Neville v. Hyland*, (3 Ir. C. L. R. 338.)

Hayes, Q. C., (with him Napier, Q. C., and J. White,) for the defendant.—Issue could be taken on the authority of the Crown. The Attorney General had authorized the arrest of this child. [*Lefroy, C. J.*—That would be no justification; the mode in which the Sovereign commands the arrest of a subject ought to be pleaded, in order that the court may see whether it is legally exercised.] The consent of the child is distinctly alleged in the plea. [*Crompton, J.*—Is there any authority that a child of such tender years can consent to his imprisonment.]

J. D. Fitzgerald, Q. C., was not called on to reply.

PER CURIAM.*—Set aside the pleas with costs Defendant to amend within four days, and take short notice of trial.

STAPLETON v. BERGIN.—Nov.

Pleading—Judgment—Writ of Revivor—Assignee
16 & 17 Vic. c. 113:

A writ of revivor under the 16 & 17 Vic. c. 113, s. 151, at the suit of the assignee of the conuzee of a judgment is sufficient, if it merely state that the defendant is summoned to show cause "why A B, assignee of C D, shall not have execution," &c., without alleging the particulars of the assignment of such judgment, or the enrolment of the memorial thereof required by statute.

THIS was a writ of revivor at the suit of the assignee of the conuzee of a judgment. The writ was as follows:—Victoria, &c., to the said John Bergin, greeting; John Bergin, the defendant, is summoned to appear and show cause wherefore George Murray M'Gusty, assignee of Michael Stapleton, shall not have execution against the said John Bergin of a judgment whereby the said Michael Stapleton, on the 17th day of January, 1842, in the said Court of Queen's Bench, recovered against the said John Bergin the sum of £200, sterling, debt, with £2 la. 11d., sterling, damages, of which sums the said George M. M'Gusty alleges that there remains due and unsatisfied the sum of £83 2s. principal, interest and costs; therefore, &c. The defendant demurred to this writ, on the ground that it did not disclose any sufficient cause or reason why the plaintiff should have execution against the defendant on

* Moore, J., was absent.

the judgment obtained against the latter by Michael Stapleton, inasmuch as the writ did not show how the judgment vested in the plaintiff, or what was his title thereto, or how he could be entitled to demand execution on said judgment; and that it is consistent with the averments in said writ that the judgment may still be vested in Stapleton; and that it was not stated by what instrument Stapleton might have assigned the judgment; and that, at all events, no enrolment, pursuant to statute, of any such assignment was alleged.

Sullivan and J. D. Fitzgerald, Q. C. in support of the demurrer.—The question raised by this demurrer as to what averments should writs of revivor, at the suit of assignees of judgments under the Common Law Procedure Amendment Act, ought to contain. We mean to contend here, that the plaintiff does not disclose any title as the assignee of Michael Stapleton. He does not say *how* he is assignee or of what he is assignee. The 151st section of the Act directs that the writ, "after reciting the reason why such writ has become necessary, shall call upon the party to whom it is directed to appear within eight days after the service thereof in the court out of which it issues, to show cause why the party, at whose instance such writ has been issued, should not have execution against the party to whom such writ is directed for the amount claimed to be due," &c. [*Crampton, J.*—I find that the schedule does not give any form for this case, but the only form of a writ of revivor there describes the plaintiff as "executor of the said John James."] The executor by virtue of his office is entitled to sue, as such; but the assignee must superadd another character. [*Lefroy, C. J.*—Does not your demurrer admit that the plaintiff was assignee; how can he be assignee unless the judgment has been legally assigned? *Crampton, J.*—Your course of pleading should have been to have pleaded something to deprive the plaintiff of his alleged right as assignee.] The plaintiff should state his case sufficiently in law to entitle himself to execution. [*Perrin, J.*—The question is, whether a statement that a man was assignee of another means that he was assignee of the judgment; the object of the recent statute was to shorten these forms.] The case of the assignee of a lease is analogous. It has been decided by the Common Pleas that in an action for use and occupation, since the Procedure Act, the omission of the averment that the defendant held the premises by the plaintiff's permission is fatal—*M'Neale v. M'Court*, (6 Ir. Jur. 256, C. P.) That shows what kind of certainty is still requisite in the statement of the plaintiff's title, and in this court, in a recent case a summons and plaint was set aside as irregular for simply averring that the plaintiff was assignee of a reversion, without deducing his title. With regard to the assignment of a judgment under the 9th G. 4, cap. 5, (fr.) the attested copy of the memorial of the assignment has been held the proper evidence of the fact of the assignment—*Hobhouse v. Hamilton*, (1 Sch. & Lef. 207.) In *Assignee of Lynch v. Kennedy*, (11 Ir. L. R. 841,) the writ of *sci. fa.*, which was at the suit of the assignee of the conuzee, contains the usual averment that the conuzee by deed duly executed, &c. assigned the judgment, debt

and damages to the plaintiff, "as by the memorial and record thereof, &c. manifestly appears." The defendant simply pleaded that the conuzee did not assign *modo et forma*, concluding with a prayer of judgment, and a demurrer was allowed upon the ground that the assignment being matter of record and not in *pais*, *nul tiel record* ought to have been pleaded. The statement in the present declaration as to the character of the plaintiff is not one in which issue can be safely taken. The word "assignee" is one of wide import. It may mean an assignee of a bankrupt or insolvent. It may again imply that the right to this judgment may have been equitably vested in the defendant by a deed of assignment, which, if not enrolled pursuant to the statute, would give no right of action to the plaintiff. What issue can be taken with safety upon this averment, if the term "assignee" be understood to mean an assignee by record? *Lynch v. Kennedy* shows that a simple denial of the assignment would be bad, because it is not the fact of the existence of the deed itself which is to be inquired into, but whether it was duly enrolled. But we are deprived by this mode of pleading of the opportunity to plead to plea of *nul tiel record*, for no record was averred to exist here. It is not even stated that the plaintiff was assignee of a judgment. If this were an averment that the plaintiff was the assignee of a bankrupt we should be bound, in order to dispute that, to serve notice as to what part of his title we denied, whether the debt, trading, or act of bankruptcy. The new statute does not alter the rules of pleading further than it expressly points out. It does not abolish the plea of *nul tiel record*, or allow the parties to have tried by the country, that which formerly was triable only by the record. The New Rules expressly provide for the plea of *nul tiel record*. The 51st section of the English Common Law Procedure Act corresponds with the 81st section of the Irish Act, repealing the abolition of special demurrers; and yet it has been held in England, that a declaration on a contract which simply averred that the defendant had agreed with the plaintiff, without stating the consideration for such agreement, was bad. By a parity of reasoning we say that this writ by simply entitling the plaintiff assignee of Stapleton, but without showing the mode of the assignment, is bad, as not showing sufficient matter to ground the action. It is perfectly consistent with the statement, as it now stands, that the plaintiff's title is derived under several successive assignments. How would it then be possible to plead *nul tiel record*? The memorandum at foot of the writ, referring to the number of the roll, is no part of the record.

Hickey, contra, was not called upon.

LEFROY, C. J.—This statute has swept away, very advantageously, all special demurrers; and I do not know any instance in which the usefulness of that provision can be more manifest than in the present case. The statute only requires a party to state in plain, clear, language the substantial right in which he sues, with the addition of this single qualification—that unless the plaintiff state a special right to sue in a representative capacity, he shall be intended to sue in his own right. Now, it has been

admitted in this case that there is no representative capacity in which the plaintiff can be taken to sue, except as assignee of this judgment. There are indeed other assigneeships; but it has been admitted that if he were to sue in respect of these, he should have so stated. It then comes to this: the only assignment by virtue of which the plaintiff here is entitled to sue is in respect of one in his own right, and that can be no other than as assignee of the judgment. But it is not necessary to rest upon mere assumption or argument; for, on reading the words of this writ, I cannot see how the plaintiff can more plainly state that he is assignee of this judgment. The body of the writ states and refers to the original record on which Stapleton is plaintiff, and Bergin is defendant. Now we must take notice of our own record; we have it before us, and upon that the writ has issued. Mr. McGusty issues this writ, in which he styles himself assignee of Michael Stapleton, that is to say, of the plaintiff in the judgment in which Stapleton appears to be original plaintiff; and he then calls upon John Bergin, the defendant in that record, to show cause why he, as the assignee of Stapleton, should not have execution against the same John Bergin in respect of the judgment recovered by Stapleton on the 17th of January, 1842, against the defendant, for the sum of £200. The specific judgment is described. I cannot conceive a more distinct statement of the right of the plaintiff as assignee of that judgment, calling, as he does, on the defendant to show cause why he should not pay him, as such assignee, the amount of that judgment. A demurrer has been taken to that statement. The demurrer admits everything which is well and sufficiently pleaded in its legal acceptation, and as the plaintiff here sues as assignee of the plaintiff in the judgment, this demurrer accordingly admits this fact, and that he is legal assignee of the judgment. How can he be a legal assignee of the judgment? By the fact of there being a memorial enrolled upon the record; for the defendant admits that Mr. McGusty is the assignee, and it is vain to say that there are other acceptations of the word "assignee," equitable assignee, for example. The effect of this admission is to concede the fact of the plaintiff being assignee in the legal acceptation of the term. Therefore, we must take it that the plaintiff is an assignee by virtue of an enrolled deed of assignment. Then, with regard to the complaint which the defendant has made with respect to his having been deprived of the right of pleading *nul tiel record*, he has admitted that very fact by his demurrer, and so has ousted himself from such a denial, having admitted, as he has done, that this plaintiff was an assignee, which he only could be by an enrolled assignment; but, at all events, the plaintiff has here substantially averred the existence of such a record, and he may be answered by saying that there was no such record. We must, for these reasons, overrule the demurrer.

CRAMPTON, J.—This amounts to a special demurrer, founded on the ground of uncertainty. Let us see what the form of the plaint ought to be. The plaintiff is bound to set forth a true and succinct statement of his cause of action. What is wanting

in this plaint with regard to the requisites made necessary by the Act of Parliament? It is plain that the plaintiff does not sue in any other right than his own. Everything is stated clearly, and the uncertainty complained of is merely deduced from the circumstance that the term might apply to some other assigneeship than that in respect of a judgment. That is a mistake; for, in case he were to have sued as the assignee of a bankrupt or insolvent, he should aver the special character of such assignee; but here he sues only as the assignee of a judgment. But the Legislature has prescribed a form for writs of revivor, and the form which has been given is one adapted not exclusively to the case of executors, but because that case is one of ordinary occurrence, and in every other respect the particular writ of revivor applicable thereto is the same as in others, that was selected for an example, and the form in question applies as well to the case of an assignee, so that he merely substituted the word "assignee" for that of "executor." I think that it is impossible to contend that the defendant here has been subjected to any difficulty or embarrassment, so as to have been misled.

PERRIN, J. concurred.

Demurrer overruled.

RUTLEDGE v. RUTLEDGE.—Nov. 21.

Practice—New trial—Death of party.

A verdict had been found against a defendant in ejectment, who died subsequent to the trial, but before judgment was entered up on the postea. Leave had been reserved at the trial to enter up a verdict for the defendant, in case the court should rule the points saved in his favour. The action was defended on behalf of creditors of the defendant by a receiver in a cause under an order of the Court of Chancery. A conditional order having been obtained to enter a verdict for the defendant, cause was shown, partly on the ground that the court had no jurisdiction to disturb the verdict, on account of the death, inasmuch as no personal representative to the defendant had been raised up. Held, that the court would entertain the application to set aside the verdict, upon the receiver's undertaking to be answerable for the costs of the motion.

THIS was an ejectment on the title, brought to recover the possession of certain lands in Mayo, to which the plaintiff claimed to be entitled under the will of his ancestor, Peter Rutledge, made in 1766. At the time of bringing the ejectment a receiver had been appointed over the defendant's interest in a certain cause in the Court of Chancery, and pursuant to an order at the Rolls he defended the ejectment on behalf of the parties interested. The cause was tried at the last Assizes for Mayo, when a verdict was found for the plaintiff, subject to certain points saved, and with liberty reserved to change the verdict for the plaintiff into one for the defendant, in case the court above should rule in his favour. After the trial, but previous to the ensuing Term, the defendant died, and a conditional order was obtained to change the verdict accordingly. Cause was now shown against the same, and, prior to discussing the merits of the motion,

Walter Bourke, Q. C. and West, Q. C. (with whom was *Jordan*.) objected that the court ought to discharge the rule without further argument. The parties who represent the defendant have no *locus standi* here, as no personal representative has been raised up. The statute 7 W. 3, cap. 7, s. 2, has been repealed by the Common Law Procedure Amendment Act; but section 159 contains a similar provision with reference to suits, pending which, after verdict and before judgment, either party has died. By section 162 the assignees of a bankrupt or insolvent may continue a suit when the plaintiff has become bankrupt or insolvent, pending the suit, provided they give security for costs. It is true that these sections apply particularly to personal actions; but, by section 221, the proceedings in ejectment, in case of the death of the defendant after verdict, are declared to be the same as in personal actions. There is no party here in existence who will be liable for the costs of this motion, which has not been authorized by the personal representatives of this party. In the case of *Freeman v. Rosher*, (13 Q. B. 780,) where, after a verdict for the plaintiff, with leave reserved to move for a non-suit or a verdict for the defendant, the defendant died before a motion could be made, the rule was notwithstanding made absolute to enter the verdict for the defendant, it appearing that the executors authorized the motion; *Patteson, J.*, in giving judgment, there said, "Had nothing taken place at the Assizes, except a verdict for the plaintiff without leave being reserved to move to enter a verdict for the defendant, I do not say that a question might not have arisen as to our power, but here such leave was reserved and by consent of the plaintiff; and that consent must clearly be understood to extend to a motion by the executors. Then, if we make the rule for a verdict absolute, the effect is as if the verdict had been found at the Assizes, that is, before the defendant's death, and then the statute enables us to enter the judgment for the executors. The only question, therefore, is, whether this motion is made by the executors. The cases cited against the rule might apply if it were moved for without their consent." Here there is no executor or other personal representative.

Fitzgibbon, Q. C. and P. Blake, Q. C. contra.

PER CURIAM.—It is only reasonable that some person should be answerable for the costs of this motion. We will hear it, the receiver undertaking to be answerable for the costs.

[The motion then proceeded upon this understanding, and the rule was afterwards discharged upon the merits.]

HIGGINS v. BOURKE.—Nov. 15.

Security for costs after defence—44th Rule—Special circumstances.

Where a motion was made by the attorney for defendant for security for costs within the usual time, but was refused by reason of the insufficiency of the affidavit, which was made by the attorney in the absence of his client, who not being aware of the necessity for it, had not properly instructed the attorney. A motion made after defence filed, grounded on affidavit of the defendant stating the

reasons of his absence, and swearing positively as to merits, was granted under the 44th Rule, the court holding that the affidavit disclosed sufficient special circumstances to warrant the order, but costs of motion to be paid by defendant.

St. John Armstrong moved that proceedings be stayed till security for costs given. The affidavit of the attorney, which was used on the motion made here on the 9th, stated the reasons of his making the affidavit, but that not being deemed satisfactory the motion was refused. The defendant now swears that he on receiving the summons and plaint handed it to his attorney with instructions to take defence, and that not knowing he would be required for some time, or that he would have to make any affidavit, he left for the country on unavoidable business of his own, and did not mention where he was going to his attorney. That on his return to his residence on the 9th of November he there found two letters from his attorney, with directions for an affidavit to ground a motion for security for costs, but which was then too late for him to make, as the motion had been made and refused on that day. He swears positively as to merits.

Jonathan Sherlock contra.—The defendant within the usual time made his application for security for costs, and was refused; he had the means of obtaining the order except for his own neglect, by which the plaintiff is not to be prejudiced: the attorney when making the affidavit should have stated he was acquainted with the defence and set it out briefly, and at all events, it was the duty of the defendant to have properly instructed his attorney as to his defence, which was to have been put on the file before the return of the defendant from the country. His case is, that by his own *laches* he waived his time for obtaining the order now sought, and made an abortive attempt to get it then on his special circumstances; besides, he obtained time for pleading, as his time for doing so had expired on the 8th, he filed his defence on the 11th, and it is a rule that security for costs cannot be required after time to plead given.

St. John Armstrong in reply.—This is a question for the discretion of the court. It is clearly a fatality, and we have not been guilty of any neglect; we have given a fair explanation of the reason of our failure on the former motion to obtain the order; many cases show that when a fatality prevents an application, such as this, from being made in due time, the court will receive a fair explanation for the delay.

CRAMPTON, J.—The right to get security for costs is a valuable one; but, in order to prevent this right being turned into an occasion for delay, the parties must come on before the time for pleading has elapsed. It is, however, added by Rule 44 that, in special cases, after defence filed, the court may grant such an application. Now, the question is, whether there are here such special circumstances as would come within the meaning of the rule, and give us power to let the party come in so as not to be deprived of that right, to which he would undoubtedly have been entitled, had he duly applied in the first instance. I think that there are some special circumstances here; the defendant did come in due time to make this application, but with

a defective affidavit. Now, under ordinary circumstances, he should not be listened to on a subsequent occasion; but, by a fatality, the defendant being absent, could not communicate with his attorney in time for the making of the motion. Under these circumstances the attorney was called on suddenly to make in person an affidavit, which was necessarily defective. If he could have said that his client had a defence upon the merits, we should have granted the motion, but as he stated the fact merely on information and belief, we thought it better to refuse the application. If the attorney were not acquainted with the nature of the case, the defendant ought to have instructed his attorney better. It would certainly have been wise had he done so; but it is, I believe, a common practice for persons when served with a writ of plaint, to put it in the hands of their attorney, without giving particular instructions till the time comes for filing their defence. Under these circumstances I am disposed to relax the strict rule of the court, but will add that the party making the application must pay the costs of the motion to the opposite side.

Rule accordingly.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

THOMPSON v. SHANLEY AND OTHERS.—Nov. 20, 21, and 23.

*Co-defendants—Default—Notice of trial—16 & 17 Vic. c. 113, s. 97—92nd General Order.**

An action being brought against A, B, C and D to recover certain gales of rent reserved by lease; the plaintiff discontinued as to A and B. The other defendants, C and D, were tenants in common of an undivided moiety. Called judgment to go by default, but D took defence. The plaintiff marked judgment against C, but without the affidavit required by the 92nd General Order. Issue being joined on the defence pleaded by D the case came before a jury without any notice of the trial being given to C. The jury assessed the amount due by D, but did not assess any sum against C. Held, that the judgment against C was interlocutory, and not under section 97 of the Common Law Procedure Act, and that the proceedings before the jury were irregular as C had no notice of them.

Semble, where the demand is for a liquidated sum, and judgment by default has been marked against one defendant for that sum, upon an affidavit specifying the amount, no notice of subsequent proceedings against other defendants need be given to the defendant in default.

Quære, is an action for several gales of rent reserved by lease against tenants in common, assignees of the lease, an action for a liquidated demand within the meaning of sections 96 & 97 of the Common Law Procedure Act.

THIS WAS AN ACTION TO RECOVER ONE AND A HALF YEAR'S

* "An affidavit specifying the sum actually due shall be filed before any judgment by default shall be marked under the 96th or 97th sections of the Common Law Procedure Amendment Act (Ireland,) 1853."

rent reserved by lease. The summons and plaint recited a lease bearing date 30th September, 1805, by which one Robert Thompson demised to Thomas Carr certain messuages for 150 years at a rent of £100 per annum. This lease contained the usual covenant on the part of the lessee to pay the rent; an entry under this lease was alleged. Robert Thompson died in the year 1823, having previously devised his reversion to Alexander Thompson. This Alexander Thompson, by will bearing date 8th March, 1845, devised this reversion to the plaintiff, and died shortly after. It was alleged by the plaintiff that one undivided moiety of the interest in the lease of 1805 was vested in two of the defendants, William Shanley and Anne Shanley, as tenants in common, and that the other undivided moiety was similarly vested in Matilda Shanley and Francis Percy, the other defendants, and that £138 9s. 3d., present currency, for one and a half year's rent, was due by the defendants. William Shanley and Anne Shanley took defence, but the plaintiff discontinued his action against them. Matilda Shanley also took defence, and alleged that the undivided moiety did not vest in her, &c. Upon this defence the issue settled was, "Whether one undivided moiety of the interest of Thomas Carr of and in the said premises, or of or in any of them, or any part thereof, or any other part or share of the interest of the said Thomas Carr, did or did not become, or ever was, or now is legally vested by assignment thereof, or otherwise in the said Francis Percy and Matilda Shanley, or in the said Matilda Shanley either solely or as tenant in common with any other person or persons, and whether the said Matilda Shanley is or ever was possessed as tenant in common, or otherwise, of the interest of the said Thomas Carr, of and in the said premises, or any and what part thereof." The other defendant, Francis Percy, did not take defence, and the plaintiff marked judgment against him. It appeared that no affidavit was made of the amount due by Francis Percy, nor did the plaintiff state any amount in the judgment. A suggestion of this judgment was entered on the record, but no direction was given that the jury should assess any sum as due by Francis Percy. The above issue was tried before Chief Justice Monahan at the sittings after last Trinity Term. The jury found on the issue for the plaintiff, and at the request of the counsel for the plaintiff the Chief Justice directed them to find as against Matilda Shanley for one-fourth of a year's rent. To this the counsel for the defendant objected, "On the ground that the jury not having Francis Percy before them, who was not called on to appear at the trial or served with notice of it, under the circumstances of the case, and having regard to the pleadings, damages could not be assessed against the defendant, Matilda Shanley, alone; and that the jury were not, upon the evidence, justified in finding the said specific proportion of rent to be due by the said Matilda Shanley." A conditional order for a new trial had been obtained this Term, and cause was now shown by the counsel for the plaintiff,

Whitaker, Q. C., (with him Robinson, Q. C.)— This is not an action for unliquidated damages; but for a definite portion of rent; the action being against two, and one having let judgment go by

default: the jury in assessing damages against the other could not, on the record, find against the defendant in default. The objection is, that Percy was not before the court, but as he let judgment go by default, he could not appear at the trial. He has allowed judgment to go for a fixed sum, namely, an amount equal to that awarded against Matilda Shanley. The plaintiff proved title to less than he demanded, but that is no ground of objection. *Denn. d. Burgess v. Purvis*, (1 Bur. 326.) The proceedings are regulated by section 97 of the Common Law Procedure Act. There is to be no inquiry where the damages are liquidated and there is a default.

O'Hagan, Q. C., and *J. B. Murphy*, in support of the rule.—There is no difference between cases of liquidated and unliquidated damages as to the judgment, even if this should be considered a case of liquidated damages, which we deny. The cases on this point are cited in Tidd's Practice, 9th ed. 722. There must be an inquiry where there is a default; and this is not altered by the Common Law Procedure Act, as by the latter part of section 97 judgments by default are to operate in the same manner as before the Act. The old practice was, to insert a *tam ad triandum quam ad inquirendum* clause in the jury process, and this applied equally to actions of debt as to other actions. Tidd. Pr. 894; *Mitchell v. Millbank*, (6 T. R. 199); Tidd's Forms, 244, c. 30, s. 12. The damages should therefore have been assessed against Percy at the same time that they were assessed against Matilda Shanley, and he should have had notice of the proceedings. [*Monahan, C. J.*—The proportions as between these two do not matter, as the judgment must be joint. If tenants in common be sued together, the judgment against them must be joint no matter what their shares may be.] It would also be for the advantage of Matilda Shanley that damages should be marked against Percy, for although there is no contribution between tort-feasors—*Merryweather v. Nisan*, (3 T. R. 186,) there is between joint contractors. [*Heydon's case*, (11 Co. Rep. 5.) was also relied on.]

Robinson, Q. C., in reply.—It is necessary to consider what the law was before the late statute, and what it is since. Under the old practice nominal damages would have been claimed; the mode of proceeding is laid down in Chitty's Archbold's Practice, 886, 888. But in debt the judgment was final, and could be marked without assessing the nominal damages. It is still clearer now that there need not be an inquiry in cases like the present, for nominal damages are no longer claimed; the judgment is final whether there be one or two defendants. The 5th section of the Common Law Procedure Act abolishes forms of actions, and section 10 requires the summons and plaint to contain a true statement of the cause of action, and not a claim for damages merely. Section 96 abolishes the rule to compute, and gives a new privilege to the plaintiff; but the 92nd General Order protects the defendant from oppression, as an affidavit is required specifying the amount of the demand. This shows that the judgment is final. Again, the jury could not have assessed damages at all against Percy, for there is not any longer a jury process, as it is

abolished by section 109, there could not therefore be a special *verdict*. They can only find upon the issue on the record; upon that finding the execution must be joint against both defendants for the sum found and no more, so that no injury is done to the defendant in default by not giving him notice.

Cur. adv. vult.

Nov. 23.—*MONAHAN, C. J.*, this day delivered the judgment of the court.—In this case a question of importance upon the construction of a portion of the Common Law Procedure Act has been raised. The action was commenced against four parties to recover rent under a lease. One undivided moiety of the premises was alleged to have come to two of these parties, and the other moiety to the other two, as tenants in common. Two of the parties pleaded that the estate of the lessee had not been assigned to them. The plaintiff did not take issue on this plea, but discontinued his action against these parties, so that the pleadings then stood as if it were an action against two defendants only to recover the rent of an undivided moiety of the premises from them as tenants in common. One of these defendants, Percy, allowed judgment to go by default; but the other, Margaret Shanley, pleaded that no part of the lessee's interest vested in her. The issue on this plea was sent to a jury. Meanwhile judgment had been marked against Percy, and no notice of the trial against Shanley was given to him, nor did the jury at the trial assess any damages against him. The objection now before the court is, that these proceedings are altogether irregular, inasmuch as the defendant, Percy, ought to have had notice of the trial against Shanley, and the jury in that case ought to have assessed damages against the defendant Percy as well as against Shanley. I confess I had some leaning in favour of the objection at first; but it was urged by the counsel for the plaintiff that they could have marked judgment against Percy, and issued execution at once under the 96th and 97th sections of the Common Law Procedure Act, as this was a liquidated demand, and the defendant had allowed judgment to go by default; and they also contended, that in case they did not issue execution it was not necessary to give Percy notice of the subsequent proceedings, for if the judgment marked had been for too large a sum, it should be amended by the finding of the jury. It is not necessary to decide that question now, but yet that reasoning satisfied me. The plaintiff's claim, so far as it regards the amount of rent, raises another question—namely, whether this is an action for a liquidated demand in the sense of the 96th and 97th sections? We do not decide that question one way or the other; our decision turns upon the acts of the parties, and the way they proceeded under the statute. We were referred to the 92nd General Order, and it altered our opinion very much. It requires an affidavit of the amount demanded, and it was argued from that that the judgment must be final. If that general order had been complied with, I would have been satisfied that Percy need not have been a party to the proceedings before the jury. But what are the facts of the case? The plaintiff marked an interlocutory judgment, and it was not a judgment for any sum of money,

nor was there any affidavit. A blank was left for the amount, which was to be ascertained before execution could issue; and it could not be ascertained under the 97th section, as the 92nd General Order was not complied with. As, therefore, this was not a judgment marked for a sum certain under the 97th section, we think Percy should have been a party to the proceedings before the jury. The parties can take whatever course they think proper; either to enter a new judgment for a sum certain, or proceed anew. We must set aside the former trial and verdict.

Rule absolute.

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

GRACE v. LEWIS.—Nov. 24.

Costs—Compromise of Action—Liquidated Damages—Changing Attorney—Lien for costs.

In an action for oral slander a compromise was entered into between the parties, but before the sum agreed upon had been paid over, the plaintiff's attorney having been informed of the intended settlement of the action, warned the plaintiff not to settle the demand without his intervention, but the plaintiff directed him to proceed no further in the action as a compromise was in progress, and the sum of £10 as damages, and £3 as costs, had been offered by the defendant. The plaintiff's attorney objected to the amount of costs, stating that he would abide by the taxation, and proceeded with the action, and served a cautionary notice upon the defendant not to proceed in the compromise without paying him the costs due. The plaintiff then entered a rule to change his attorney, and the sums of £10, and £3 costs, were subsequently paid to the plaintiff. Upon an application by the plaintiff's attorney that the defendant should pay him the amount of taxed costs: the court (upon consideration of the peculiar circumstances of the case,) ordered that the applicant should be paid the sum of £5 by the defendant.

Semble, where the plaintiff and defendant fix upon a certain sum to be paid by the latter as a compromise of the suit, and the plaintiff's attorney serves the defendant with a cautionary notice not to pay over that sum to the plaintiff until his costs be paid, the plaintiff's attorney has, in such cases, (as well as where the damages are ascertained by verdict or award) a lien for his costs.

THIS was an application made on behalf of the plaintiff's attorney in this cause, that the defendant should pay to him the sum of £11 19s. 2d., being the amount of the taxed costs in the above action. It appeared that the applicant had commenced proceedings at law, pursuant to instructions received from the plaintiff, in an action for oral slander, and had served a summons and plaint, to which the defendant had filed a defence, and that upon the 31st of May last, notice of trial for the sittings after Trinity Term had been served upon the defendant's attorney, together with a copy of the issues as settled by counsel, with a requisition to return the same, when approved, within four days. An offer to com-

promise the suit having been made to the plaintiff, the applicant cautioned him against entering into any such arrangement except through his attorney, and upon the 7th of June last, he also served upon the defendant's attorney a cautionary notice warning him against compromising the suit without consulting him, and stating that the costs of the proceedings were due to him and not to the plaintiff, and that in case of such a compromise being made, he would hold the defendant responsible for such costs. Upon the same day the plaintiff informed the applicant that the opposite party had offered to pay him a sum of £10 to compromise the action, and £2 10s. for costs. The issues not having been returned within the proper time, the applicant issued a summons to settle the issues before Baron Greene in chamber, upon the 10th of June, upon which day he was requested by a clerk of the defendant's attorney to furnish him with his bill of costs, which he did, amounting to £10 17s. 7d., but offered to accept a sum of £8, rather than prevent an arrangement between the parties. At a subsequent interview between the applicant and the defendant's attorney, the latter offered £10 to settle the suit, and £3 costs, to which the former objected, stating that he would abide by the taxation, and referring to the cautionary notice that had been served upon the defendant's attorney. A notice to change his attorney in the cause was then served by the plaintiff upon the applicant, whereupon the latter proceeded to tax his costs, and served upon the plaintiff the same when taxed, amounting to £13 19s. 2d., but the latter refused to pay the amount, whereupon the applicant issued execution and also served a notice upon the defendant's attorney calling upon him to pay the taxed costs, and that in default of his so doing, an application would be made to this court. The applicant also stated that the plaintiff was an attorney's clerk and had no property of his own which could be taken in execution, and that he had stated his intention of taking the benefit of the Insolvent Act in case he should be arrested. The plaintiff filed an affidavit stating that the understanding between him and his attorney was, that he should only pay the costs out of pocket in case the action was unsuccessful; and that when his attorney heard of the offer of compromise, he hurried on the proceedings, although directed by the plaintiff not to proceed further: that £10 had been paid to him to compromise the suit, and £3 for costs, and that the costs served on him by his attorney amounted to £18, which were reduced on taxation to nearly one half. The plaintiff denied collusion.

Mackey in support of the application.—When there is a compromise of debt and costs in an action of this nature between the parties, the court will compel the defendant to pay the plaintiff's attorney the costs incurred, in case the latter has served him with notice not to settle with the plaintiff until his bill of costs be paid. *Li Welsh v. Hole*, (Doug. 226,) Lord Mansfield says: "I am inclined to go still farther and hold, that if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice." [*Pennefather, B.*—But in that case the compromise

was made pending a writ of error, and the verdict had liquidated the damages.] So does the payment of £10 by the defendant in the present case. [*Pennefather, B.*—What you would require is, a case deciding that when unliquidated damages only are claimed, an attorney has a lien upon his client's right of action.] In an action for a liquidated demand the attorney would have such a lien, as he might proceed with the suit; but in a case of this nature parties cannot be prevented from compromising the action. In *Ormerod v. Tate*, (1 E. 464,) the plaintiff and defendant agreed to a reference after the suit had been at issue, and the arbitrator awarded the defendant to pay to the plaintiff a certain sum by instalments. The plaintiff's attorney served the defendant with notice, as in the present case, to pay him the amount of damages and costs: notwithstanding which, the defendant paid the amount to the plaintiff, telling the attorney he should look for his costs elsewhere, and the court ordered that the defendant (although the plaintiff had given him a release from the entire debt upon payment of the first instalment) should pay over the first and any other accruing instalment to the plaintiff's attorney. [*Pennefather, B.*—These two authorities decide the question as to a sum ascertained by verdict or award, but the case of unliquidated damages still remains.] In *Read v. Dwyer*, (6 T. R. 361,) the question of the amount of damages, which was for business done by the plaintiff for the defendant, had been referred to the Master to ascertain, who awarded a certain sum to be paid to the plaintiff with costs, and as in the above cases, the defendant paid the amount to the plaintiff himself, after notice from the attorney of the plaintiff not to do so, but was compelled to pay it over again to the latter. Lord Keenyon, C. J., in giving judgment says: "The principle by which this application is to be decided was settled a long time ago, namely, that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and, in many instances, at whose expense, those fruits are obtained." This observation applies to the present case. It is admitted that until the demand be liquidated in some way, either by verdict, arbitration, or compromise, there can be no lien for costs; but where the parties do agree to a certain sum as damages, I submit that there is no distinction between the ascertainment of the amount in that manner, and by verdict or award. Besides, in the present case the sum of £8 has been paid by the defendant to the plaintiff for costs, and it has never been paid to the plaintiff's attorney.

Fitzgibbon, Q.C., (with him *M. Mahon*.) contra.—The action in this case was for verbal slander, and if the plaintiff did not get more than 40s. damages, he would lose his costs. It is not to be overlooked in the present case that the plaintiff's attorney elects to proceed with the action after he had been cautioned by the plaintiff not to do so; and that the compromise did not actually take place until the plaintiff had changed his attorney. The plaintiff, who is at present a mere pauper, is in custody, and is it to be said that an attorney is to have a lien on the chance of compromising the damages of a pauper? In *Galbally v. Hume*, (3

Ir. L. R. 34,) which was an action of trespass, the defendant effected a compromise before trial with the plaintiff, but without the knowledge of the plaintiff's attorney, and it was held, that the action being for unliquidated damages, the attorney had no lien for his costs. The application was that the defendant should pay to the plaintiff's attorney the costs incurred, notwithstanding the compromise; and *Pennefather, B.* in delivering judgment in that case, distinguishes between the cases of liquidated and unliquidated damages, and concludes by saying, "We do not wish to hold out any general rule that an attorney will have a lien, but we refuse the present application without costs in the hope that future applications will not be made, and, if made, they will be refused with costs." Besides, in the present case the plaintiff's attorney has arrested his client, and so obtained satisfaction. [*Pennefather, B.*—As to the changing of the attorney it is alleged that no sum was ascertained as damages while the applicant was the plaintiff's attorney, now the rule to change is upon payment of costs, and can an attorney be changed until costs be paid?] When the rule is entered, the attorney should proceed to make up his costs. [*Richards, B.*—The money was not paid by the defendant until after he had received the cautionary notice from the opposite attorney.] It would be monstrous to hold that the attorney of the plaintiff, who was a pauper, should be at liberty to proceed with this action. [*Richards, B.*—At any rate he was entitled to the sum of £3 paid to the plaintiff.] In *Lyons v. Wilkinson*, (13 Ir. L. Rep. 224,) which was an action of ejectment, the possession had been given up by the defendant after notice of trial, and his attorney applied for leave to enter up judgment as in case of nonsuit, upon the ground that the land had been given up behind the attorney's back, and this court held that the attorney had no lien.

Mackey in reply.—The case of *Galbally v. Hume* is clearly distinguishable from the present case, and the other authorities relied upon in support of this application, by the absence of the cautionary notice, which is essential in such cases; besides, it does not clearly appear in that case that any certain sum had been paid or payable to the plaintiff, which is the chief ground of the former decisions. As to the alleged fact that the compromise had not been made until after the rule to change the plaintiff's attorney, it has been sworn that before that rule had been entered the plaintiff informed him that a sum had been tendered and agreed upon; and it is a rule that in such cases the law will not compel the parties to proceed further—"ad vana et inutilia lex neminem cogit"—therefore the damages must be regarded as liquidated in the present case by the compromise.

*PENNEFATHER, B.**—There is a good deal of principle involved in the consideration of the present case, and although, perhaps, we may not feel absolutely called upon to decide the case upon principle, yet we cannot avoid taking it into consideration in treating the matter as laid before us. Authorities have been cited deciding that in cases of unliquidated damages an attorney has no lien

* Pigot, C. B., and Greene, B., were absent.

for his costs, and especially in cases of oral slander like the present. That, I think, we may take to be perfectly clear. It is equally so that an attorney employed in such a case cannot interfere for the purpose of preventing his client from disposing of his rights as he may think fit, nor can he compel him to proceed with any suit he may have commenced to obtain redress. That is equally clear. There is a decision to that effect in this court, and it has been impressed upon my mind by a remarkable expression of Lord Gillamore, that an attorney has no lien on the want of equity in his client's case. Therefore that want of equity does not confer upon the plaintiff's attorney a right to proceed with the action. But the present case is not exactly the same as what is there alluded to. If the damages in an action of this nature, although originally unliquidated, had been ascertained by a verdict, the case of *Welsh v. Hole*, (Doug. 226,) decides that in that case the attorney has a lien for his costs. The same rule exists in cases of arbitration, when the amount of damages, although originally uncertain, has been ascertained by the intervention of arbitrators, because in such a case the award is tantamount to a verdict for the purpose of deciding the question of damages; and in such cases it is not competent for the defendant to pay over the amount so settled by arbitration to the plaintiff in fraud of his attorney, after notice to him not to do so, the amount being ascertained, although originally uncertain. In the present case the amount has not been ascertained either by a verdict, or a reference to arbitrators; it was originally unliquidated, but if it be competent for the parties to refer such questions to arbitration, can it be said that it is not competent for them to settle their claims between themselves without the intervention of arbitrators? If that be so, is there any ground for holding that the amount so ascertained by the act of the parties themselves shall not have equal weight and effect as if it had been decided by verdict or arbitration? Let us consider how the present case stands. Proceedings are taken by the plaintiff's attorney for oral slander, and it has been sworn that this attorney undertook to prosecute the suit upon the understanding that he was only to get the costs out of pocket in case the suit did not terminate successfully. Supposing that to be so, can we say that the attorney is to be affected by that agreement when the demand which was the subject of the action has been ascertained by the parties between themselves. In the month of May notice of trial had been served, and in June a compromise was spoken of, as the parties had a perfect right to do, and the result was an arrangement between themselves that the defendant was to pay the plaintiff a certain sum to settle the suit; but when in thus adjusting their mutual rights the parties come to the conclusion that a certain amount was to be handed over by the defendant to the plaintiff, can it be said that the plaintiff's attorney was not instrumental in obtaining for his client this adjudication upon his rights? In *Galbally v. Hume*, (3 Ir. L. R. 33,) decided in the year 1840, the amount ascertained does not clearly appear; and the circumstances of that case are in other respects obscure. In the present case this is not

so. The amount settled between the parties is clearly ascertained, namely, £10 as damages, a sum that would carry costs in any action in which a verdict might be given for the plaintiff. The compromise takes place in June, and the plaintiff's attorney is informed of it, and directed not to proceed further in the action. This was a direction that he was bound to obey, and he was not at liberty after this to go on any further and incur more expense; but he does so, refusing the sum of £3 which was tendered as costs of the proceedings so far, and declaring that he will abide by the taxation. The plaintiff and defendant then appear to me, I must say, to have adopted an expedient to remove the plaintiff's attorney, by entering a rule to change the attorney upon payment of costs. The object of this clearly was, to deprive the attorney of any claim that he might have had at the time. But had it that effect? It was done for a purpose not to be commended; but does it remove him from being the attorney? He was the attorney upon the record at the time the compromise was entered into; and the rule that was entered for the purpose of removing him, was upon the condition of paying the costs due to him, and I do not think that he can be considered as removed without the payment of these costs. But, perhaps, we need not decide that question at present. He then furnishes his bill of costs for £18; it is impossible for us to say whether or not that amount was justly due: but an attorney should furnish his bill of costs to a reasonable amount. However, in the present case it was reduced on taxation to one-half the amount demanded; and upon inspection of this bill of costs, considering that issue had been joined at the time and notice of trial served, the amount should not have been more than £5. Under these circumstances, can this person claim the favour of the court.—I do not mean to convey that any suitor is to be supposed to receive anything by favour, but such is the technical term—but can a suitor be looked upon with encouragement after having acted in this manner? It has been urged that attorneys should be encouraged to engage in suits in cases of this nature, to assist parties in obtaining their rights; I do not mean to assert the contrary of this proposition: at the same time it is a great abuse of the office of attorney that he should take up the cause of any one without first looking into the merits of the case. This is a great abuse. It appears that the sum of £3 has been paid by the defendant to the plaintiff over and above the amount paid to compromise the action, which was £10. The former sum should not be so paid to the plaintiff, and therefore, upon considering the whole of the case, and under its peculiar circumstances, we shall make an order that the defendant do pay to the plaintiff's attorney the sum of £5 in satisfaction of any demand upon him, and that there be no costs of the present motion. The circumstances of the present case are so peculiar, that the rule we make is not to be considered as a precedent for the future.

RICHARDS, B.—The facts of the present case fully authorize the order to be made, without trenching upon any decided principle.

Rule accordingly.

COURT OF CHANCERY.

HILARY TERM, 1854.

[Reported by WILLIAM HICKSON, Esq. Barrister-at-Law.]

KELLY v. BIRCH.—Feb. 9, 10.

Practice—Discharge of party arrested by fraudulent contrivance.

A transferred and handed over to B, her attorney, certain shares and money, for the purpose (as he afterwards alleged,) of assisting in the compromise of a suit. B, on being required to return them, refused to do so. A then filed a cause petition against B, and, apprehending that he would abscond, obtained a writ of ne exeat regno against him. Before the writ could be executed B absconded, whereupon A proceeded against him criminally, and procured a magistrate's warrant, under which he was arrested in England, and brought back to Ireland, where the writ of ne exeat was put in force. A afterwards abandoned the prosecution against B, who was acquitted of the criminal charge. B now moved that he might be discharged from custody under the writ of ne exeat, alleging that this prosecution was a mere contrivance to bring him within the jurisdiction of this court, and not intended as a bona fide proceeding. Held, that under all the circumstances of the case, the abandonment of the prosecution did not necessarily prove it to have been originally merely colourable or fraudulent, and that if this prosecution were not merely a colourable proceeding, the detention of B under the writ of ne exeat regno was not irregular, and would not be interfered with.

It was stated in the petition in this case, which was filed on the 4th of May, 1853, that the petitioner had transferred certain railway shares and bank stock, and paid over certain sums of money to the respondent, who was acting as her solicitor, for the purpose of effecting a compromise of a suit in which the petitioner was engaged; that the respondent afterwards refused to retransfer the shares or stock, or to repay the money. It then went on to charge that the respondent was about to abscond from the jurisdiction of the court; and prayed for an account of the shares, stock, and money, and any other securities in which they might be invested, a declaration of the petitioner's rights, and a writ of *ne exeat regno* against the respondent. Accordingly the writ issued on the day of filing the petition; but, before it could be executed, the respondent quitted this country. Shortly afterwards the petitioner swore informations against the respondent for feloniously stealing the securities, and a warrant for his arrest was placed in the hands of a police officer and backed in England, and a reward was offered for his apprehension, by means of which proceedings the respondent was arrested in Southampton and brought to Ireland. The writ of *ne exeat regno* was then put in force against him, and on his being brought before the police magistrates on this criminal charge, they committed him for trial for a misdemeanour under statute 9 Geo. 4, c. 55, s. 42. The policeman by whom the respondent had been arrested subsequently brought an action against the petitioner for the reward, and on the

trial in that action he swore (as the respondent alleged by his affidavit) that the petitioner told him when she was sending him away with the warrant, that she only wanted to bring the respondent, by means of the criminal process, within reach of the writ of *ne exeat regno*. It did not appear that the petitioner was present at the trial, and she swore she knew nothing of this statement by the policeman, and that it was false if it had been made. The Grand Jury of the City of Dublin found a bill against the respondent; but, immediately before the trial, he had the proceedings removed by *certiorari* into the Queen's Bench, where, after a postponement at the request of the petitioner, the case came on to be tried on the 2nd of December, 1853. On that day the petitioner requested a further adjournment on the ground of the absence of witnesses, but refused to pay the costs of the day as the price of the indulgence. The case was then proceeded with, and no evidence being offered by the prosecutrix, the respondent was acquitted. He now moved that he might be discharged from custody on the ground that the prosecution instituted against him was only an improper contrivance for bringing him within the jurisdiction of the court, that he might be thus detained under the writ of *ne exeat regno*, and that therefore his detention under the civil process was irregular.

The case and arguments are fully set forth in the Lord Chancellor's judgment.

Martley, Q. C. and *S. Ferguson*, in support of the motion, referred to *Birch v. Prodger*, (1 N. R. 135); *Wells v. Gurney*, (8 B. & C. 769); *Barrett v. Price*, (9 Bing. 566); *Buchmaster v. Cox*, (2 Ir. L. Rep. 101.).

Hughes, Q. C., *Hamilton Smythe, Q. C.*, and *Francis W. Brady* for the petitioner.

LORD CHANCELLOR.—In this case there arises a very serious question. The court always looks favourably, if it be possible, upon the application of a party who seeks to recover his liberty on the ground of the illegality of the process by which he has been arrested; but of course it is guided by the settled rules of law, and the facts of the case. Now with regard to the rule of law it is not disputed by either party; and the facts alleged on one side, and denied on the other, are such as would precisely bring the case within its operation. Mr. Birch in his affidavit, so far as it concerns this part of the case, swears, "That the said petitioner formed the design of instituting criminal proceedings against this deponent, not with the belief that such was a *bona fide* proceeding, or could legally be taken, or in fact sustained, or with the intention of prosecuting same to a trial for the purposes of justice, but as a sham or device intended for the purpose of arresting deponent under the colour of such criminal proceedings, and so bringing deponent, by means of such custody, within the jurisdiction of this honourable court, in order to have deponent then detained under the said writ of *ne exeat regno*." That charge expresses, almost in the precise language of the authorities, the circumstances under which a party arrested would be entitled to his discharge; if the case made by the respondent in those words were sustained, the court would be bound to act

upon it, and to discharge the respondent from custody. The law upon the subject is set out very concisely in *Wells v. Gurney*, (8 B. & C. 769.) The facts in that case were exceedingly similar to those which the respondent alleges to exist in this. It was a case where criminal process was used under circumstances in which civil process could not have been employed, with the result that the defendant, having been seized by virtue of criminal proceeding, was made answerable by that means to the civil process. The defendant was arrested on a Sunday on a warrant for an assault upon a third party, and then on Monday he was taken on the civil process; the court thought it was clearly made out that there was collusion between the plaintiff and the third party (the prosecutor.) Bayley, J., says: "It is clear that the criminal process was used on the Sunday to give the plaintiff an opportunity of making the arrest on the civil process on Monday; and by the execution of the criminal process on the Sunday, the defendant was taken into custody, and detained till Monday, and the plaintiff was thereby enabled to arrest him on the civil process on that day. I admit that contrivances must sometimes be used in order to execute the civil process of courts of justice; but these contrivances ought to be such contrivances as may be lawfully used, and arrest by means of criminal process is not a lawful contrivance." That is a summary of the law upon the subject, which is further stated in distinct terms in *Goodwin v. Lindon*, (3 N. & M. 879; s. c. 1 A. & E. 378.) The precise point is not there decided by the court; but Lord Denman, C.J., says: "When a party is arrested on a criminal charge in pursuance of a scheme for arresting him with more facility upon a civil suit, the court will order him to be discharged. But this acquittal here, upon two indictments preferred by the same party at whose suit he is upon his acquittal, and discharge arrested, does not of itself show that the criminal charge was a mere contrivance on the part of the plaintiff to enable him to arrest the defendant; it does not appear that it was a contrivance for that purpose." These cases distinctly point out what facts must be proved to sustain an application of this kind, and that it must clearly appear that the criminal proceeding was a mere contrivance for executing civil process. That being so, the next thing to be decided is, what was the real character of the criminal proceedings in the present case? In the first place let us consider the position of the parties in May, 1853. The petitioner alleges that the respondent was her confidential solicitor and agent, and that, while so confidentially employed, he received, as her agent, from her, or him, Mr. Boyle, on her behalf, money or securities to a very large amount, to be applied by him to special purposes; and that, in breach of his trust, he had converted this property to his own use, and, in short, had been guilty of embezzlement. Now, if that case be true in fact, it is necessary to surmise what was the position of Mrs. Kelly. By statute 9 Geo. 4, cap. 55, such a transaction was made a criminal offence; and if the statute had done nothing more, it might, perhaps, have been argued that until the criminal prosecution had been completed the petitioner had no civil

remedy for the injury; but the statute expressly provides that nothing therein contained shall affect any remedy which parties otherwise might have had for procuring restitution of the embezzled property. Consequently the petitioner had two remedies—one civil, by suit in equity, or an action for money had and received; the other criminal, by a prosecution for the embezzlement. I call the prosecution a remedy for her, inasmuch as the statute gives the criminal court power to order restitution of the property embezzled, though it may be a question by what machinery such an order could have been carried out; still the two courses were open to the petitioner, on either of which it would have been lawful for her, under the circumstances, to have procured the arrest of the respondent. It is not contended that her arresting him on criminal process would prevent her from going on in the civil suit; nor can the fact of the petitioner and prosecutrix being the same person be considered as in itself entitling him to his discharge. Some expressions are used in that case in the Irish Law Reports to the effect that any interference by the plaintiff in the civil suit in procuring the arrest in the criminal, would prevent the defendant being detained in custody, but they must be taken with reference to the subject-matter of the case, and be held to mean any improper interference; the case in *Nev. & Man.* proves that. The expressions of the court are: "The acquittal of the defendant upon two indictments preferred by the same party at whose suit he is upon his acquittal and discharge arrested, does not of itself show that the criminal charge was a mere contrivance on the part of the plaintiff." It may, therefore, be taken as clear that the person injured by an embezzlement which the Act renders a criminal offence, may adopt both courses, and may in a criminal court proceed to vindicate public justice, and in a civil court sue for the property of which he has been deprived; and may, in both, have the party kept in custody without danger of being defeated in the civil suit merely by having also instituted the criminal prosecution. Still, of course, the double proceeding is open to the observation, that if the criminal charge is only used for the purpose of giving effect to the civil suit, and if the criminal arrest be not *bona fide* intended for the purpose of forwarding public justice, but merely to bring the party within the reach of civil process, the court will, as was done in the cases cited, order the discharge of the defendant; and, accordingly, Mr. Birch has sworn in the precise and pointed language which I have already quoted, that the criminal prosecution was a mere pretence and contrivance to have him brought within the jurisdiction of the court. To determine whether that statement is well founded, I must examine the proceedings which have taken place from their commencement. Now, it is plain that the petitioner's first intention was, to pursue her civil remedy in this court; and for that purpose she filed a cause petition on the 4th day of May, 1854, and at the same time an allegation (which has since been proved to have been well founded) that the respondent was about to withdraw from the jurisdiction, she obtained a writ of *ne exeat regno* to issue against him; but he left

the country before this writ could be executed. The civil suit being thus, in fact, frustrated, the petitioner appears to have formed the intention of prosecuting the respondent. It is now alleged by the respondent, this prosecution was not undertaken *bona fide*, that it in fact was a mere contrivance; that Mr. Birch was arrested not for the purpose of convicting him upon the criminal charge, but merely for the purpose of securing his person so as to make it subject to the operation of a civil suit. Now, undoubtedly, with regard to the originating of these proceedings, there is one statement made which, if true, would conclude the question: I mean Mr. Birch's allegation as to what he says was sworn by Ryan, the policeman, in the presence of Mrs. Kelly, in the action which he brought for the reward. Ryan is stated to have sworn that "she asked him what course the magistrate would take with deponent (Birch) if taken; as it was not the wish of the said Sarah Kelly to prosecute deponent, but only to have him brought by a magistrate's warrant within reach of the writ of *ne exeat regno* obtained from the Lord Chancellor." If the court is to rely on that allegation, there is an end of the case; the respondent is entitled to his discharge. But Ryan himself has made no affidavit here; and it is merely asserted in the respondent's affidavit, that on a former trial he made this statement in the presence of Mrs. Kelly: an assertion which her affidavit expressly contradicts, and that in the most distinct terms. That being the state of the evidence at both sides, the court will certainly not act against the positive swearing of the petitioner. If that statement of Mr. Birch's had been sustained, and that fact proved, there would be no question in the case; but the alleged conversation has not been proved by any party to it, and I cannot act on a mere declaration of that kind against the positive swearing of Mrs. Kelly. Well, undoubtedly, Mrs. Kelly in the prosecution of the case, swore informations before the magistrate, charging Mr. Birch with an offence in terms importing an accusation of felony, and not properly applicable to the offence of which he really had been guilty. It is surprising with what negligence magistrates, who are responsible for the consequences, will issue warrants upon informations taken before their clerks, and perhaps omitting the most material allegations. But the parties are not to be held responsible for this; and Mrs. Kelly swears that her information was prepared without proper advice: so that I think nothing can be properly grounded on their irregularity. However, the information discloses an offence within the Act; and it is sufficient to found a right to issue a warrant, and a warrant is issued accordingly. Under that warrant the respondent was arrested at Southampton, and brought back to Ireland on the 18th of June, 1853; and on the same day the writ of *ne exeat* was lodged, the respondent being undoubtedly legally in custody, on a legal charge, and under a legal warrant. Now, in order to test whether this prosecution was instituted with the intention that it should be carried out—with the intention of obtaining a conviction, and a sentence of transportation or other lesser punishment, and a restitution of the property pursuant to the statute after-

ward—or whether Mrs. Kelly resorted to this prosecution for the purpose only, as sworn by the respondent, of arresting him under colour of these proceedings, and so bringing him within the jurisdiction of the court; it is necessary to examine the further proceedings which took place, and which, at all events, were carried on with very great expense. The transactions in question required much research and enquiry; it was necessary to visit different places in England and Ireland to serve subpoenas out of the jurisdiction, and to pay the travelling expenses of witnesses, matters costly in themselves, and adding much to the expense of a prosecution, which are always large. Everything which could be done in the most completely *bona fide* prosecution was done. At the city commission in 1853, an indictment was sent in to the grand jury, witnesses were examined by them, and a bill was found against Mr. Birch. Much has been urged by the respondent as to the proceedings of the petitioner in the Court of Queen's Bench; and had the conduct of the petitioner in the month of August been like her course on the late trial in the Queen's Bench, I should have little difficulty in deciding: but it is not asserted that the petitioner had not in the month of August an intention of proceeding on the indictment. She herself swears that she was then ready to proceed; that everything had been prepared; that her witnesses were here, having been brought at a heavy expense from England. It is strange in what a rapid way this part of the affair is passed over in Mr. Birch's affidavit, considering what actually took place. He says, "the said Sarah Kelly at the commission for the City of Dublin in the month of August last, sent up to the grand jury a bill of indictment against deponent for embezzlement of the said monies and securities which are the subject matter of the said cause petition; and the said bill of indictment was duly found, and was afterwards removed into the said Court of Queen's Bench by *certiorari*." In that statement is omitted the important portion of the transaction, from which it now appears that the witnesses were in attendance when the bill was found, and that everything was ready for trial if the prosecutrix had not been interrupted by *certiorari*. I must conclude therefore, that she would have gone on, and the case would have ended either in the conviction or acquittal of Mr. Birch, if she had not been interrupted by the *certiorari*. Then what appears really to have happened? Not that the case was removed on the application of Mrs. Kelly for the purpose of avoiding a trial, as one might perhaps believe from the reading of the affidavit, but on the application of Mr. Birch, supported by his affidavit, stating that there were in the case serious questions which might require the consideration of the full court. Therefore in fact the delay which then occurred was caused by Mr. Birch's own conduct, and not by anything done by Mrs. Kelly; and I cannot draw from the actual facts the conclusion which the respondent requires, viz.: that Mrs. Kelly had no intention of carrying on the prosecution; but on the contrary I must say there appeared a full determination upon her part to proceed with it. Then notwithstanding Mrs. Kelly's opposition the indictment was brought into the Queen's Bench;

and by the statute regulating the proceedings there upon a *certiorari*, it is provided that the prosecutor is not to be the active party, and the duty of bringing the case to trial is cast upon the traverser. Consequently Mrs. Kelly is not answerable for the fact of the proceedings being so delayed that the notice of trial was not served until the very last day upon which it would have been in time for a trial at the succeeding sittings. On the next day, the 19th of November, Mrs. Kelly obtained an order for a special jury; and on the first day of the sittings she applied to have a day fixed for the trial. On Tuesday the 29th of November the Chief Justice fixed the ensuing 2nd of December for the trial of the case, although the prosecutrix pressed for a later day. This left only two clear days to bring over the witnesses from England; and upon an affidavit of Mrs. Kelly's solicitor, another application for postponement was made, but without success. Special messengers were sent to secure the attendance of the witnesses; but on Friday, when the case was called on, they had not arrived, and consequently the case for the prosecution was not ready for trial. There being an insufficient attendance of jurors, counsel for Mrs. Kelly applied to have the case postponed. I will not say whether I think that was fair or unfair; we all know that in practice accidental advantages of this kind are often caught at. However, after a delay, a sufficient number of jurors arrived; and then an application was made for an adjournment on the ground of the absence of witnesses. The Chief Justice offered to postpone the trial till the succeeding day, on the terms of the prosecutrix paying the costs of the day. It does not appear that he would have allowed any further adjournment; and the counsel for Mrs. Kelly, believing that they could not be sure of the attendance next day of witnesses whom they deemed material, did not accept the offer. Consequently the case went on, the prisoner was given in charge to the jury, and no evidence being offered, a verdict of acquittal was recorded. Now it is very material that, as is sworn here, all this was concluded without any communication with Mrs. Kelly; that she was not consulted as to the proposal of the Chief Justice, or asked whether she would pay the costs; in short she knew nothing of what was going on in court. Consequently it is a strong decision which is called for by the respondent here. He requires me to decide upon the very motives of Mrs. Kelly from the acts which her counsel determined on without consulting her, and by which, as it is sworn, she was disappointed and annoyed. The motives and design of Mrs. Kelly in this prosecution are the matters really in question here; and I cannot properly reason as to those motives or designs from transactions as to which she was not consulted. The question then is, whether on the whole, considering all these proceedings, I am bound to treat this prosecution as merely colourable. When I am required to decide between Mrs. Kelly's affidavit and the alleged statement of Ryan, the policeman, I must take her actions into account; and I find that she did actually proceed in the prosecution, that at the Commission she was prepared to go to trial, and was only prevented by the act of the re-

spondent; that the case was then postponed notwithstanding her strong opposition; that the trial in the Queen's Bench was brought on and a person sent at great expense to bring over the English witnesses, who did not arrive until too late. Under these circumstances, I think it would be a very strong thing, to decide that this was merely carrying on a contrivance. Judging from the whole case, I cannot conclude that she was carrying on a merely colourable prosecution, or that all these proceedings were taken merely for the purpose of procuring an arrest which could not be accomplished by civil process. I must therefore refuse this motion; but I shall let the costs be costs in the cause.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq., Barrister-at-Law.]

KER v. KER.—Dec. 4, 5.

*Deed—Construction—Habendum—Remoteness—
"Dying without issue."*

By a deed of assignment made in 1833 between A of the first part, his sons, B, C, D, and E, of the second part, and his wife F, (as trustees for D and E) of the third part, after reciting a lease of the lands in question with a covenant for perpetual renewal thereof, as being in the possession of A, and also that A being desirous of making provision for his sons B, C, D, and E, had agreed to convey his interest in the lease to them, it was witnessed, that in consideration of 10s. and other considerations therein mentioned, the said A did grant "unto the said B, C, D, and E the said lands, &c.," (setting out one-fourth as the portion of each,) "to have and to hold the said lands, &c. unto the said B, C, D, and E, as follows: that is to say, to the said B his one-fourth of the said premises as herein-before described, from the date hereof, for and during the term of his natural life, and from the day of the death of the said B, if he shall leave lawful issue him surviving, then to such of them as he shall by deed or will limit or appoint, but if he shall die without issue, then said one-fourth of said premises to be divided and descend to the survivors or survivor of the said three brothers C, D, and E, which shall be then living." Held, that the limitation contained in the habendum was not void for remoteness.

Held also, that B having died without issue, C who survived B, D, and E, became absolutely entitled to the divided part of B in the premises assigned by the above deed.

THE question in this case arose upon the construction of a deed of assignment made in the year 1833 between Moses Ker of the first part, Henry, James, John, and Moses Ker, jun. (sons of Moses Ker), of the second part, and Sarah Ker, wife of Moses Ker, as trustee for their sons John Ker and Moses Ker, of the third part; which, after reciting a lease of the lands in question to the ancestor of Moses Ker for the term of thirty-one years, with a covenant for perpetual renewal, and also a renewal of this lease to Moses Ker for a term of thirty-one years, further recited, that "whereas the said Moses Ker, being desirous of securing a provision for his said

four sons, hath agreed to convey to them the said premises, &c., upon the terms and subject to the conditions hereinafter expressed," witnessed that for the consideration of 10s., and other considerations mentioned, Moses Ker did "grant unto the said Henry Ker, James Ker, John Ker, and Moses Ker, all that and those," &c., limiting one-fourth to each, and describing the portion of each by abutments—"to have and to hold the said lands, tenements, and premises, &c., unto the said Henry Ker, James Ker, John Ker, and Moses Ker, as follows, that is to say, to the said Henry Ker his one-fourth of the said premises as hereinbefore described, from the date hereof, for and during the term of his natural life, and upon the day of the death of the said Henry Ker, *if he shall leave lawful issue him surviving*, then to such of them as he shall by deed or will appoint; but if he shall die without issue, then said one-fourth of said premises to be divided and descend to the survivors or survivor of his said three brothers, James, John, and Moses, which shall be then living, share and share alike, said issue or survivors, whichever shall become entitled, to enjoy said premises during the remainder of said term, and for such further terms as shall be added thereto in pursuance of the covenant for perpetual renewal." Then followed a similar provision as to the fourth part granted to James Ker: and as to the fourth part given to John and Moses Ker, it was given to Sarah Ker, their mother, "to hold in trust for them, and dispose of same as she may deem right, until they respectively attain the age of twenty-five years, for their education and support from that period, to hold to each of them one-fourth part for the term of their respective natural lives, from the day of their respective deaths to such of their children (if any they have) as they shall by deed or will limit and appoint; but if they or either of them, or both die without issue, then the one-fourth part of the person so dying without issue to go to and be divided amongst the surviving brothers, share and share alike, such issue or survivors, whichever shall be entitled, to enjoy such premises during the remainder of the term, or such further term," &c. Henry and James Ker entered into possession of their shares in the estate, immediately after the execution of the deed; and John and Moses Ker upon attaining the age of twenty-five years. Moses Ker, jun., (Moses and Sarah having died previously) died in the year 1846 intestate, leaving a widow and one daughter, (who died an infant,) but without having exercised his power of appointment. James Ker died in the same year intestate, leaving a widow and seven children, but without having exercised his power of appointment. Henry Ker died in 1853, without ever having had any issue, leaving his widow, Margaret Ker, the respondent, who took out administration of his effects, and obtained possession of his share of the lands. John Ker, the petitioner, who survived his brothers, married in 1841, and had issue. The petition prayed for a declaration that under the deed of 1833 the petitioner, John Ker, was entitled for life to the portion of the premises assigned to him, with remainder to any of his children whom he might appoint, and that he was also

entitled absolutely to the divided part of the premises which were assigned as above to Henry Ker, deceased.

F. Fitzgerald, Q.C., for the petitioner.—*Target v. Gaunt*, (1 P. Wms. 432,) is a leading authority on this subject. The facts were these. A person possessed of a term of years demised it to H, his son, "for his life, and no longer, and after his decease to such issue of the said H as H should by his will appoint, and in case H should die without issue, then to A for the residue of the term." H died without issue living at his death, and the question was, whether the term should go to the executors of the testator, or of H, or of A; and the court held that the devise over to A was good. The same principle was recognized in *Lodding v. Kyme*, (Ld. Ray, 203); *Wood v. Saunders*, (1 Ch. Cas. 131, citing the *Duke of Norfolk's case*.) The entire estate in the premises was given to the sons, and therefore the only manner in which the *habendum* can be taken is as creating a trust. [*Lord Chancellor*.—Can this court construe a void *habendum* to take effect as a trust?] This court may regard it as a good declaration of uses, even if it would be doubtful in a court of law. The intention of the grantor is all that the court requires to raise a trust. *Wright v. Cartwright*, (1 Burr. 282.)

Christian, Sergt. (with him *T. K. Lowry*), contra. The only question in this case is, in reference to H. Ker's fourth part. The deed of assignment recites the grantor's interest in the term of years; and by the premises assigns the lands to the four sons. The words "executors, &c." are not used; nor does it limit the estate granted in the term. Then follows the *habendum*, the effect of which would be to cut down the estate given by the premises; and therefore, it must be treated as void. *Wright v. Cartwright*, is to be distinguished, inasmuch as there the entire estate was included in the granting part of the instrument; in the present case there are two distinct clauses. It is clear that in a Court of Law this *habendum* could not be sustained; and the question is, whether it can have any effect in a Court of Equity. It has been argued that it may be treated as a declaration of trust; but no rule of conveyancing can draw such a distinction. The only case of analogy that could be relied on in support of such a construction would be, the effect of a feoffment as a covenant to stand seized to uses; but there is this difference, that the present deed can only have one mode of operation. There are also provisions in this deed consistent with the grant in the premises, and inconsistent with the alleged effect of the *habendum*, viz., to pay an annuity to the mother for her life, a provision that might have continued in effect after the death of the sons. Even supposing the *habendum* to have the effect contended for, the claim of John Ker would be void for remoteness. The words in the deed "if he should leave lawful issue him surviving," and "die without issue," must be regarded as referring to a different class of persons. In *Candy v. Campbell*, (2 Cl. & Fin. 421,) a testator bequeathed a sum of money to C. H. his daughter, "but in case of her death without lawful issue, I then will the money so left to her to be equally divided between my nephews and

nieces who may be living at the time," and it was held that C. H. took an absolute interest, the limitation over being void for remoteness; inasmuch as the words "her death without lawful issue," implied a failure of issue at any time, and was therefore void. In *Barlow v. Salter*, (17 Ves. 479,) there was a bequest to the testator's daughter, "and in case she dies without issue, all to be divided between my four nephews and nieces,"—and it was held that the limitation over was too remote, there being no expression or circumstance to limit the generality of the words to a failure of issue at the time of her death. The same doctrine was upheld in *Simmons v. Simmons*, (8 Sim. 22,) cited in 2 Jar. on Wills, in which the words were "in case of her dying without issue." The word "then" refers to death without issue generally. *Pye v. Lynwood*, (6 Jurist, 618.) Besides, the legal meaning of these words must be taken much more strictly in the case of a deed than in a will. *Bayley v. Morris*, (4 Ves. 793); *Rochfort v. Fitzmaurice*, (4 Ir. Eq. R. 382.) The *habendum* must be treated as void in this case, as limiting the prior grant made by the premises. Shep. Touch. 76. The recital in the deed to the effect that the grantor intended to make a provision for his sons, and of his agreement to convey them subject to the following provisions, shows that the grant was made to the sons absolutely, without any intention of creating a trust. Conditions are to be construed strictly, especially when they go to destroy a vested right. *Doe v. Godwin*, (4 M. & S. 265); *Lessee Sharpe v. Bergin*, (Longf. & Towns. 232.) [They also cited *Mannings' cases*, (8 Rep. 99); 2 Bl. Com. 177; *Crozier v. Crozier*, (2 Conn. & Law. 294); Barton on Real Property, 192, (last ed.)]

H. Law in reply.—No particular form of words is necessary to raise a trust. A recital in a deed or a cheque in writing, has been held sufficient for that purpose; and an imperfect conveyance at law, if the consideration of blood or money come in, will be held good in equity as a trust. The rules regulating trusts in deeds and wills are the same. *Fenwick v. Greenwell*, (10 Beav. 412.) As to the words "die without issue," they will, in some cases, receive a limited construction, as in the case of *Leeming v. Sherratt*, (2 Hare, 14,) in which the testator gave certain pecuniary legacies to his daughters, to be invested free from the control of their husbands, the principal to be disposed of as they should direct, to their issue, but in case "they should die without issue," to go to his surviving children; and it was held to refer to issue living at the time of their death. The limitation is not void for remoteness. 2 Jar. on Wills, 362, and cases there cited; *Eno v. Eno*, (6 Hare, 171.) As to the argument founded upon the difference of construction to be adopted in deeds and wills; it is to be observed that there is one rule of construction applicable to both, viz. the intention of the parties. *Lees v. Ford*, (2 Ell. & Bl. 970.) In *Lessee Dawson v. Dawson*, (13 Ir. L. R. 472,) the limitation was thus: "To F. for life, after his death to W. and his issue male lawfully begotten, and for want of such issue, to F. and his heirs for ever;" in an ejectment brought by the heir of F. against the devisee of W, the latter insisted that W.

had taken a *quasi* fee or a *quasi* estate tail in the lands, which he had barred; but it was held that W. had no more than an estate for life, and that the limitation over to F. was not void for remoteness. In *Westwood v. Southey*, (21 L. J. Ch. 478,) Kindersley, V. C., in giving judgment states the rule thus: "Now, it may be stated to be a general rule, I do not say without exception, arising perhaps out of a different context, but as a general and *prima facie* rule, where there is a gift over to the survivors or survivor of several persons, after the death of one of them without issue, that the words 'without issue,' are construed to mean without leaving issue at the death. This may be stated as the general *prima facie* rule:" citing *Ranelagh v. Ranelagh*, (2 Myl. & K. 441,) in which the testator by his will left several bequests to his children, and used the following language: "In case of the demise of any of the above parties without lawful issue, then, his or her proportions to be divided equally among the survivors." As to *Candy v. Campbell*, [rep. nom. *Campbell v. Harding*, (2 Rus. & Myl. 399,)] the distinction relied upon by Sir E. Sugden in his argument was that the peculiar circumstances of that case could not justify the court in giving to the words "death without lawful issue," the effect contended for. In *Simmons v. Simmons*, the gift over to the issue was treated as subject to a mere discretionary power vested in the devisee for life. A different construction is to be given to devises of real and personal estate, as appears from the judgment of Stewart, V. C., in *Re Winches Trusts*, (22 L. J. Ch. 752,) in which the testator having given to A. an annuity "for her life, and the issue from her body lawfully begotten, on failure of which to revert to my heirs," it was held that A. only took an estate for life.

Dec. 5.—LORD CHANCELLOR.—I have looked into the authorities cited, and the deed of assignment, and I am of opinion that under the circumstances of the case the petitioner is entitled to a decree. The limitations of the deed are peculiar. A term of years is assigned by a deed *inter partes* to the children of the grantor, and this being so it must be regarded as a declaration of the intention of each of the executing parties. It commences by reciting that the assignor was desirous of securing a provision for his four sons, and had agreed for the considerations afterwards expressed to convey to them the lands in question. It therefore appears that whatever these parties do take must be according to the terms of the deed, as I cannot conceive a more unequivocal declaration of intention than that which appears upon the face of this document. The deed then proceeds to witness that in consideration of the sum of 10s., and other considerations—and therefore we must regard the assignment as made for valuable consideration—that Moses Ker grants to his four sons all that and those the premises in question; and he then proceeds to divide and set it out as it were by metes and bounds; and thus, as to this portion of the deed, the nature of the estate so conveyed to the grantees would depend to a great degree upon the nature of the estate which was the subject-matter of the conveyance; if it were fee simple the deed would pass an estate for life; but, in point of law, this estate being a

term of years, the result I apprehend would be to pass the entire term. There is one case I believe to the contrary; but there can be no doubt but that this portion of the deed would pass to the grantees all the grantor's interest in the land. Then follows the *habendum*, which is considerably different from the former portion of the deed. It is in these terms: "To have and to hold the said lands, tenements, and premises, &c., unto the said Henry Ker, James Ker, John Ker, and Moses Ker as follows, that is to say, to the said Henry Ker his one-fourth of the said premises as herein-before described from the date hereof, for and during the term of his natural life;" there ends the *beneficial estate* given to him, that is to say, an estate for life, which, it was contended, is inconsistent with an estate for years in the same lands; but it is unnecessary to consider that question. It then proceeds, "and from the day of the death of the said Henry Ker, if he shall leave lawful issue him surviving, then to such of them as he shall by deed or will limit or appoint," (and I must observe that this is a very narrow remainder, there being no gift to the issue in default of appointment,) "but if he shall die without issue, then said one-fourth of said premises to be divided and descend to the survivors or survivor of the said three brothers," &c. John happened to be the survivor at the time of the event contemplated, viz., the death of Henry without issue, and therefore in the words of the *habendum* he "became entitled to enjoy said premises, during the remainder of said term, and for such further term as should be added thereto." It has, however, been contended that the claim of John is not well founded, inasmuch as the *habendum*, under which his title would arise, is void, as being inconsistent with the premises of the deed, and therefore that the estate at law continued in the grantee; and it was further contended that although the *habendum* might not be subject to that objection, still that the limitation to John was void for remoteness—a position which I do not, however, conceive to be sustainable. With regard to the validity of this as an *habendum*, there can be no doubt upon the authorities, but that if there be a full estate granted by the premises, an *habendum*, which is inconsistent with the premises, will be void. This rule, however, is subject to some exceptions. The first question is, does this principle apply to the present case. In *Goodtitle v. Gibbs*, (5 B. & L. 709,) an estate in certain freehold and copyhold premises was conveyed by deeds of lease and release to J. W., his heirs and assigns, to hold the same to J. W., his heirs and assigns from and immediately after the death of the grantor, and for the uses and purposes mentioned; and it was contended that an estate in fee simple was given to the grantee in the premises, and therefore that the words in the *habendum* following "his heirs and assigns" should be struck out, as creating a freehold in *future*; but the court took this distinction, that when the estate in the premises resulted from implication of law, then a *habendum* may be more limited in its effect, but that such not being so as to the case then before the court the general rule applied. Abbot, C. J. in his judgment says, "The distinction to which I allude is this: if no estate is

mentioned in the premises the grantee will take nothing under that part of the deed, except by implication and presumption of law; but if an *habendum* follow, the intention of the parties as to the estate to be conveyed will be found in the *habendum*, and consequently no implication or presumption of law can be made, and if the intention so expressed be contrary to the rules of law, the intention cannot take effect and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises the intention of the parties is shown, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected and the deed stand good upon the premises;" citing *Carter v. Madgwick*, and *Jarman v. Orchard*. In the present case there is no estate limited by the premises except by implication of law, for in the premises there is no statement as to the nature of the estate to be held by the grantees in the term, and therefore it can only arise by implication of law. In the case alluded to there is a remarkable case cited by the Chief Justice as one of the chief authorities upon which he founds his judgment. *Jarman v. Orchard*, (Skin. 528; Salk. 346; Show. P. C. 199.) The grantor in that case, who was assignee of a term of years, assigned to his grand daughter, and her executors, administrators, and assigns, the said cottage, &c., "*habendum* the said cottage, &c., to the said Mary, her executors, administrators, and assigns, from and after the decease of the said T. N. (the grantor) and his wife, for the residue of the term, subject to the rents and covenants," and his lordship goes on to say, "Now, if this deed was considered as an assignment to commence and take effect after the death of T. N., the deed would be void, as in law assigning nothing, the life interest of T. N. being deemed in law to be of greater value, and longer duration than any term of years; and it was contended that the deed only could be construed as such an assignment because it appeared that T. N. did not mean to part with his interest in the term during his own life. The question arose after the death of T. N. In the Queen's Bench judgment was given against the validity of the deed, but that judgment was reversed in the Exchequer Chamber, and the reversal affirmed in Parliament; and the ground of the reversal was, that the entire residue of the term passed by the provisions of the deed, and that the *habendum* was void." But in that case it clearly appears that the entire term passed by the premises, and the words are printed in italics in the report, showing that they were supposed to affect the question. Now, if that be so, that the premises granted the term absolutely, as appears by the words set forth, and that in the present case there are no words in the premises to limit any estate, save by implication of law, (the words "executors," &c. being omitted), and the nature of the estate only appearing by intendment of law; therefore, from the judgment of Chief Justice Abbott in *Goodtitle v. Gibbs*, it would appear to follow that the *habendum* in that way might be good; and, although a party cannot take in the *habendum* of a deed, unless

named in the premises, that is to say, he cannot take an estate in possession, though he may take in remainder, therefore there may be an estate for life to Henry Ker with remainder over, and the *habendum* may, as it appears to me, be valid in the present case, subject, of course, to the question of the validity of this limitation. But, laying this aside, and considering the entire instrument, it appears to be a deed *inter partes*; they take an estate under it in the manner in which it was limited to them by the words of the deed; and, if there were three words more—"in trust for"—there would be no doubt upon the subject; but it appears to me to be substantially the same as if it were so. As to the other part of the case, the question can scarcely arise under the circumstances, for it appears that there are only five years of the term remaining unexpired; but at any rate there appears to be a clear limitation of the estate. It has been urged that these words contemplate a general failure of issue. In a certain sense they may sometimes have that meaning, but in common sense they mean upon failure of issue at the death of the parties; and the words of the context show that this is their meaning. This case resembles in principle *Target v. Gaunt*, and that class of cases. The words in that case were, to Henry for life, "and after his decease to such of the issue of the said Henry as Henry by his will should appoint," and the court held that such issue were meant as he should, or at least might appoint the term to, which must be intended *issue then living*; but in the present case there is no occasion for seeking such an explanation, for we have the words "if he shall leave lawful issue him surviving," then to such of them as he shall appoint, "but if he die without issue," meaning, of course, issue him surviving. The case of *Candy v. Campbell* does not touch upon the present one. The words used there were, "in case of her death without lawful issue, I then will the money so left to her to be equally divided between my nephews and nieces who might be living at the time"—"at the time" in that case meant the time of the event happening upon which the money was to go to the nephews and nieces. But the language used in the present case was very different. A more difficult question arises in the case of *Garratt v. Cockerill*, (1 You. & Coll. 494.) [His Lordship stated the case.] I merely mention that case as an illustration, it being beside the matter to be decided in the present instance, for the latter depends upon the words of the deed itself. In *Hanan v. Drew*, (10 Ir. Eq. Rep. 333,) I acted upon the authority of *Target v. Gaunt*. In that case the testator bequeathed a sum to trustees to permit his daughter to take the interest for her life, and in case she should "leave any issue lawfully begotten," that the principal should be disposed of among her issue as she should appoint, and for want of an appointment, equally, but, "in case of failure of issue," that the funds should be paid over; and, acting upon the authority of *Target v. Gaunt*, I conceived the limitations over to be good. I shall, therefore, make a decree with costs.

Decree with costs.

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1854.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

HIGGINS v. BOURKE—Nov. 9.

Practice—Security for costs—Affidavit—16 & 17 Vic. c. 113.

An affidavit which was made by the attorney stated, that the defendant had left home without telling deponent where he might be found, "that the defendant had a just and valid defence, on the merits, to the plaintiff's action, inasmuch as the defendant was not indebted to the plaintiff, but the plaintiff was indebted to defendant in a very large sum of money, which defendant is ready to prove, as deponent is informed and believes." Held insufficient.

St. John Armstrong moved that proceedings should be stayed until security for costs were given, the plaintiff being out of the jurisdiction. The affidavit is made by the defendant's attorney, who states that his client has left home for the country, not knowing that it would be necessary for him to make an affidavit; that this motion is not brought for delay, but to protect defendant, as plaintiff is not a mark for the costs of an action. "That the defendant has a just and valid defence on the merits to the plaintiff's action, inasmuch as the defendant is not indebted to the plaintiff, but, on the contrary, the plaintiff is indebted to the defendant in a large sum of money, which the defendant is ready to prove, as deponent has been informed and believes." The usual preliminary notice has been served, but disregarded.

Jonathan Sherlock contra.—The affidavit is not sufficient; it should have stopped at the word "action," without qualifying the positive allegation as to merits. The words "has been informed and believes" goes to the entire sentence, and then the affidavit in fact comes to this, that the attorney swears he is informed and believes the defendant has a just defence in the nature of a set-off, and which he is ready to prove; that is clearly insufficient. The affidavit, as made by the defendant, should either swear positively as to merits, and no more; or, if swearing on belief should show a fair case to the court for grounding that belief, and if the affidavit is made by the solicitor, he should state that he is fully acquainted with the nature of the defence, and shortly state the substance of the defence, and his belief of its truth, unless he could make the usual positive allegation.

St. John Armstrong, in reply, contended that the affidavit was sufficiently satisfactory that this was the case of an English horse jockey, seeking to recover moneys on foot of racing transactions, and, even if his statement in his summons and plaint were proved, yet it was very questionable if he could at law recover at all.

CRAMPTON, J.—This affidavit is not a satisfactory one. If it were positive as to the merits, without anything further, I would hold it good enough, but that is qualified by the subsequent sentence; and the whole concludes with a statement that he is so informed and believes, which must control the entire clause.

*Motion refused.**

* *Ex relations.*

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at Law.]

LONG v. LONG.—Nov. 10 and 21.

Cause Petition—Issue—Deed executed by supposed Lunatic, and issue refused.

A cause petition having been filed for the recovery of rent under a lease, and for the administration of the estate of the assignee of the lessee, the petitioner claimed as assignee of the reversion under a deed of the year 1822, and stated payment of rent for 24 years to such assignees. The respondent in her discharge did not deny the payment of rent, and as to the execution of the deed of 1822, said she knew nothing, but that the grantor was a lunatic at the time. The Master directed that each party should examine on interrogatories, and refused to direct an issue. Held, that an issue should not be directed as to the question of lunacy, and that the onus of proving the lunacy lay on the respondent.

Motion by respondent to vary the Master's rulings by having such issue directed, and for an order that petitioner proceed at law, (the respondent waiving all temporary bars) refused with costs.

THE cause petition under the 15th section was filed in this matter praying that an account might be taken of the sum due to the petitioner from Richard J. Long, for rent of the lands of Shanavagh, under a lease of the 19th April, 1807, and for an administration of the assets of the said R. J. Long for the payment of said demand. The petition stated that R. J. Long had been for many years tenant to the lands under a lease of 1807, which was a lease for lives renewable for ever, at the yearly rent of £24 12s. present currency, granted by Lord Riversdale to Richard Long. That upon the marriage of James Long, the son of the said Richard Long, in 1809, the said Richard conveyed all his interest under the said lease, to the use of the said James Long for life, then to the issue of said marriage in such shares as the said James Long should appoint, whereby the said Richard James Long, the eldest son of the said James Long, took a vested interest by way of remainder expectant upon the determination of the life estate of the said James, in the whole estate and interest in the lands under the lease of 1807, and which estate afterwards took effect in possession upon the death of the said James. That Richard Long, the grandfather, after having parted with all his interest in the lands under the lease of 1807, as before mentioned, purchased the fee simple in the same lands about the year 1813, and then, by a deed bearing date the 3rd August, 1822, granted all his then interest in the said lands, that is, the fee simple of inheritance, to his son Richard Long, his heirs and assigns, for ever. "That Richard Long the elder died in 1823, whereupon Richard Long his son became entitled to the rent reserved by the lease of 1807, and was duly paid the same by the said James Long up to the time of the death of the said James Long;.....and after his decease by the said Richard James Long." That Richard Long died intestate and without issue; and the petitioner thereupon became entitled as heir-at-law to the fee simple in said lands, and to the rent reserved by the said lease of 1807. That from 1834 to 1845,

the rent under the lease was paid by the said R. J. Long, with the permission of the petitioner, in part payment of an annuity of £100 charged on the fee of the lands for the wife of Richard Long deceased. Richard James Long died in 1852, and the petition was now filed to recover 6½ years arrears of the rent under the lease of 1807, from his personal representatives. A summary order was made referring the matter of the petition to Master Litton, and on the meeting on summons to proceed on the 20th June, 1853, the Master made an order that an account be taken of the debts, legacies, funeral, and testamentary expenses of Richard James Long, the testator in the petition named, and of his personal estate and effects, into whose hands the same came, how applied and disposed of; and further, that the petition should stand as a charge, and that the respondent Ellen Long should file a discharge thereto, setting forth an account of assets and debts, and that advertisements should be published for creditors. The respondent Ellen Long filed a discharge, stating that she never heard of the deed of settlement of 1809, but referred to the evidence petitioner might produce of same, that she never heard of nor saw the deed of August, 1822, until the filing of the said petition, and that she was informed and believed that at the date of the said deed of 1822, and for some years previous thereto, Richard Long the alleged grantor in the said deed was a lunatic, without lucid intervals, wholly incapable of managing his affairs or transacting business, and that any deed executed by him at or about the time of the execution of said deed, were and must be null and void. That the said respondent was advised and believed that Richard Long died seized in fee simple of the lands in 1823, and that same then descended to R. J. Long as eldest son and heir-at-law. That the respondent was prepared to adduce proof of the insanity of the said Richard Long from 1815 to the time of his death, and that she believed that the petitioner admitted the insanity of the said R. Long at the time of the execution of the deed of 1822. The matter then came before the Master on charge and discharge, on the 25th August, 1854, and the respondent's counsel submitted that the case should now be sent to a Court of Law, and that the Master was bound to send it there; but, the Master being of opinion that the facts stated in the petition may exist and be proved, which would disentitle the respondent to call for an issue to a Court of Law, and in that event that the Master had jurisdiction to hear the cause, made the following order: "It is ordered that the parties be, and they are hereby at liberty to examine as to the matters in the said petition and said discharge, such examination to commence by the 10th of November, 1854, and not before; and it is further ordered that publication do pass on the 10th December, 1854; and it is further ordered that this cause be entered for hearing in the general list of causes for Michaelmas Term.

Deary, Q. C., now moved that the order of the 25th August, 1854, might be varied, and that an issue might be directed to try and enquire whether Richard Long the alleged grantor in the deed of the 3rd August, 1822, was a lunatic at the time of the execution or date of the deed, and for conse-

quent directions; and that George Long the petitioner might be directed to proceed at law as he might be advised, for the recovery of the alleged arrears of rent mentioned in the petition—the said Ellen Long offering to waive all temporary bars and technical matters, or for such other order as the court should think fit. Under the 16th section of the Chancery Regulation Act the Master had power to direct this issue if he had thought fit; petitions under the 15th section are now heard before the Master with precisely the same powers as the Court of Chancery or Rolls Court had previously. The Master is bound to receive evidence, and has power to direct an action at law, or an issue as to a fact disputed before him. Now, if this matter had come before the Lord Chancellor, he would have sent the question as to the validity of this deed of 1822, before the proper tribunal, viz. a jury; which is most competent to try a question of this kind as to the sanity of an individual. *Hampson v. Hampson*, (3 V. & B. 43); *Fullagar v. Clark*, (18 Ves. 481.) It will be a saving of expense to direct an issue now, for the validity of the deed must, in the end, be decided by a Court of Law. If the evidence before the Master should be contradictory, either party will appeal, and then an issue must be directed; and when the court see that exceptions will be taken to a report, they will direct an issue at once. The petitioner should have proceeded at law. As assignee he had no right to come at first to a Court of Equity premitting his legal remedy. In a creditor's suit, the court frequently directs the suit to stand over until the legal rights of the creditor are decided at law; the court here is somewhat in the same position as the court in such a suit. The Master acted upon this, that the payment of rent for a length of time gave a right independent of the lease; such payment of the rent will be evidence, but does not debar us of our right to have the question tried before a proper tribunal.

O'Riordan.—The question raised here is exactly that on which the Master has decided. Counsel insisted before the Master that the case should be sent to a court of law, but the Master thought that something might be proved in the evidence before him which would show there was no occasion to send the question to a court of law as to the validity of the deed of 1822. The rent under the lease of 1807 was paid for twenty-four years after 1822 to the owners of the reversion, whom the petitioner represented. In 1846, for the first time, the respondent disputed the payment of the rent, and then on the grounds of the lunacy of the grantor of the deed of 1822. The petitioner alleges the lease of 1807, under which the rent was payable, and the payment of the rent down to 1846, and the deed of 1822, by which the reversion became vested in the petitioner. The form of the respondent's discharge is such that it does not negative any one of these facts, and the Master said that, if these facts were proved, he would not direct any issue.

R. Warren in reply.—The petitioner does not rely on the Statute of Limitations, nor on the payment of rent for a long time, but he sets out his title, and if we overturned a link in that title, we

upset the title, he relies on the deed of 1822, and we say to it "*non est factum*." The question then is upon this deed, and whether the grantor was a lunatic at the time of its execution. An examination before the Master would be only a useless expense, and an issue would have to be afterwards directed. [He cited *Jacob v. Richards*, (23 Law Jour. 557); *Molton v. Camroux*, (Ex. Rep. 427.)]

MASTER OF THE ROLLS.—This is a case of some importance, and my impression is that the Master was right in his decision. The petition was filed for the administration of the estate of an assignee of the covenantor in the lease of 1807. The petitioner has a demand as creditor by covenant, and has a right to come into equity, and establish his legal claim, before asking an account of the assets. The petitioner claims to be assignee of the reversion under and by the deed of 1822, and says that the rent was regularly paid under the lease for twenty-four years subsequent to this, and that in 1846 the assignee of the lessee, for the first time, refused to pay the rent. There is no allegation that the deed of 1822 was not executed under the hand and seal of the grantor. The petitioner says he is ready to prove the deed by witnesses, and to support the fact of the payment of rent for twenty-four years. The respondents, on the other hand, say that they have a defence at law, that the grantor of the deed was a lunatic, but then the onus of proving this lunacy is on the respondents themselves, and, for the purposes of this motion, I must assume the deed to have been properly executed. If the petitioner, in an action at law, threw down the deed, and proved the payment of rent under it for such a length of time, the court would direct the respondent to prove the lunacy, if he relied on it. I am called on then to direct an issue at law without it appearing to me that there is any evidence to support the case at law. In the case of *Jacob v. Richards*, (23 Law Jour. 557.) the plaintiff relied on the mortgage deed, and he was encountered by the finding of an inquiry of lunacy, then the onus lay on him of disproving the lunacy; there the deed was *prima facie* invalid, and therefore the onus lay on the plaintiff, but here the onus is the other way. The petitioner has a *prima facie* case; he has only to produce his deed. If there is any question as to the sanity of the grantor, the onus of proving it lies on the respondent, and he has not produced evidence before the Master sufficient to raise such a question.

Nov. 21.—His Lordship gave a written judgment, refusing the motion with costs.

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1854.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PRET, Esq., Barristers-at-Law.]

BRENNAN v. FLOOD.—*Nov. 14, 24.*

Landlord and Tenant—Distress—Tenancy in common—Pleading—9 & 10 Vic. c. 111.

A demised to B a term for lives still in being at the time of action brought. B subdemised to C, for a

life still in being one undivided moiety of the lands, reserving a rent which considerably exceeded the head rent. *B* afterwards by his will, reciting that under the sub-lease he had a profit rent of £77 12s., late currency, devised £17 a-year, like currency, of said profit rent to *E*; his daughter. *E* and her husband subsequently distrained *C*, who had become the assignee of the demised premises, for an arrear of the portion of rent so devised. *C* having replevied, sued *E* and *F*, who pleaded the foregoing facts by way of avowry. Held on general demurrer, that *E* and *F* were entitled to distrain upon the lands in question, inasmuch as *E*, by the devise became seized pro tanto of a portion of the reversion expectant on the lease to *C*, for the rent incident to which they might separately distrain, and that the fact of the tenancy in common created by the demise by *B* to *C* of an undivided moiety of the premises did not oust the right of distress.

The above avowry was pleaded generally, without averring that the requisitions of 9 & 10 Vic. c. 111, s. 10, had been complied with. Held, that such an allegation was unnecessary, and that it lay upon the plaintiff to rely upon any non-compliance with that statute by way of replication.

THIS was an action of replevin. The summons and plaint was in the form generally used for that particular cause of action. The defence, pleaded by way of avowry, stated a demise of the premises in question by the tenant in fee to Thomas Brennan, the father of defendant, Alice, for a term of lives still in being, at £25 per annum, late currency; that Thomas Brennan, on the 18th of Novem. 1824, subdemised same to John Brennan for a life still in being at £102 12s., late currency, payable quarterly, with the usual clauses of distress and entry; that Thomas Brennan made his will, dated the 19th of November, 1824, by which he devised to Alice £17 a-year of said rent, and after his death all the estate of John Brennan vested by mesne assignments in the plaintiff; and it then avowed as for a distress for the arrears of the £17 a-year. A second defence was likewise pleaded nearly in the terms of the first, but it averred in addition a power of distress given by the will for the recovery of the £17 a-year; it omitted to state the devolution of the interest of John Brennan to the present plaintiff by mesne assignments, but merely stated the death of Thomas Brennan, the father of defendant Alice, before the plaintiff had any estate in the lands, and likewise the fact of his occupation during the whole period in respect whereof the arrears had accrued. Demurrer—assigning for causes that it was not competent for Thomas Brennan, the lessor, to distrain during his lifetime for the rent therein mentioned upon the demised premises generally; and also that the avowry was defective in not having shown performance and observance of the acts, matters, and things requisite to validate a distress for rent, pursuant to 9 & 10 Vic. c. 111.

Lawless, (with whom was *R. Armstrong, Q. C.*) in support of the demurrer.—It was the duty of the defendant in the defence to show that the formalities prescribed by the 9 & 10 Vic. cap. 111, s. 10,

relative to the service of the notice of particulars had been complied with. That section says, that, unless such notice shall be served, such distress shall be unlawful and void. It was, therefore, proper that the defendant should show that every thing had been done on his part, which was necessary to constitute a valid distress. A similar rule was laid down in a plea of justification to an action of trespass.—*Madden v. Brien*, (1 Ir. C. L. R. 322.) With regard to the other cause of demurrer, Brennan, the testator, had no reversion. Nor was there at any time a right of distress under the lease of 1824, as that was a lease of an undivided moiety, and a tenancy in common was accordingly created between the original parties. In *Vin. Ab. Distress*, (D.2,) it is said, "In an assize it was said for law, that when a rent-charge descends to a daughter, and after the land descends to the same daughter and to her two sisters, nothing is extinct but the third part of the rent, and yet the daughter who has the rent cannot distrain for the other two parts of the rent till partition be made, for she is seized of the land *per my et per tout* with the other two sisters till partition be made." *Bro. Ab. Distress*, pl. 37. A man cannot distrain upon his own land. If the case of the defendant depends on the power of distress for the £17 given by the will, it is clear that he has no such right, in consequence of the demise having been anterior thereto. *Suffery v. Elgood*, (1 Ad. & El. 191); 1 Rolle Ab. 669, pl. 45; *Com. Dig. Distress*, B. 2. *Johnson v. Falkiner*, (2 Q. B. 925.)

Samuel Ferguson and Battersby, Q. C. contra. The devisee of part of a rent may distrain for it, in the same way as it has been held that debt lies by an assignee of part of a reversion, and also by several devisees of parts of a rent for their proportions. *Archer v. Walters*, (Cro. Eliz. 651.) A rent-charge may be divided by will or by deed, operating under the Statute of Uses, so as to make the tenant liable without attornment to several distresses by the devisees. *Rivis v. Watson*, (5 M. & W. 255.) It was admitted in that case that a rent-service might be so divided as to leave a power of distress incident to each portion. Here it is a mistake to say that the prior demise prevented this distress, inasmuch as this portion is part of the rent reserved upon the lease, and is not a rent-charge. The relation of landlord and tenant subsists in that case. The right of distress was incident to this lease, although made of an undivided moiety. One tenant in common may distrain upon another for rent in arrear under a demise from the one to the other.—*Snelgar v. Henston*, (Cro. Jac. 611); *Co. Lit.* 192, a; so with respect to remedy for waste—*Moore*, 71. The ground of demurrer assigned is absurd, for that proceeds upon our not having shown that we distrained upon the undivided moiety, which would be an impossibility. *Kemp v. Carey*, (Ventris, 227,) recognizes the right of distraining the goods of the tenant of an undivided moiety. [They also cited on this branch of the case 2 Rolle, 212; *M'Cullia v. Thompson*, (1 J. & S. 63); *Doa v. Lakeman*, (2 B. & Ad. 30); *Barnes v. Dixon*, (1 Ves. sen. 42); *Johnson v. Arnold*, (1 Ves. sen. 168); *Bliss v. Collins*, (5 B. & Ad. 882); *Roberts v. Snell*, (1 M. & G. 577); *Harrison v. Barnby*, (5 T. R. 246); *Yates v. Cow*,

(2 Brod. & Bing. 661.)] With regard to the second point: the Common Law Procedure Act does not make any fundamental change in the rules of pleading further than it expressly points out. It was never necessary in an avowry to anticipate what should properly come from the opposite side. The defence is in the nature of an avowry, in which it was never considered necessary to notice the requisites of the Ejectment and Distress Act. The Common Law Procedure Act does not repeal the Statute of General Avowries, which would be done in case this defence were held to be bad on the ground complained of. The case of *Madden v. Bryan* is no authority, because that was an action of trespass, and the Statute of General Avowries does not apply to such an action, but merely to replevin.

Armstrong, in reply.—With regard to the latter question, *Clooney v. Watson*, (2 Ir. C. L. R. 129,) decides the proposition that where the notice of distress under the 9 & 10 Vic. c. 111, is defective, the distress is so far a nullity, as to admit of a second distress by the landlord, irrespective of the first. Therefore, it is evident that, unless it appears on the face of the defence that the statute has been complied with, there is no allegation of a valid distress, and, consequently, no answer to the action. Again, without disputing the proposition, that, under the Statute of Uses, a reversion may be severed so as to allow of several distresses, the question here is, whether, assuming this to be a devise of the rent reserved by the lease, could one tenant in common distrain upon his co-tenant in common for rent issuing out of the same lands. The lessor and the lessee here were tenants in common by the lease reserving the rent. In *Litt. 299*, it is said, "If a man seized of certain lands, in feoffe another of the moiety of the same land, without any speech of assignment or limitation of the same moiety in severalty at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common." *Co. Lit.* 189, a. 190, b.; 2 Bla. Com. 192. Being tenants in common, while the lands were held in common and before partition, the lands were not liable to be distrained on.—*Bro. Ab. tit. Distress*, 38. It is different when one tenant in common leases to the other his undivided moiety, for there the exclusive possession is in the lessee. That was the case of *Snelgar v. Henston*, in which there was an outstanding lease of the entirety of the lands, which had been assigned to one of the tenants in common; but that case did not decide that a tenant in common, in possession of an undivided moiety, can distrain on the other undivided moiety.

Nov. 24.—LEFROY, C. J.—In this case several objections have been argued, and it has been questioned whether the objections specified in the demurrer correspond with those stated in the points for argument. As we are of opinion that all these objections, however raised, are untenable, it is not necessary to notice that objection. Some of these objections might, at common law, have been available, as for example, that a tenant cannot be made responsible for a portion of an entire rent, but a complete answer to that objection is afforded by the respective statutes of Uses and Wills, which are

admitted to give the parties which act under them a power of alienation, as it were by act of law, which latter would not have required attornment. The general principle was that a tenant could not be made liable for several distresses in respect of different portions of the same rent, except when an apportionment took place by act of law, in which case the owners of the reversion were entitled to avow for their respective portions, as coming in by act of law. The law upon that subject was fully considered in *Rivis v. Watson*, (5 M. & W. 225), and that case fully recognized the principle that a tenant who, by means of a devise or by the statute of Uses, becomes liable to a party for a portion of his rent cannot defend himself, by the want of attornment or on other grounds which would have held good at common law. The next objection was that this was a distress by one tenant in common upon another. That objection was founded upon a misapprehension of the rule of law, which is not that a tenant in common may not distrain upon the lands, which he holds in common, but that a tenant in common cannot distrain the cattle or goods of another tenant in common. That is very reasonable, because where a tenant in common demises his portion of the lands, he thereby acquires the rights of a landlord in relation to his tenant, and the right to distrain upon the lands demised, though the possession thereof be common to the landlord and tenant. Therefore, although every tenant in common may authorize, by virtue of his possession *per my et per tout*, any other person to put his cattle on the lands, which are privileged from distress by that authority, that cannot, in general, deprive the tenant in common, who has demised, of his right to distrain, which he enjoys in every part of the land. *Viner's Ab. Distress*, 1, contains all the cases on this subject, the rules of which I have thus stated. I therefore am of opinion that this objection is untenable. Then comes the third objection, which is that the defence should have alleged a compliance with all the requirements of the statute 9 & 10 Vic. c. 111. That does not allege that a notice of distress was served. As, however, antecedently to the passing of the Common Law Procedure Act that was not required, we are of opinion that the defence is still regulated by the previous rule, the law remaining as it was prior to the passing thereof. That is mere matter of avoidance, because, *non constat* that the tenant contemplated relying upon a thing which was introduced by the Legislature in defeasance of the right of distress given to the landlord by a statute which enabled him to avow generally. The tenant might possibly not rely thereon. I am, therefore, of opinion that with respect to all these objections the demurrer must be overruled.

CRAMPTON, J.—Two objections have been chiefly relied upon in support of this demurrer. First, it is insisted that in such a case as the present there was no right of distress. The rule which governs that is quite clear. There is no doubt that one tenant in common cannot distrain the other, but if a lease be made by one tenant in common to a purchaser, that creates the relation of landlord and tenant, and the landlord may distrain. It is also laid down that if one of several joint tenants grant a

rent-charge, the grantee may distrain, not the lands generally, but the cattle and goods of the grantor. This is very reasonable. Here we have a tenancy in common created by a lease, reserving rent; and a distress is made for that rent on the property of the lessee alone, which clearly comes within the rule I have stated. With regard to the second objection, which is, that the party distraining and claiming as landlord has not in his defence alleged that he delivered a notice pursuant to 9 & 10 Vic. cap. 111. *Madden v. Bryan* has been relied on; but that case differs from the present; and, assuming that that case was rightly decided, about which I own that I entertain some doubts, it turns on this consideration. The action was one of trespass, to which a justification was pleaded, alleging only, in general terms, that the proper notice, as required by the Act 9 & 10 Vic. c. 111, had been served. A demurrer to this came on to be argued, whereupon the Court of Common Pleas decided that the justification was bad. Now, if that case had been decided on special demurrer, I could understand that if a party thought proper to plead that he had complied with the terms of the statute, a full justification being required in the action of trespass, the court might not have held the plea as pleaded to be a complete justification; but this is not an action of trespass but of replevin, where, under the 25 Geo. 2, the defendant is entitled to plead a general avowry, and could not have been called on to enter into a special statement of facts, and there is no authority to show that now he is required so to do, or to allege a compliance with the terms of the 9 & 10 Vic., which it was not necessary for him to do before the passing of the Procedure Act. Here is the distinction between the case in the Common Pleas and that now before the court. It has been admitted that if this had been a case of replevin before the passing of the Procedure Act, this avowry would have been sufficient; but it is said that that statute made a change in the mode of pleading an avowry, and that avowries are no longer to be general, as under the 25th Geo. 2. That statute was, however, never repealed; and, unless there be something in the Procedure Act which takes away that right, we must regard it as still subsisting. Now, in order to support that position, they rely on the 48th section, which says that a party shall not be allowed to reply, except in special cases. But this does not affect the right of the parties, for the court or a judge has a discretion to allow a replication to be pleaded in any case of necessity. The only fundamental change in the action of replevin made by the Procedure Act is that it has now been converted into a personal action, and is to be commenced by a writ of summons and plaint. But then it is said that under this new system the defendant must put forward in the first instance that he has complied with the 9 & 10 Vic. c. 111. That is mere matter of avoidance, and the question is, whether the defence is on that ground bad on general demurrer, because it does not contain an answer to what is properly matter of avoidance, because the plaintiff is not in a position to file a replication as of course. But the court would, in such a case, grant liberty to file a replication in the very terms of the statute, if such a controversy arose.

This demurrer must, therefore, in my judgment, be overruled.

PERRIN, J. concurred.

*Judgment for defendant.**

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

HASSARD v. CAULFIELD.—Nov. 12.

Principal and agent—Deputy—Marshal of the Marshalsea—Trespass—Ratification—Respondeat superior.

In an action of trespass for false imprisonment brought against the Marshal of the Marshalsea of the Court of Queen's Bench by a prisoner, it was proved that the plaintiff had made use of strong expressions at the refusal of the officers of the gaol to afford medical assistance to one of the female attendants, who was taken ill: and that the Deputy Marshal had accordingly confined the plaintiff in the punishment cell of the prison for several hours, but that previous to his so doing he had neglected to commit to writing (as required by the 27th Rule of the prison) the particulars of the charge and evidence relating thereto. The Marshal was not present at the time of the imprisonment, but no evidence was given to point out exactly where he was at the time, or how long he was absent. Held, that the Marshal was not liable, merely as such, for the act of the Deputy Marshal. Held also, that the requirements of the 27th Rule not having been complied with, an act of false imprisonment had been committed.

Seem, that if the Marshal had returned to the gaol before the imprisonment had terminated, or had been within its precincts during the arrest, he would have been liable.

Quære, as to what will amount to "absence" on the part of the Marshal to enable the Deputy Marshal to act as Marshal.

THIS was an action for trespass and false imprisonment. The plaintiff was at the time of the alleged trespass a prisoner in the Four Courts Marshalsea; and one of the female attendants of the prison having been taken ill with symptoms of cholera in the prison, a messenger was sent to the hatch for the purpose of obtaining medical assistance, and he having returned with a reply that the prison doctor could not be sent for, the woman not being a prisoner, the plaintiff advanced to the hatch, saying that it was "unnatural and brutal conduct," and then turned round in the direction of the house of the governor of the prison, (the rear of which abutted upon the precincts of the gaol,) calling out, "Governor, Governor." He then returned to his room, but in a short time was recalled to the hatch, where he was arrested by the Deputy Marshal, who sent him to the punishment cell forthwith, where he was imprisoned for several hours. It was also proved that the plaintiff's legal adviser had subsequently observed to the Marshal of the gaol (who was the defendant in the present action) that if the latter had been there, the circumstance would not have occurred, to which the Go-

* Moore, J. was at Nisi Prius.

vernor replied, "Indeed I fear it would, as I see no reason why any difference should be made between Mr. Hassard and any other man, because he is a gentleman." This case was tried at the Nisi Prius sittings after last Hilary Term by the Lord Chief Baron, and at the close of the plaintiff's case the defendant's counsel called upon the learned judge to nonsuit the plaintiff upon the following grounds: that no evidence had been given of the appointment of the Deputy Marshal; that it had not been proved that the Governor had previously authorised or subsequently ratified the acts of the Deputy Marshal; and that, in the absence of the Governor, the Deputy Marshal had full authority to act upon his own responsibility, and that for such acts the Governor was not responsible; which his Lordship refused to. The defendant's case then proceeded; at the close of which, in reply to an observation of the learned judge that the 27th Rule* had not been complied with, the defendant's counsel contended that the rule was merely prescribed by the Court of Queen's Bench for the better regulation of the prison and its officers, but that the non-observance of it did not affect the plaintiff's right of action, as the powers of committal existed in the Marshal, or, in his absence, in the Deputy Marshal, independently of this rule. At the close of the trial his Lordship again refused to submit the questions proposed by the defendants to the jury, but directed them that the governor was liable for the acts of his deputy, although committed in his absence; whereupon the jury found a verdict of £50 for the plaintiff. A conditional order having been obtained to set aside the verdict,

Lynch, Q. C., showed cause.—The observance of the provisions of the 27th prison rule is necessary, to prevent the exercise of arbitrary power by the officers of the prison. The first ground upon which it is contended that the verdict for the plaintiff should be set aside is this: that the Marshal of the prison is not to be held responsible for the acts of his deputy. *Yorke v. Chapman*, (11 Ad. & Ell. 813.) was an action against the Marshal of the Court of Queen's Bench, for assaulting and imprisoning the plaintiff; and it was alleged in defence that the act complained of was done in the enforcement of prison discipline by a person acting as Deputy Marshal, but no appointment of that person was proved in evidence, nor any act connecting him with the Marshal, nor any recognition of his acts by the latter. The latter fact distinguishes it from the present case, the Marshal having recognized the act of his deputy. The Deputy Marshal is appointed under the provisions of 7 Geo. 4, c. 74, s. 123; and the rule of *respondeat superior* exactly applies. The reason, of this rule of law is, that persons in authority shall be obliged to appoint fit and suitable deputies: and that they shall not leave their duties in the charge of irresponsible agents. This rule is derived from the provisions of one of the earliest Gaol Acts, 27 H. 8, c. 24, and is recognized in 2 Inst. 382. *Woodgate v. Knatchbull*, (2 T. R. 148,) was an action brought against a sheriff for receiv-

ing higher fees than he was entitled to by his bailiff, and he was held responsible for the act of his deputy; and in *Raphael v. Goodman*, (8 Ad. & El. 565,) cited in *Yorke v. Chapman*, the principle of *respondeat superior* is clearly recognized. In *Bac. Ab.* Officer L. a deputy is stated to be a person who acts in right of his superior, and for whose regularity his superior shall answer; thus extending the rule to others besides sheriffs and their officers. The Deputy Marshal is not a distinct officer from the Marshal, but merely an agent, and they are not distinguishable from each other by their acts alone. In *Sharpley v. Hornsby*, (4 Ir. Jur. 389,) the principle of *respondeat superior* is recognised as applying to cases in which an agent is employed, and where the superior is not compelled by statute to employ a deputy. The Rules of the Marshalsea must be regarded as having the same efficiency as a statute; the judges of the Court of Queen's Bench being empowered by Act of Parliament to frame them.

Macdonagh, Q. C. (with him *Hayes, Q. C.*) contra. *O'Mahony* in reply.—All the authorities that can be cited on the other side, apply only to injuries to personal property; and are, therefore, distinguishable. In *Lane v. Collott*, (12 Mod. 489,) the rule is thus stated: "The reason why a principal shall answer for his deputy is, because as he as principal has power to put him in, so he has power to put him out, without showing any cause, and that although he had expressly given him an estate for life in the deputation,"—per Holt, C. J. It is in respect to injuries to the person, and not to the property, that the principal is to be held responsible. In *Barker v. Braham*, (2 W. Bl. 867,) an action was brought for false imprisonment, against an attorney for suing out an illegal writ of *capias ad satisfaciendum*, and delivering it to the officer by whom the arrest, which was the subject of the action, was made. It is contended by the other side that the absence of the governor is a sufficient excuse; but it would be a dangerous principle to hold, that the deputy, upon the occasional or temporary absence of the Marshal, shall become invested with full authority as an independent officer, to deal with the inmates of the prison as he thought fit. It is quite clear that the governor has full power both to appoint and dismiss his deputy; section 112 of the Prison Act only refers to the keepers of the prison, when requiring that previous application must be made to the Court of Queen's Bench. [*Greene, B.*—The words of the Act are, "keepers or other officers of any prison." *Richards, B.*—It is admitted that there has been an irregularity; but the question is, can you sue the Marshal in trespass, instead of his Deputy who committed the act.] It must be assumed that the governor was not really "absent" from the prison at the time of the offence committed. [*Richards, B.*—The words "illness or absence" in the Act mean, such as would incapacitate him from the performance of his duty.]

*PENNEFATHER, B.**—This case is one of considerable importance; and, after considering the several propositions that have been laid before the court, we are of opinion that it should be submitted

* 27th Rule of the Four Courts Marshalsea: "Previously to committing a prisoner to the punishment cell, the Marshal shall satisfy himself of the truth of the charge by examining witnesses, and taking their testimony in writing."

* Pigot, C. B. was absent.

to a new trial. It is an action for trespass and false imprisonment, brought by the plaintiff, (who at the time was under confinement in the Marshalsea as a debtor,) against the Marshal of the Marshalsea, and the plaintiff complains that he has been unjustly imprisoned under the following circumstances. It appears that upon the day in question, a maid servant employed in the gaol was taken extremely ill, and that the plaintiff (being apprehensive, as he states, that she was attacked with cholera,) proceeded to the hatch for the purpose of obtaining medical assistance, and that the persons who were there refused to provide such aid, stating that they could not send for the physician of the gaol, inasmuch as the female was not one of the inmates of the prison, and therefore not entitled to the attendance of the gaol physician. The plaintiff appears to have become indignant at this, and to have used strong language, which I need not repeat. A complaint was made of his conduct to the Deputy Marshal, the Marshal himself being, as it is stated, absent at the time, and the former sent for Mr. Hassard. Some conversation subsequently took place, and the result was that the Deputy Marshal ordered the plaintiff to be imprisoned in the cell, at first for a short period of time, but he was subsequently detained for several hours. This was substantially the case made at the trial; and it was insisted on behalf of the plaintiff that there should be a verdict for him, upon the grounds that no authority had been proved to have been given by the Court of Queen's Bench to the Deputy Marshal to do such acts as that complained of, and, therefore, that it must be considered as the act of the Marshal himself, against whom the action was brought, and not that of the Deputy Marshal, the former being responsible for the acts of his deputy, as regarded this act of trespass and false imprisonment. Such was the case made at the trial by the plaintiff, and it involved the consideration of at least two propositions: first, whether or not this was a case of false imprisonment, and, if so, whether the defendant was responsible for it. Before canvassing the arguments that have been made use of upon both sides, it will be better first to consider the circumstances and position of these parties, namely, the Marshal and Deputy Marshal. Under the provisions of the General Prison Act, 7 Geo. 4, cap. 74, the Lord Lieutenant is empowered to appoint a Marshal of the Marshalsea of the Four Courts, as also other officers; but by the same Act of Parliament the Marshal is not only authorized but *required* to appoint a Deputy Marshal,—not merely a *deputy* but a Deputy Marshal, that is to say, as I understand the words of the statute, a distinct officer, besides three hatch men and other officers connected with the prison, to whom he is also directed to pay certain salaries. The Court of Queen's Bench, under the provisions of the same Act of Parliament, were also empowered to make certain regulations as to the management of the prison. The public should be aware that while the governor of this prison is allowed control over those persons who are under his care, it is his duty, nevertheless, to take care that things shall be so conducted within the walls that the regulations and rules in reference to prison discipline shall be maintained, while, at the

same time, the Marshal exercises a sort of arbitrary power. In ships, both in the naval and merchant service, the same kind of discipline prevails, so that any attempt at outrage or insubordination may be at once suppressed by the commander, and, therefore, it is provided by the 27th Rule of the prison, that in case there shall be any insubordination the Marshal shall be empowered to imprison any person guilty of such insubordination in the punishment cell; but, as a safeguard against wrongfully imprisoning parties in such cases, it is required that the Marshal shall satisfy himself of the truth of the charge preferred, and that he shall take down in writing the testimony of the witnesses produced, that is to say, the charge and the evidence of it. The Marshal is not, as I apprehend, empowered to administer an oath upon such occasions; but he is obliged to commit to writing the particulars of the charge, for the information of the Inspector of prisons, and, if necessary, of the Court of Queen's Bench. By the 33rd Rule, as framed by the said court, it is provided that all the powers conferred upon the Marshal by the provisions of the 27th Rule shall devolve upon the Inspector and Deputy Marshal in the absence of the Marshal. Upon the occasion in question it appeared that the Marshal was absent from the prison, but where he was or how long he was absent did not appear. It also appeared that in his absence the Deputy Marshal acted in his stead, and, as I have stated before, committed Mr. Hassard, the plaintiff, to prison. But it appears that the Deputy Marshal did not, previous to ordering Mr. Hassard to be imprisoned in the cell, take an examination in writing of the persons who made and established the charge; and upon these grounds it has been urged that he was guilty of an act of trespass and false imprisonment, for which he must be held liable to the plaintiff in damages; and this proposition the court does not mean to controvert. But then it has been contended that the Marshal himself is liable for this act of trespass and false imprisonment committed by the Deputy Marshal; and this proposition is resisted by the other side, upon the grounds that, inasmuch as the Marshal did not sanction the act of the other party, and as it was committed in his absence, he was not liable, at least in this form of action; but besides this argument, it was also urged upon general grounds that the Deputy Marshal was a distinct officer, holding for such purposes an authority quite independent of that of the Marshal,—not so as to control the acts of the Marshal, or to enforce a different discipline, but to act in the absence of the Marshal as if he were present in cases requiring the enforcement of the rules of discipline in the prison, but subject to the obligation of taking down in writing the testimony of witnesses in cases of this nature, the authority of the Deputy Marshal arising out of the provisions of the 33rd rule. It is upon this part of the question that the case chiefly depends. It has been insisted on behalf of the plaintiff that there was evidence of an express assent to and recognition of the conduct of the Deputy Marshal subsequently given by the Marshal himself; on the other hand, it is contended that the words he made use of did not amount to an assent, and that this matter was not pressed at the trial: that the question of previous authority or

subsequent ratification was not put in issue before the jury, and that the court should therefore decide the case as if no such previous authority or subsequent ratification had existed. However that may be as to the evidence that was adduced at the trial, we must look to the report of the judge who tried the case; and it would appear from that, that this part of the question was not submitted to the jury. Another question is now pressed upon the court in reference to the absence of the Marshal at the time of the occurrence; and it is contended that the authority, as vested in the Deputy Marshal, is not to extend to all momentary cases of absence of the Marshal, as, for instance, if he should leave the gaol for the period of ten minutes. We do not mean to decide exactly as to what period of absence or what kind of absence may be necessary in order to give the Deputy Marshal this authority under the provisions of the 33rd Rule, for the nature of the absence of the Marshal upon this occasion has not been laid before us, and, therefore, both we and the Nisi Prius Court have been kept in the dark upon this subject. It may happen that during a very short absence of the Marshal, it may be necessary for the Deputy Marshal to act promptly, and therefore we do not like to lay down any rule upon this subject. I do not wish to give an opinion on this subject, not having materials for forming one, as I consider it to be a very important question. If it be thought fit to bring this question a second time before a jury, then this question as to the power of the Deputy Marshal to act under the circumstances of the case, may be discussed in a manner which has not been adopted on the present occasion; and upon which, therefore, we cannot pronounce an opinion. We think, upon the whole, that the verdict as found, cannot be supported; but, at the same time, we are of opinion that we should not decide any of these questions. Therefore, we shall not direct a verdict to be entered for the other party; but we shall make an order that the present verdict be set aside without costs, either of the trial that has taken place, or of the present motion.

RICHARDS, B.—I fully concur in the judgment of my brother Pennefather. It is clear that Mr. Nasard has been wrongfully imprisoned; that is to say, that the forms prescribed by the rule of the Queen's Bench were not followed previous to his having been placed in confinement, and therefore, I think that he has a cause of complaint. But, I am also of opinion that under the form of action that has been adopted, and under the facts of the case, the Marshal cannot be held responsible, except something beyond what was presented to the jury upon the last trial of this case, be put forward before some future jury. There are two points of view in which I think the Marshal might be held responsible: first, if he had returned to his duties before the plaintiff had been discharged from custody; and if he had a fair opportunity of finding out the facts of the case, and of satisfying his mind as to the nature of the charge, and if, under these circumstances, he had not relieved or discharged the plaintiff; if such had been the case, I think there would have been evidence to have gone to the jury affording satisfactory proof of the assent of the Marshal to the

act of the Deputy Marshal. I think we might arrive fairly at such a conclusion from some of the authorities cited, for instance, *Yorke v. Chapman*; but I put the case more especially, if the Marshal had a fair opportunity of finding out the circumstances of the case before the imprisonment had terminated—but if, on the other hand, he could show that he was perfectly unaware of the entire transaction until the whole thing had terminated, it would be hard to hold him liable. As regards the question of the absence of the Marshal, I think that a fair argument has been suggested, for it appears to me that it is not a mere temporary absence of three or four minutes that can be regarded as being contemplated; for instance, as in the present case, that his going round to his own house would establish an absence within the rule of the Court of Queen's Bench. If he was within his own house at the time of the occurrence, he was, it was proved, within the precincts of the gaol, and this will be a fair question for the consideration of the jury upon a future trial of the case; for, if that be so, the Deputy Marshal had no right to act, as in the absence of the Marshal, for he was only Deputy Marshal when the Marshal was absent, but if he acts in such a manner in the Marshal's presence, or in the case that I have mentioned, he must be then regarded as acting for the ease and convenience of the Marshal, and in such a case the latter should not be protected. Now I think that it is right that the Marshal should ascertain such matters as these accurately, for it is not proper that a person should throw such responsible duties as these upon another person, although it is too much the fashion for persons having important duties to perform to do so, and then to sneak out of the consequences. As to the manuscript book containing the proceedings in the prison, that has been laid before us, it appears that the greater part of the duties have been performed by the Deputy Marshal; however, I do not wish to make any observations upon these matters, as I suppose they will come out again upon a second trial.

GREENE, B.—All that is material for the court to decide in this case has been already stated, that is to say, that it does not follow from the mere relation existing between the Marshal and Deputy Marshal under the provisions of the Act, that the Marshal, as principal, is responsible merely on that account for the act of the Deputy Marshal. It does not appear to me that the Deputy Marshal is the mere servant or delegated agent of the Marshal, and, unless that be so, the verdict cannot be sustained upon the testimony adduced at the trial, as establishing the Marshal's liability upon the ground of one being principal, and the other deputy. This is the only question in the case upon which I wish to be understood as expressing an opinion—such is also, I believe, the general opinion of the court; and therefore it does not become necessary in the present case to decide as to the application of the principle of law, that although a principal may not be responsible on account of his actual position as such, yet that he may become so on account of a former authority, or subsequent recognition.

Rule absolute for a new trial.

COURT OF CHANCERY.

CHAINE v. DUNGANNON.—Nov. 23.

Appeal against recitals in an order—Costs.

The Court of Chancery will not expunge from an order of the Rolls recitals which reflect on the character of a party, unless there has been some miscarriage in the proceedings, or some injustice done. An appeal motion for this purpose dismissed with costs.

In a suit for tithe rent-charge several of the defendants were struck out of the bill by side-bar rule on payment of their proportion, and the costs of subpoena and appearance. The bill was set down against the other eight defendants, who then entered into a consent to pay whatever costs were taxed against them, and they paid £26 on account. The general costs of the suit were taxed against them to £36 2s. 0½d. A motion was made to the Rolls in January, 1854, and an order was obtained whereby the Taxing Master was directed to review his taxation, and report what amount of costs would be properly charged against these eight remaining defendants, if the other sixty-three defendants had been charged with the proportion of the costs of the suit to which they would have been liable under the 28th section of the 1 & 2 Vic., c. 109. A report was made, and in pursuance of it, his Honor directed the plaintiff's solicitor to refund to the eight defendants £17 6s. 3d. out of the £26 paid by them for costs, and that the plaintiff should pay to these eight defendants the costs of the motion of January, 1854, and the proceedings thereunder. Held, on appeal, against the payment of costs directed by the order, that this order should be affirmed, and the appeal dismissed with costs.

THIS was a motion by way of appeal from two orders of the Master of the Rolls, dated respectively the 21st of January, and 6th of July, 1854. The first order, and the grounds on which it was made, are reported in the 6th vol. of the Irish Jurist, p. 174, and the appeal against that order was not against the curial part of it, which directed a reference to the Taxing Master, but against the recitals in it, which declared that the course taken by the plaintiff's solicitor, Mr. W. J. Gaynor, against eight of the defendants had been unjust, and, in order to have these recitals expunged, the appeal motion to these orders came on before the Lord Chancellor on the 18th of February last. His Lordship made an order reciting, that "inasmuch as the question whether the matters and course of conduct of the solicitor for the plaintiff, in said order referred to, were unjust or otherwise, may in some measure depend on the result of the report of the Taxing Masters, and the other proceedings by said order required, and upon the final decision of the court thereon;" and remitting the case to the Master of the Rolls for further proceedings, with liberty to the appellants, if so advised, to renew that motion after the final order of his Honor should be made. The second order now appealed from was made on the 6th of July, 1854, by the Master of the Rolls on the return of the Taxing Master's certificate, whereby he decided that W. J. Gaynor, so-

licitor for the petitioner, should, out of the sum of £26 paid to him by said eight defendants on account of their costs in this cause, refund to the said defendants the sum of £17 6s. 3d., being the balance of said sum after payment of £6 13s. 9d., the proportion of the costs to which the said defendants were liable, and the sum of £2 for the said defendants' proportion of the costs of the taxation, and whereby it was further ordered that the plaintiff should pay to the said defendants the costs of the motion and order of the 21st of January, 1854, and of the proceedings thereunder, and of that motion, when taxed. It was only against the latter part of this order, giving these costs to the eight defendants against the plaintiff, that this appeal was directed, and both motions having been now brought on together,

Miller, Q. C., and A. Henderson, for the petitioner, were heard in support of the appeals.

Hughes, Q. C., and T. K. Lowry, in support of the Rolls' orders.

LORD CHANCELLOR.—I feel myself bound to leave the orders of the Master of the Rolls untouched. As to the appeal against the first order, it was a very unusual thing to appeal against recitals in an order, and especially recitals in which the judge pronouncing his order merely expresses his own reasons for the making of it. Those reasons are pertinent to the scope of the order, and though, on appeal, I consider I have jurisdiction to expunge the recitals, as well as to vary or set aside any other part of the orders, it is a jurisdiction I will never exercise unless there has been some miscarriage or some injustice done to the party complaining, and, considering the entire facts of the case, I do not consider there has been any such in the present case. The learned judge who had so put his opinion of the case upon record has great experience in such matters, and had investigated the case fully. As to the second appeal it was merely against so much of the order as directed the payment of costs, and must have failed upon that ground, even if it had not been warranted by the merits of the case, which I consider it had, and I must, therefore, affirm both orders, and dismiss both appeals with costs.

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at Law.]

BELL v. JOHNSTON.—Nov. 13.

Cause Petition—Substitution of Service—Lunatic Respondent.

Notice of filing a cause petition was directed to be served on a respondent who was of unsound mind and out of the jurisdiction, by serving the keeper of the lunatic asylum, and the friend of the lunatic in London. And liberty was given to petitioner to appoint a guardian ad litem, in case respondent's friends should neglect to do so.

Lawson moved for liberty to serve one of the respondents, Anna Johnston widow, a person of unsound mind, with notice of the filing of the cause petition in this matter; she residing in England out of the jurisdiction of the court.

The following order was made :

"Let the petitioner be at liberty to serve with notice of the cause petition, Anna Johnston, one of the respondents, residing in Lancaster County Lunatic Asylum, at Ramhill, near Prescott, in Lancashire, England, and who, it is alleged by the petitioner, is a person of unsound mind, but against whom no commission of lunacy has issued, by serving the said notice on the governor and keeper of the said lunatic asylum, and also by serving same in London upon Mr. Edkins, 7, North Bank, St. John's Wood, London. And it is further ordered, in the event of the relations or friends of said Anna Johnston, taking no steps to have a guardian *ad litem* appointed for the said Anna Johnston, that petitioner shall take the necessary proceedings to have such guardian appointed, and let the costs of this motion be costs in the cause."

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

FITZGERALD v. BROWNE.—Nov. 14.

Landlord and Tenant—Contract relating to Lands—Compensation—Use and Occupation—Special Damage.

An agreement had been entered into between A and B, by which the latter was to demise to the former three denominations of lands, R. S. and T. containing 400 acres, at an acreable rent of 14s. per annum, for a term of five years. B put A into possession of one of these denominations (R), but was unable to make out title to the others, and when about two years of the term had expired, B sued A for the rent due out of the lands of R, at the rate of 14s. per acre, which the latter paid. A then brought the present action against B, for having failed to fulfil his contract, as to the other lands, but averring no special damage; and the jury found damages by their verdict for the plaintiff, acquitting the defendant at the same time of fraud or negligence as regarded the title to the lands. It was proved that R was not worth 14s. per acre, per annum. Held that a contract for the sale or demise of lands does not per se contain a warranty of title as to the lands contracted to be sold or demised; but that inasmuch as the plaintiff had paid a certain sum as the annual rent of that portion of the lands into possession of which he had been put, exceeding the yearly value, he was entitled to a verdict for the amount of the difference between the actual value and the amount paid by him.

Quære—Whether the plaintiff could recover special damage (if laid) in this action.

THIS action was brought to recover damages for an alleged breach of contract. The summons and plaint averred that by a certain memorandum of agreement of the 26th of April, 1852, made between the plaintiff and defendant, in considera-

tion that the plaintiff had agreed to become tenant of the lands of Browne Hall, Tullymore, and Tullybeg, containing about 400 acres, for the term of five years, at the rate of 14s. per acre, and also in consideration of his advancing the sum of £150 to pay poor-rates and other charges then due out of the lands, to be repaid to the plaintiff by instalments, the defendant agreed to put the plaintiff into possession of the lands of Browne Hall forthwith, and that he would put him in possession of the other lands within a reasonable time, and execute to the plaintiff a lease of the lands in question for five years, within a reasonable time from the date of the agreement; and that although the plaintiff had performed all conditions necessary to be performed on his part, yet that the defendant, although he had put the plaintiff in possession of the lands of Browne Hall, did not within a reasonable time from the date of the agreement, or hitherto, although often requested, put the plaintiff into possession of the lands of Tullymore and Tullybeg, or any part thereof—to the plaintiff's damage of £600. The plaintiff averred no special damage. The defendant in his defence admitted that he had agreed to grant a lease of the three denominations mentioned in the summons and plaint, and to put the plaintiff in possession of the lands of Tullymore and Tullybeg within a reasonable time, and stated that at the time of making the agreement he believed that he had power and legal authority to execute such a lease, and that he expected at the time that he would have been able to evict the person then in occupation of the lands of Tullymore and Tullybeg, and to put the plaintiff into possession; but that after the making of the agreement he for the first time discovered that he had no power to do so, not being able to evict the occupier out of these lands; that he had put the plaintiff into possession of the lands of Browne Hall, containing about 200 acres; that the sum of £140 had been paid by the plaintiff; and that the plaintiff had never paid any rent for the lands in his possession, and averred that he was ready and willing to give the plaintiff credit for the sum of £140 out of the rent payable for the lands in the plaintiff's possession, admitting that he had sustained damage to the amount of £10, which was accordingly lodged in court. The issue for trial was whether the plaintiff had sustained damage beyond the amount of £10. This case was tried at the last assizes for Carrick-on-Shannon, before Mr. Justice Moore, and the memorandum of agreement was proved as stated in the summons and plaint. The plaintiff also proved upon oath that the lands of Browne Hall were only worth 12s. an acre, and that he would not have taken the lease in question, but that it was also to contain a demise of the lands of Tullymore and Tullybeg, which he stated to be worth 16s. an acre. He admitted that when he was put into possession of the land of Browne Hall he was aware that the lands of Tullymore and Tullybeg were in the occupation of another person as tenant, under a receiver of the Court of Chancery, and that the defendant had stated to him that he was taking steps to remove the tenant. Evidence was

then adduced by the plaintiff to show that he had incurred considerable damage by purchasing stock to put upon the lands of Tullymore and Tullybeg, to which evidence, as also to that in reference to the relative values of the several denominations, counsel for the defendant objected, but the learned judge admitted the evidence and saved the point.

At the close of the plaintiff's case counsel for the other side called upon the learned judge either to nonsuit the plaintiff, or direct the jury to find merely nominal damages, upon the ground that the special damage given in evidence had not been set forth as such, in the summons and plaint; and that under the circumstances, no fraud having been proved against the defendant, the plaintiff was only entitled to nominal damages: which his lordship having refused to do, the defendant went into evidence of his exertions made to obtain possession of the lands of Tullymore and Tullybeg. The learned judge then told the jury that contracts relative to the sale of lands were differently circumstanced from other contracts, and that damages for the loss of the bargain could not be recovered in the present case, unless the jury were of opinion that fraud had been committed by the defendant, or that he possessed at the time of the agreement such knowledge of want of title as would amount to fraud, or that he had been guilty of some intentional misconduct or gross neglect, in endeavouring to obtain possession of the lands, but that there did not appear to be evidence either of fraud or neglect. He also told them that they could not give damages solely in respect of the plaintiff having purchased stock for the lands of Tullymore and Tullybeg; but that as the rent in the agreement was 14s. an acre, all through, that if they thought that the lands of Browne Hall were not worth so much an acre, and that the plaintiff could not have given such a rent for those lands alone, they would be justified in giving the plaintiff as damages, the excess of 14s. an acre, over the real acreable value of the lands of Browne Hall, inasmuch as the plaintiff had agreed, and was bound to, and had paid that rent, and had been damnified to that extent. The jury found that there was no fraud, or misconduct, or negligence on the part of the defendant, but found a general verdict for the plaintiff, for £100 10s. 0d., as damage sustained by the latter, being the difference between the stipulated rent (at the rate of two shillings an acre for five years,) and the acreable value of Browne Hall. The issues left to the jury were:—"First, whether there had been any fraud. Second, whether the defendant had used every proper exertion to obtain the possession of the lands of Tullymore and Tullybeg, and to evict the tenant then in possession. Third, whether the plaintiff had sustained damage in respect of the causes of action in the plaint mentioned, to any greater amount than £10, and if so to what extent." A conditional order having been obtained in behalf of the defendant, to set aside the verdict so found, and for a new trial, on the grounds of the reception by the learned judge of evidence of special damage, none having been laid in the summons and plaint; on the ground of the finding as to

damages being inconsistent with the other finding, and because the finding was contrary to the charge of the learned judge, contrary to law, and on the ground of newly discovered evidence,

Exham (with him *C. Kelly*,) were called upon by the court to support the conditional order.—It must be considered that at the time of the contract the plaintiff understood that there was a question as to the defendant's ability to give him a lease of the lands of Tullymore and Tullybeg.—[*Paunefather, B.*—Is it admitted that the jury have negatived the fact of fraud?] That is so: and therefore, the only question for the court is, whether a landlord having entered into such an agreement as this, and failing under such circumstances, from causes not under his control to make good the title to the lessee, the latter can recover more than nominal damages. There is a well known distinction between contracts relating to lands, and contracts as to other things in this respect; in the former, the party disappointed in the bargain not being entitled to more than nominal damages, except in case of fraud, the fact of *mala fides* being the only thing that would entitle the lessee to substantial damages. In *Robinson v. Harman*, (1st Exch. 350,) it was held that the plaintiff was entitled to recover full damages for the loss of his bargain for a good and valid lease of certain lands; but distinctly upon the grounds that the defendant was aware at the time of making the bargain that he was absolutely unable to fulfil the contract. In *Hanslip v. Padwick*, (5 Exch. 615), the defendant entered into an agreement with the plaintiff to let a ferry, and give him a good title, and accordingly he furnished an abstract of title, which was objected to by the plaintiff on account of certain incumbrances affecting the subject of the proposed demise; and the plaintiff having brought an action for breach of covenant against the defendant, it was held that the plaintiff was entitled to the expense of the preparation and stamping of the agreement, and of the investigation of title, and of the means used to procure a good title, but not for any supposed amount of profits that he might have realized if the lease had been perfected. The latest decision upon this subject is *Hadley v. Baxendale*, (23 Law Jour. 179, E.) in which it was held that where a contract is entered into under special circumstances, which are communicated by one of the contracting parties to the other, the damages resulting from a breach of the contract, which the parties might be reasonably supposed to have contemplated, are the amount of injury that would ordinarily follow from such a breach of contract, under the special circumstances; but that if the special circumstances are unknown to the party breaking the contract, he at the most can only be held to have contemplated the amount of injury that would arise generally, and in the multitude of cases not affected by any special circumstances, by such a breach of contract. This decision is as to contracts in general, but it is founded upon the principle mentioned as to contracts relating to lands, and recognizes the former cases. The defendant could not have recovered more than the yearly value of Browne Hall as

rent, the agreement being worth nothing, as the defendant had failed to carry out the entire of it. In *Tomlinson v. Day*, (2 Bro. & Bing. 681,) a tenant took a farm of land under an agreement, by which the lessor agreed to allow him a right to sport upon the lands, and under which a certain rent was reserved; the lessor failed to fulfil his portion of the agreement as regarded the right of sporting; and in an action brought to recover the rent, it was held that the jury might ascertain the value of the lands occupied by the defendant, without regarding the amount of rent reserved by the agreement. The same principle was recognized in *Gardiner v. Williamson*, (2 B. & Ad. 336). In *Neale v. M'Kenzie* (1 M. & W. 747), the defendant having taken 100 acres of land, entered into possession, but found that a portion was already in the possession of a prior occupant, and from so much of the land he was excluded; and it was held that the landlord could not distrain for the entire rent. [*Greene, B.*—That appears to have been the case of a bulk rent.] The mistake in the present case arose from this, that the jury treated the agreement either as a lease, or as a valid agreement for a lease, and assessed the damages accordingly; whereas if the landlord had to sue for the rent, the action should be for use and occupation, and not upon the agreement. The next objection is that the verdict gives prospective damages, the term of five years not having been completed at the time of the action brought; and also, that the damage should have been specially laid. [*Greene, B.*—Is it necessary in such a case? It appears to me that the loss sustained by the plaintiff would be the natural consequences of the acts of the defendant.]

Carleton, (with him *Burke, Q.C.*) in support of the verdict. [*Richards, B.*—The chief difficulty in the case is as to the question whether or not the real value of the lands affects the case.] The general rule of law is, that any person losing by the failure of another party in the fulfilment of a contract, is to be repaid the amount of the loss. To this rule there are certain exceptions, as when the contract relates to the title to real property, provided that the failure to complete the contract be free from fraud or collusion, as in *Flureau v. Thornhill*, (2 W. Bl. 1078) and *Buckley v. Dawson* (6 Ir. Jur. 374), such contracts being founded upon an implied condition that title can be established by the vendor, and there being no warranty of title, as in the case of goods; and therefore if a party in such cases brings an action for the loss of his bargain, the court will say, you cannot recover for what was never made the subject of the contract. But the present case is distinguishable, for the plaintiff does not sue for a supposed loss, but for actual damage. [*Richards, B.*—I do not think the defendant controverts that position.] The plaintiff proved that he would not have taken a lease of Brown Hall alone. [*Pennefather, B.*—If the plaintiff was bound to pay 14s. an acre all through, I think that the charge of the learned judge was correct. It therefore becomes material to consider whether he was so bound. *Richards, B.*—Provided that point was stated to the judge

when the exceptions to his charge were taken, which upon examination of counsel's certificate I find not to have been done, the exceptions being so far merely stated in general terms; therefore we must conclude that this point was not presented to the judge at the trial.] It is only in such cases as *Neale v. M'Kenzie*, where the court has no criterion to guide them, that the principle contended for by the other side can be found. It is not for damages sustained by reason of the loss of our contract that we are suing, but for damage actually sustained. The former was the question in *Flureau v. Thornhill*; but the two questions are distinguished in *Buckley v. Dawson*. As to the question of newly discovered evidence, that cannot be sustained, the alleged evidence being the books of the poor law valuation, which cannot be regarded as newly discovered.

Robinson, Q.C., was heard in reply.

PENNEFATHER, B.—This case has been very fully discussed on both sides, although we have been obliged to call upon counsel for the defendant to support the conditional order, counsel on the other side not having received their instructions in time. The case is by no means free from difficulty. This action was brought by the plaintiff against the defendant for failing to complete an agreement entered into by him in the year 1852, for a lease of certain denominations of land, at an acreable rent of 14s., for a term of five years. I say emphatically that the demise of these lands was at an acreable rent, for not only is the entire quantum of the rent unascertained by the terms of the agreement, but it is distinctly stated that it is to be at the rate of 14s. an acre, and that certain allowances are to be made to the tenant in respect of portions of land under plantation, and other matters of that nature, so that the rent in question possesses all the features of an acreable rent, as distinguished from a lump rent. Unquestionably by computing the number of acres, and adding together the amount payable for rent, you may arrive at a lump sum, but that is not sufficient to make this a lump rent. The present action is brought for the breach of this contract, the defendant having failed to put the plaintiff into possession of all the lands agreed to be demised, although he did put him in possession of one of the lots; and it is contended that this contract is to be construed differently from general contracts relating to personal matters. It appears to have been a rule of law from a very early period, as appears from the case cited from Sir Wm. Blackstone's Reports, that special damage for breach of contract cannot be recovered beyond the costs out of pocket, in cases like the present, where real property is the subject matter of the contract; and it is founded upon this principle, that persons agreeing to convey or demise lands, are supposed to do so under the assumption that they will be able to make out a good title to the lands to be conveyed or demised. They do not give a warranty for title in such cases, but the contract is conditional upon their being able to estab-

* Pigot, C. B. was absent.

lish a good title; and therefore if a person having made an agreement of this sort be unable (that is to say, without fraud or gross negligence) to make out his title, and if under the terms of the original contract a condition of this sort is to be ingrafted into the agreement between the parties, to the effect, as I understand it, that the party offering to convey or demise shall be able to do so; then in such case he not being able to do so, and the other party having sued for breach of the contract, the verdict should be given for the former: but the cases do not go so far, only deciding that *actual* loss occasioned to the disappointed party may be recovered. There is no case, that I am aware of, deciding that there shall be a verdict for the plaintiff for merely nominal damages; but if the defendant be bound to make good actual loss sustained by the other party in reference to the contract, then the question of nominal damages ceases, and a question as to the amount of actual loss is the proper one to send to the jury. I therefore take it that this verdict is founded upon this principle, and that it was in this manner that the case came before the jury. But it has been objected on behalf of the defendant, that damages not specially set forth in the summons and plaint cannot be recovered in the present action. It may be questionable whether such damages, even although set forth in the summons and plaint (not being actual loss sustained by the plaintiff in reference to the contract) could be recovered at all; but in point of fact no damages have been given by the jury in the present case for anything except what was either actual loss, or the immediate consequence of what occurred between the parties. The finding of the jury acquits the defendant of the imputation of fraud in the transaction, and this must be regarded as amounting to a finding in defendant's favour. Then as to the other demand, he has paid £10 into court, thereby contending that this is not a case for material damages. He concedes, I imagine, that some damages have been sustained by the other party in the way of expenses and costs, and to meet that he offers him £10, being willing to make compensation so far, but the plaintiff is not satisfied with that sum, conceiving that he is entitled to more; for he says, "I have agreed for a lease of all the lands; I have undertaken to pay an acreable rent of 14s.; I have got possession of Brown Hall only, and have paid 14s. an acre for that, and under the terms of the agreement I am liable for that rent; I have paid more than the value of Brown Hall, and the excess of what I have paid over and above that value is so much actual loss sustained by me, for which I deserve to be recouped; and Brown Hall being estimated at 12s. as the acreable value, and the other denominations at 14s., the amount of loss I would sustain would be £20 per annum, and that sum I have actually paid to the defendant, he having brought an action against me to recover it; and this is the mode in which I have been damaged." To this the defendant replies that the plaintiff, instead of having paid the money claimed by him, should have defended the action, and insisted that he was only bound to pay 12s. a year instead of 14s.;

and perhaps at the end of the five years of the lease he might, after an immense amount of litigation, have established his right to pay only 12s. an acre. I think the plaintiff was right in paying the 14s. per acre, when the other insisted on it, as he did not wish to be involved in litigation. However, he has paid it after action commenced for its recovery; and it is said that the parties having not only by the payment of the rent, but also by the records of the court, admitted that the acreable rent is 14s., and that the lands of Black Hall are worth so much, the agreement now under consideration is to go for nothing. It must strike every one that this would not be very just; and it appears to me that such a proposition would be equally unfounded in point of law. One party makes a claim; the other accedes to that claim; and it is said that it is then too late to deny that there is an agreement between the parties that the rent of Brown Hall is to be 14s. an acre *per annum*. The learned judge who tried the case left it to the jury to say what was the amount of damages, founded upon the difference between 12s. and 14s. per annum. He left that question to the jury upon the assumption, which I think he was perfectly justified in making, that the plaintiff was bound to pay the rent of 14s. an acre per annum for Brown Hall, having already paid it for some time; and therefore that the sum of 2s. per acre would be the proper measure of damages. The defendant objects that the true measure of damages is not the difference in value between the sums of 12s. and 14s., but they did not call upon the judge to set the jury right upon this point; if they had done so he might have considered the matter; and he might have altered his direction to the jury; but as they have not done so their objection fails in point of form. Thus in my opinion it would appear that this objection does not meet the state of things; nevertheless if we were satisfied that justice could not otherwise be done, we would attend to the objection, such as it is, and send the case to be tried again; but we are not of opinion that such a course would be consistent with justice. As regards the money that has been actually paid by the tenant, it has been ascertained that an actual loss, amounting to about £40, had been actually sustained by this party during the one or two years of the tenancy that has expired. The remaining part of the question is, whether the same rule is to be applied as regards the remaining portion of the term. This division of the damages has not been fully argued upon either side, but it occurred to my mind, and I do not wish that it should pass without observation. The amount of damage sustained for the portion of the term that has expired being about £40, and that for the portion that is yet to come being about £60, and the sum of about £60 having perhaps been given by the jury in advance, we must consider that the former sum was so much damages for money actually paid by the tenant, and therefore so far the verdict must stand, and if so the costs of the trial must follow the result of that verdict. But it occurs to me that this distinction between these two sums need not be taken into account in the present case, the parties having

agreed that for the remainder of the term a certain yearly sum is to be paid as rent for Brown Hall; and the only difficulty on this head, upon this portion of the case, may be removed by our saying that the plaintiff is to undertake and submit to pay a certain sum as such for the future. Such an arrangement meets, I think, the justice of the present case, besides saving much expense to the parties. It has been alleged that there has been surprise in the present case, that the defendant was not prepared with evidence of the value of the land. But he has brought witnesses to establish the value of Brown Hall; and because one of his witnesses swears that it was worth only 12s. a year per acre, he says that he has been taken by surprise, and that he would be able to establish the contrary upon a future occasion. This objection, therefore, cannot be regarded as being sustained, and the consequence is that the cause shewn must be allowed; and we feel bound to direct that the plaintiff's attorney is not to be allowed as against his client the costs of attendance upon the present motion.

RICHARDS, B.—I fully concur in the judgment of my brother Pennefather, and do not think that the rule pronounced by the court upon the present occasion trenches at all upon the principle contended for at the Bar. The proposition contended for is, that in cases of the sale or letting of land, damages are not to be given to the party who sustains the loss of such a bargain, when it arises from the inability of the party contracting to sell or let, so to do. To this proposition I fully assent; but there are exceptions to it in cases where the bargain fails to be completed through fraud or gross negligence on the part of the party undertaking to complete the sale or demise. If the contract had been merely unfulfilled, and there appeared to have been no fraud or negligence, I fully agree that no damages could be recovered; but this is not so in the present case, for the contract between those parties has not been wholly unfulfilled, but this contract has been partially executed, and the plaintiff seeks to hold the defendant liable for certain expenses he has been put to. This makes a clear and important distinction between the present case and those that came within the general rule I have alluded to.

GREENE, B.—This is not a verdict for damages sustained through the loss suffered by the plaintiff by losing a good bargain, but it is a verdict granting a certain amount of compensation to him for damages sustained by him by reason of the part performance of a contract; but it does not come within the principle of the case cited from W. Blackstone. Now that being so, the damages have been estimated upon grounds quite distinct from those that existed in the authority alluded to.

Cause allowed.

COURT OF ADMIRALTY.—1854.

[Reported by W. G. CHAMNEY, Esq., Barrister-at-Law.]

"THE VICTORIA."

Collision—Negligence—Harbour Regulations—Costs.

To recover full compensation for injuries sustained by a collision, the party complaining must be prepared, in the first place, to prove that the accident was not occasioned by any fault of his, and that the entire conduct of those concerned, or having an interest in the injured vessel was blameless, and clear of wilful neglect and gross negligence. A vessel anchoring upon the known track pursued by river steamers, or within a few yards of the channel, and without exhibiting a light, will be deemed open to the charge of wilful neglect and gross negligence.

At any time, (whether required by the harbour regulations or not,) in a close river, where there are a number of vessels passing and repassing, it is only an act of proper seaman-like precaution to exhibit a light; and in a suit for collision a crew neglecting to take such a precaution will not be held altogether blameless.

THIS was a petition filed on the 25th of October, 1854, by Michael Hodder Joseph Roberts, owner of the late smack "Adelaide" of Cork, 30 tons burthen, (John Mahony master,) and Peter Moore Fisher, corn merchant, of Miltown Mills in the Co. of Waterford, the owner of the cargo on board said smack, which consisted of 349 barrels of wheat, and was valued at about £700, to recover compensation from the registered owners of the "Victoria" steamer, 81 tons burthen, and 50 horse power, (Michael Finn, master,) for the loss of the smack and cargo, which took place on the evening of the 6th of October, 1853, about 7 o'clock, P. M. near Monkstown, on the River Lee, between Passage and Queenstown. The smack, which was about three years old, was alleged to be worth £250.

The petition stated that on the 5th of October, 1853, the promovent (Fisher) shipped the cargo of corn in question on board the intervenient's (Roberts') smack, which was bound for Cork, at the port of Youghal, and that at an early hour on the following morning the smack, which was well found in every respect, and had on board a competent master and crew, proceeded on her voyage, and reached the harbour of Cork at half past five, P. M. upon the same day, and safely anchored there off Monkstown, on the Western shore, in a situation where small yachts and vessels are usually moored, and out of the way of the line of navigation up and down the river, with her head towards Monkstown, and her mainsail unfurled. That soon after the smack was so anchored, the impugnant steamer, which was in the employment of, and ran in connection with, the Cork and Passage Railway, passed her on her way from Passage to Queenstown, calling at Monkstown for passengers, and in some time afterwards, about 7 P. M. was perceived returning from Queenstown on her last voyage up to meet the train, when the accident which gave rise to the suit, arose. The petition alleged that the evening was fine, and that the "Victoria" was observed to be approaching Monkstown Pier, at full speed, or nearly so, and out of her usual and proper course, keeping more in shore than she had done on her down voyage, and that when the crew of the smack so observed her, fearing that they would be run down, they shouted and hailed to make her keep out of

their way, but that notwithstanding the crew of the steamer, which did not appear to have any "look-out," made no reply, and continued the course they were taking at great speed, until within a short distance of the smack, when she suddenly altered her course, but without effect, as she struck the smack under full way, on the larboard bow, driving her own larboard paddle-box on the deck of the smack, thereby tearing away the smack's standing rigging, bulwarks, and stauchcons, and throwing her on her beam ends, with her larboard side partly under water. The two vessels, it was alleged, remained in this position for some minutes, when the steamer, moving off from the smack, she began to fill, and sunk immediately after in about six and a half fathoms of water. Upon the morning of the following day a survey was held upon the smack and cargo, to determine as to the best course to pursue to preserve them, the result of which was, that the harbour-master of Cork, with the assistance of some barges, and a large body of men, commenced the necessary operations forthwith to raise her, but, in consequence of the severity of the gales which prevailed at the time, they were then unable to do so. She was, however, as soon as the weather moderated, raised under the superintendence of a skilful engineer, when a further survey was held, and her cargo ordered to be discharged. The smack was accordingly got on shore, and when the cargo was taken out and examined, it was considered expedient to sell both by auction, and the result of the sale was, that the vessel and cargo were so much deteriorated in value that they only realized a sum of £154 10s.—an amount not even sufficient to pay the expenses incurred in raising the smack, which amounted to a sum of £189. The promovent's and intervenient's pleading further alleged that the owners of the "Victoria" received due and sufficient notice of the attempts made to raise the smack, and the surveys made upon her, but that they refused and neglected to interfere therein; and then went on to state that the collision and loss of the smack and her cargo took place and were owing to the want of care and caution, and through the mismanagement and negligence of the master and crew of the steamer, which was out of her proper course, was going at too great speed, and had no look out; and that if there had been a proper look-out on board the "Victoria," the smack could have been easily seen, although she had no light up, inasmuch as it was not usual for small vessels or yachts lying in such a position to exhibit lights. The petition concluded with the ordinary prayer in such cases, and by a statement to the effect that the master and crew of the smack used all their exertions to avoid the collision, and that no blame whatever could be properly attributed to them.

The impugnants exhibited a matter contrary and defensive on the 18th of November, in which, after stating that the "Victoria" was commanded by an experienced and skilful master, and had on board a competent and sufficient crew, consisting of five men, exclusive of her engineer and firemen, proceeded to set out the facts relied on to entitle them to a decree in their favour. It stated that the steamer in question has been for some years past, one of

those vessels constantly employed in the harbour of Cork conveying passengers to and from "The Cork and Passage Railway" to Monkstown and Queens-town, according to the hours specified in the time tables of said railway, and was well known to call at the quay at Monkstown, both on her up and down voyages, to land and take in passengers. That on the evening of the 6th of October, 1853, when the accident occurred, they left Passage as usual at half-past six o'clock or thereabouts for Queenstown, calling at Monkstown; and that the promovent's smack had not arrived at her moorings at Monkstown at that time, as incorrectly alleged in the petition. That the ateamer proceeded on her voyage to Queenstown, and at seven P. M. again left her berth to return to Passage, during which interval the "Adelaide" arrived at Monkstown, having come into the harbour by an unusual route round the spit-light on the west side of the harbour islands, so that she was not, and could not have been seen by the crew of the steamer, who did not in fact see her until immediately before the collision. That the smack on her arrival anchored very close to the quay at Monkstown, in the channel of the river and in the stream of the tide, so as to be exactly in the way of the steamer on her return voyage, and therefore an improper place to have moored in—the proper place for yachts and such small craft being at a considerable distance to the westward, where safe anchorage can always be obtained without interfering with the navigation of the river. That when the steamer left Queenstown it was dark and raining, and that consequently she got up her lights and proceeded with great caution at a little more than half speed, having her captain at his proper post on the paddle boxes, and two of her crew forward on the look out. That the smack had no light up; that it was therefore impossible to distinguish her beyond the distance of a few yards, and that the crew of the steamer not having any reason to suppose she was in the way, or that any vessel would have anchored in her well-known track, proceeded on her course as usual until very shortly before the collision. That it was untrue that any noise was made by any person on board the smack, such as hailing or shouting, when the steamer was approaching, to apprize the steamer of the position of the smack—that if any such hailing took place it must have been heard not only by the captain of the "Victoria" and the look-out men, but by the persons on the pier who were waiting for her arrival—and that, in fact, the captain and crew of the smack were not on deck, as alleged in the petition, and had no person on the watch. That by a certain Act of Parliament (1 G. 4, c. 52,) the Harbour Commissioners of Cork were empowered to make bye-laws, for ordering and securely placing vessels in the harbour, &c., and in pursuance thereof, amongst other bye-laws, regularly made the following, which were printed and published, and extensively circulated by the harbour master and his deputies, and other officers connected with their board, viz :

"That neither the master, commander, or other person having charge of any ship, vessel, lighter, or boat, or any person whatsoever, shall place any ship, vessel, lighter, or boat, in any part of the river

of Cork, so as to endanger any other vessel, or to obstruct the free navigation of said river."

"That the master, commander, or other person having charge of any vessel lying at anchor in any part of the river within the Harbour of Cork, shall at sunset every evening, place a light in some conspicuous situation at the bow of such vessel, and shall cause same to remain exhibited until sunrise the following morning."

The defensive matter went on to state, that the "Adelaide" anchored in such a manner "as to endanger" the said steamer, and "obstruct the free navigation of the river"—and had neglected "to exhibit a light at sunset" and to keep said light exhibited, as required by said bye-laws; that the collision complained of took place after sunset on the 6th, and before sunrise on the 7th of October, 1853, during which time a light should have been exhibited: and that, therefore, it altogether arose from the default and neglect of the master and crew of the smack in not attending to the harbour regulations, and from their unskilful and unseamanlike conduct in anchoring in an improper place, and was in no-wise attributable to the captain or crew of the steamer. That when the smack was first seen by one of the look-out men of the steamer, about half a minute before the collision, he immediately sung out to the captain, who at once directed her helm to be put "hard to port," and her engines to be "stopped and reversed," which orders were skilful and seamanlike, and were instantly obeyed, but that nevertheless it was impossible to avoid the accident, which injured the paddle wheels and machinery of the "Victoria" to the extent of at least £50. That immediately after the collision, the master and crew of the steamer did all in their power to relieve the smack from her position, and called on the crew of the smack, who then appeared on deck for the first time, to assist them, but they refused to do so, and went away to shore in their boat, whereas, if they had remained to render assistance, the effect of the collision might have been diminished, and the injury to the smack and her cargo not have been so considerable. That shortly after the accident occurred the master of the smack admitted to a police-serjeant stationed at the pier, that he had no light up, and that when it took place, he and all his crew were down in the cabin at their supper; and in conclusion prayed, that under all the circumstances, the collision should be considered as owing to the default of the promovents, and as "an inevitable accident" on the part of the impugnants, and that therefore the promovents should be dismissed with costs.

Doctors Gibbon and Hayes, Q. C., for the promovents, cited *Morrison v. The General Steam Navigation Company*, (8th Ex. Rep. 733, and 17th Jurist, 507); *The Mellona*, (5th Notes of Cases, 450); *The Londonderry*, (4th Notes of Cases, Sup. 31); *The Virgil*, (2nd W. Rob. 205); *The Europa*, (14 Jur. 627); *Davis v. Mann*, (10 Mee. and Mes. 546); and *The Gerolomo*, (3rd Hag. .)

Sir Thomas Staples, Bart. Q. C., and *Q. A.*, and *Doctors Townsend and Chatterton*, for the impugnants.—The promovents solely were to blame, and caused the collision; and as far as the impugnants were concerned, it was a case of unavoidable accident.

Nov. 27.—*DOCTOR STOCK* this day gave judgment.—In this case I do not think it necessary or right that I should postpone my decision in order to get the notes of the evidence for examination, with the view of presenting an analysis of it, for I have heard counsel on both sides commenting upon the evidence at length, and they have all shown great ability in doing so. The court has been put in possession of a minute and accurate analysis of the whole of the evidence in the case, and it would be superfluous in the court now to take up the time of those in attendance by a repetition of topics which have already undergone a most skilful examination in the ablest hands; nor does the case present any heavy difficulties in point of law to warrant a postponement of my judgment. The authorities are nearly concurrent in their views of the legal merits of a case of this kind. Where a complaint of this sort is brought forward in the Court of Admiralty the party complaining must be prepared, in the first place, to prove that the accident was not occasioned by any fault of his, and that the entire conduct of those concerned, or having an interest in the injured vessel, was blameless; in fact, they must be prepared to show that their conduct throughout was clear of wilful neglect or gross negligence. If they can get so far, and show a severe injury or loss resulting from the act of their opponent, they themselves being clear of fault, then the *onus* is entirely thrown upon the other side, and the defendants must show that they are clear of all culpability, and free from a want of ordinary skill and caution, and if a want of skill and caution can be shown as attaching to the defendants, in that case they must unquestionably bear the whole damage, and fully compensate the promovents for the loss sustained; and, therefore, *Sir Thomas Staples*, as leading counsel for the defendants in this case, admitted, that he was bound to make out a case to show that the steam vessel was free from all imputation. Now, the issues being these—whether there was blame attachable to the complainants? and whether the steam boat was shown to be exempt from every species of imputation? these being the two issues I have to address myself to in arriving at a decision upon this case, I proceed to do so with the greatest possible confidence of the view on which I act, as one that cannot be quarrelled with, upon due consideration of the precedents and principles in cases of this kind. I regret extremely that my judgment must be adverse to the promovents, for I think it highly lamentable that losses should be thrown upon innocent individuals to such an extent, but my duty compels me to pronounce a sentence that bears severely upon the promovents, for those interested for the steamer are free from blame, and, therefore, free from the consequences of the disaster; and I am, in fact, nothing more than the mouth-piece of necessity when I am obliged to give utterance to a decision bearing hard on individuals, and distressing to my own feelings; still I have a duty to perform, and that duty I will perform with resolution and steadiness. My opinion most distinctly is, that in every part of the case the promovents here are without any remedy. I think that the conduct of

the captain of the "Adelaide" in anchoring his ship one hundred yards from the jetty at Monkstown, at full tide, the steamer having been either seen by him at the time of the accident, or a little before it, going down the river with a certain purpose of returning in half, or three-quarters of an hour, was blameable. I think that the conduct of the captain of the "Adelaide" in anchoring his ship there, directly upon the known track pursued by steamers going up and down the river, and within a few yards of the channel—or of the bank side—was faulty and unseamanlike, and that with his means of information, being many long years conversant with the port, and years and years going up and down, that with such opportunities of obtaining information, his act of anchoring the ship where he did was faulty, and cannot be supported upon any grounds; and that he is entirely open to the charge of wilful negligence, and in a high degree, for he not only voluntarily selected this position, but did so without the slightest necessity. There was smooth water within one hundred yards of him, and there were small craft there marking out the spot where this security was to be had, and I find nothing in the case to show that it was difficult to get to a place of safety, and to anchor where she would have been free from all peril. He chose to pretermitt the opportunity of removing the smack to a place where the other vessels were. The spot where there was safe anchorage was marked by the other vessels, and he cannot pretend to a want of information; and in the face of these circumstances, and apprized of the movements of the steamer, which was then on her downward passage with a certain purpose of returning, he put himself in this spot of doubtful security, and nearly on the line, if not altogether on the line of the steamer; and accordingly, the steamer returned in the lapse of a few minutes after discharging her passengers in Queenstown. Efforts were made here to show miscarriage in the captain of the steamer upon her return passage. There have been charges that his seamen did not perform their duty in taking up their posts forward for the purpose of maintaining a proper watch; and it is said that there was negligence generally in the conduct of the steamer, and that she went at an undue rate of speed, crossed the river before she need have done, and threw herself more on the western bank of the river than was requisite. I have addressed my attention to these various topics with the utmost pains, and I think, having allowed for all the weight of the evidence on the other side, that I cannot come to the conclusion that any of these matters are properly to be considered against her. She must cross the river somewhere; she must in fact violate the Act of Parliament to pass over to Monkstown. So that charge falls to the ground, unless it is shown that at an improper period she undertook to run across the channel, and thereby to produce a state of danger that would not otherwise arise. I find nothing to warrant this charge. It was necessary that she should go across, and that she should take a small sweep to come up to the pier, and I do not think that it was in any way shown that she exceeded the usual extent of line, or that she departed from her invariable practice on other nights. I must say that

this is a frivolous objection, and I think farther that every attempt made to fasten a charge on the captain and crew of the steamer, on the grounds of maintaining their watch improperly, and of unseamanlike manoeuvring, has broken down. There was an attempt to make out this charge of having no watch, by producing a printer, who was a chance passenger; but I do not believe that that man possessed an accurate knowledge of the circumstances—to treat his evidence in a lenient manner—to enable the court to place reliance on his testimony. I do not believe a word of what he said, not thereby meaning to fasten a charge of corrupt perjury upon him, but merely not believing that at this distance of time he cares so much about the transaction as to be anxious that his testimony should be right or wrong. I do not think that I can go the length of saying that he is guilty of corrupt perjury, but I think his evidence of a very light description, and therefore I think that this attempt to impute to the captain of the steamer mismanagement or misfeasance in not having a proper watch, and in crossing the river at an improper place, and getting on the western bank too soon, have failed in the hands of the very able counsel charged with the conduct of the case. I shall not go into all the topics touched on—as to how long the smack was at anchor, &c.—I do not think it necessary to the investigation of the case, or material. Whether she was there an hour or a quarter of an hour is not material; but this I know beyond all doubt, upon the invariable principles of human nature, that a greater absurdity could not be stated in the face of any body of men than to affirm, that a steam ship occupied for the purposes of trade, and exercising that trade in a lawful way—approved of by the public, and having no charge of gross incapacity advanced against her—that such a steamer as that should run against another vessel wilfully and of malice prepense, is such a monstrous absurdity that no man can give credit to it. I have not the smallest doubt whatever, but that the steamer did not see the smack until it was too late to apply a remedy to extricate her. Then the only question is, whether that failure in discerning the "Adelaide" by her white sail in the course of her passage from Queenstown was the effect of inevitable accident, or owing to the default of the steamer? I think that the watch was perfect. I do not think there was any fault in that, and I do not think the speed was too high. With respect to what was said as to her having an opportunity when going down the river of knowing the spot, the "Adelaide" was lying so as to avoid her on the return voyage, the evidence is conflicting. It is very conflicting; but even if it were shown that the "Adelaide" was at anchor before the steamer went down the river, the conclusion resulting from that would not be decisive of the question, for it would be consistent with that position that the steamer on going down may not have seen the "Adelaide." That is possible, and therefore when I find the persons on board the steamer unanimously affirming on oath, that they did not see her coming down—I do not know in what way I should be enabled to refuse them credit to a statement of a fact within their exclusive knowledge—and there-

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fore, I am obliged to arrive on this part of the case at the conclusion, that in truth and fact she did not see the smack in going down that night. If the steamer saw her it would make a very great difference, for she would have had better means of guarding against the accident; but, it is doubtful at what time the "Adelaide" took up her position, and in the second place, I cannot overlook the circumstances that the steamers people deposed to on oath, namely, that they did not see her going down. In the judgment of the court there was no culpability attached to the steamer, and I think she had not any opportunity of avoiding the "Adelaide," the complainant in this case; and consequently, I consider that the accident has been the result of what is denominated in law inevitable accident. The steamer stands therefore acquitted of blame; but let us see whether, on the other hand, the conduct of the captain of the "Adelaide" in going close by the jetty and the channel, in the track of the steamer, and in not putting up a light, was blameable. I think the conduct of the captain of the "Adelaide" constitutes a case of nautical malfeasance. As to the light, my observations will be very short. At any time in a close river like that of the river of Cork, where there are a number of vessels going up and down, and where the currents are strong, it would be manifestly an act of good caution, and conformable to the practice of the most experienced and best taught seamen to have lights up, and it should be in no instance conceived that a crew neglecting this precaution is altogether free from blame; but, in the present case it has been proved, that the harbour regulations of Cork, which are founded on an Act of Parliament, carried out by powers entrusted to Commissioners there, who have made bye-laws on the subject, require that vessels at anchor should show a light. In the course of the investigation I did feel under the impression that there had been some pretermission of care and diligence, that publicity had been given to these regulations, but I was mistaken; I did think that in so large a harbour as that of Cork that it would be difficult for a length of time to maintain the constant exertion necessary to put individuals in possession of the bye-laws, but I find that the evidence does not bear out that—for, so far as I can collect, there have been means used to circulate to every ship, when it could be done, these regulations—to circulate them among strangers, and persons frequenting the harbour of Cove; but, however, this might effect a case of notice to foreigners, I do not see how I could arrive at the belief that any man like Mahony, or any one of his men, could have been ignorant of the regulations or bye-laws, the pilots being constantly in conversation with them. They must have known that it was their duty to put up a light, and I have not the slightest hesitation in saying that the conduct of the captain of the "Adelaide" was highly indiscreet to have anchored in a wrong position, and omitted the rational precaution to put up a light. The alleged hailing is, in my mind, involved in a haze; I cannot say whether this hailing was commenced before or after, or just at the moment of the collision, but my own impression is, that it was the result of an observation on the part of the crew of the "Adelaide" after it was

too late to prevent the accident, that they began to shout under the influence of amazement and terror, and that it could not be considered as an act of precaution. Upon the whole, I am of opinion that the defence is made out in all points, and that the promonent has failed in proving any rational cause of action. I am, therefore, obliged to dismiss the promonent, and I am sorry to add, to dismiss him with costs.

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at Law.]

SIR E. M'DONNELL v. THE MIDLAND GREAT WESTERN RAILWAY COMPANY.—Nov. 11 and 16.

Cause Petition—Costs—Taxation—Briefs—When a respondent may make them out.

On hearing of cause petition only two briefs for counsel are allowed, following the analogy of motions.

Where a petition prays an injunction, and there has been a motion for an injunction, the solicitor, in preparing the bill of costs, should include as part of the costs of the injunction motion the brief of the petition and of all affidavits that have been filed up to the time of hearing the injunction motion, and of all documents properly used thereon, as he is entitled to them as part of the costs of this motion, irrespective of the result of the subsequent costs of the cause.

The Taxing Masters having certified their opinion that the respondent in a cause petition is not entitled to make out his briefs for hearing until the petition has been set down for hearing, and that if the petition is dismissed for want of prosecution under the 27th General Order of 1851, the respondent is not entitled to the costs of any briefs for hearing, on the analogy of a cause heard on a bill and answer; the Master of the Rolls declined to adopt this view, or to decide the question, considering that in the present practice in cause petitions there is nothing analogous to the passing of publication under the old system, and that there are objections to fixing the period for respondent to make out his briefs either at the time when the answering affidavits come in, or when the petition is set down for hearing, and no general order on the subject.

THE cause petition in this matter had been filed in Feb., 1853, against the Grand Canal Company, and Midland Great Western Company (see ante vol. 5, 185,) praying that a certain agreement entered into between the said two companies, and a certain lease from the railway company to the canal company might be declared illegal and void, and that the railway company should be restrained from carrying the same into effect. On the 26th of February, an order for an injunction was obtained for this purpose from the Master of the Rolls, against the Midland Railway Company, and the Canal Company. On the 19th of March, an order was made by the Lord Chancellor, affirming the order for the injunction against the canal company, but reversing it as against the railway company, and directed the petitioner to pay respondent the costs of the motion.

By this order, both the respondents had until the 1st day of Easter Term following, 15th April, 1853, to file answering affidavits. These affidavits were filed on the 14th, and the petitioners filed affidavits in reply on the 29th, and 30th. No further step was taken until the 5th November, when petitioner's solicitor wrote to the solicitors of both respondents, stating that they did not wish to incur costs by setting down the cause, provided an arrangement were made to continue the injunction and for the payment of costs, but the respondent's solicitor declined entering into this arrangement. As to the petition against the canal company, there were subsequent proceedings (see ante. vol. 6, p. 129.) As to the petition against the Midland Railway Company, there not having been any step taken for two Terms, a rule was entered to dismiss the petition, with costs. The costs were lodged for taxation, and they included an item, as follows: "Item, No. 41.—Three briefs of petition, affidavits, answers, and other documents in this matter—in all 369 sheets, post, at 2s. per sheet, £36 18s. (deducting £1 allowed on former taxation.) Term fees, £1 17s. Two points were contended for on taxation: 1st, that respondents were not entitled to any briefs, as the cause had not been set down for hearing; 2ndly, that only two briefs at most should be allowed. Master O'Dwyer, after consultation with the other Taxing Masters, wholly disallowed the items. The question had been brought before the Master of the Rolls on the 1st of June last, when he referred it to the Taxing Masters for their certificate, and they made the following:

Certificate of Taxing Masters, Nov. 6, 1854.

"In obedience to the order of the Master of the Rolls, bearing date the 1st day of June, 1854, whereby it was referred to the three taxing masters, to certify to the court in relation to item No. 41 in respondent's bill of costs, viz:—"Three briefs of petition, affidavits, answer, and other documents in this matter, in all 369 sheets of post, at 2s. per sheet—£36 18s., deducting £1, on former taxation." We have examined the bill of costs and find, that the petition in this matter was filed to restrain the respondent's from acting upon a certain agreement, entered into between said Company, and the Grand Canal Company, for the sale and the purchase of the Grand Canal, and a certain other agreement entered into by said two Companies for a lease to the said Railway Company of the said Canal, and for other purposes in said petition mentioned. On the 26th of February, 1854, the Master of the Rolls pronounced an order restraining the said respondent's accordingly, by an order of the 19th March, 1854, upon an application by way of appeal to the Lord Chancellor. His lordship was pleased to reverse the said order, and directed the petitioners to repay the respondents the costs of that motion, and further ordered that the respondents should have until the 1st day of the then Term, to file answering affidavits, which affidavits were accordingly filed, and the petitioners not having proceeded with their petition for two Terms, by an order bearing date the 14th January, 1854, it was ordered, "that the petitioners do pay

to the said respondents, the Great Western Railway Company their costs, incurred in this matter, pursuant to the 27th General Order of the court, bearing date the 31st day of July, 1851, whereby the petition in this matter stands dismissed, including the costs of this order." The respondent's costs in this matter, pursuant to said last mentioned order, came before Master O'Dwyer for taxation, and he disallowed the item number 41 as mentioned in said order of reference of the 1st June, 1854. These briefs were disallowed on two different grounds:—First the brief was disallowed on the ground, that on the hearing of the cause petition, the practice on taxation is to allow only two briefs as upon a motion. We act in analogy to motions heard in which only two briefs are allowed, and we are of opinion that the principle of taxation in that respect acted on by Master O'Dwyer, so far as the disallowance of a third brief was perfectly correct. The other two briefs were disallowed on a different principle, viz:—"That inasmuch as the cause petition never was set down for hearing, the respondent's were not entitled to make out briefs for the hearing." In a plenary suit, on bill filed, the defendant as a general rule, is not entitled to briefs (as directed by Note 3) on item 108; in schedule of fees of 3rd January, 1845,* until publication has passed, and as no examination takes place in a cause petition, and no publication passed, it is analogous to the case of a cause heard on bill and answer, and in such case the defendant is not allowed his brief, unless his cause is actually set down for hearing, and therefore in this case we are of opinion, the decision of Master O'Dwyer was right, and that therefore the entire charge made at item No. 41 was correctly disallowed. But the case as to briefs differs where an injunction is prayed, as in this case, for the defendant in a plenary suit is entitled to prepare his briefs upon filing his answer, and in the present case an injunction having been prayed by the petition, and the costs being the costs in the matter, we are of opinion that two briefs should have been allowed at item No. 71, in the costs of the injunction motion of the cause petition, and such answering affidavits as were then filed, and other documents properly used in said motion. Therefore, we respectfully submit that the respondent's bill of costs should be sent back to Master O'Dwyer, to

* "When an injunction or receiver is prayed, two briefs only to be allowed to plaintiff, and a like number to each material defendant who has separately answered, so soon as his answer shall have come in. This number to be allowed between party and party and solicitor and client, without prejudice to the question whether such defendants should have answered jointly. Should the motion for a receiver or for an injunction come on, a greater number to be allowed between solicitor and client, if directed by or on behalf of the client, or if on taxation the Master shall think it was prudent and advisable to have additional counsel, all stamps to be charged separately. Paper not to be allowed or charged in any case."

"In costs between party and party, three briefs only to be allowed on the hearing of a cause; but the taxation between solicitor and client to be subject to the master's discretion under the restriction above mentioned. The three briefs to be allowed on publication having passed, but not before."

review his taxation as to said charge No. 7 for two briefs actually used on the injunction motion.

"J. O'DWYER,
"EDWARD TANDY,
"THOMAS REILLY."

J. Clarke now moved pursuant to notice, for a review of the taxation of the costs under the order dismissing the petition, and claimed that the respondents should be allowed the item No. 41, for briefs subject to such reduction as to the number and quantity of the briefs, as to the Taxing Masters should appear reasonable. We only ask a review of the taxation as to this one item (No. 41), and require the principle to be decided as to whether respondent's solicitor is entitled to make out his briefs for the hearing as soon as the affidavits in reply are put in. If the matter was merely sent back generally for a review of the taxation, the Taxing Masters would suppose that the principle adopted by them was admitted. We submit that the putting in of the affidavits is analogous to the passing of publication under the old system. If the respondent could not make out his brief until the cause was set down, he would not have notice in time, and could not have his brief made out. As to the latter branch of the certificate, the Taxing Masters are in error. In the note to Rule 108, it is laid down that when an injunction or receiver is prayed, only two briefs are allowed; this is applicable to all cases when an injunction is prayed, and both to plaintiff and defendant, and then the Taxing Masters allow on the taxation only, such affidavits as were in when the injunction motion was made. As soon as the answering affidavits are put in, we are entitled to have copies of them made out, and therefore, we were entitled to the costs of two briefs of these affidavits as soon as they were put in. Item No. 7 in the bill of costs, is for briefs on the injunction motion, and as we were allowed briefs of the petition on that, £1 was deducted from the other briefs in item 41. The plaintiff should always make out briefs of the affidavits when they were put in; we should therefore, in like manner, be allowed briefs of the answering affidavits. The petitioner is in a much better position, for he is entitled to make out his briefs as soon as the twenty-one days expire after the service of the notice of the petitioner, and he may set down the cause then at his convenience. [*Master of the Rolls*.—Under the old practice each party might make out when publication passed.] Still plaintiff and defendant were not always in the same position, for on an injunction motion plaintiff was held not to be entitled to briefs which he had made out before the notice of motion was given. *Broadbent v. Hughes*, (10 Ir. Eq. Rep. 223, R.) When the answering affidavits are in, the cause is at issue; and therefore, under all these circumstances, the respondent should be allowed the briefs, that the cause had not been set down.

May.—The item disputed, No. 41, was first disallowed by Master O'Dwyer, and then the certificates of the three Taxing Masters reported against it. It was for the briefs made up for the hearing of the cause, and consisted of all the documents ne-

cessary for the hearing. Can it be contended that the respondents were entitled to make out their briefs in April, a month before liberty was granted for filing further affidavits? It is impossible before the cause is set down, to know what the briefs should contain, for liberty will always be given to file further affidavits up to the last moment. No inconvenience would arise from the briefs not being made out till the cause was set down, for the cause can never be heard till four or five days after being set down, which would afford abundance of time to make up the briefs. Again, it would be strange to allow briefs to be made out for the hearing before the cause is set down, when in reality it might never be set down, or brought to a hearing. There is a close analogy between setting down a cause for hearing, and giving notice of trial at common law, and these briefs are not allowed on taxation till notice of trial has been served.

MASTER OF THE ROLLS.—A very important question is raised on this motion, but the motion should have brought forward the several matters in a more specific and convenient manner. It will be necessary to ascertain how much of the briefs included in item No. 41, might have been included in item No. 7, and how much of the affidavits were on the file at the time of the injunction motion, so as to leave the question as to the brief of the documents not used on the injunction motion distinct. The matter must be considered specifically as to each of the items. No. 41 is a gross item, for brief of all the documents, and No. 7 is for the injunction motion only. The solicitor must put a fly-leaf into his bill of costs, and introduce as part of item No. 7 what the Taxing Masters will allow out of the documents briefed in item No. 41, and he must include in item No. 41, only those documents which will not be allowed in No. 7. Then as to these latter, a very serious and important question will arise on account of the practice in this court, of permitting affidavits to be filed until the last moment before the cause is heard. The very great inconvenience arising from this practice, can only be obviated by adopting the same practice here as in England, viz., to limit a certain time within which all affidavits must be filed. But here applications are continually made for liberty to file further affidavits, and according to the way in which the practice has been settled, I am obliged to allow them—first affidavits in answer; then affidavits in reply; then affidavits by way of rejoinder; then by way of rebutter; and in some cases I have even been obliged to allow affidavits by way of sur-rebutter to be filed. The plain and intelligible course would be to fix a certain day before which all affidavits should be in, and not to permit any to be afterwards filed, unless on very special grounds. If the question which is now before me arose in England, there would be no difficulty whatever, because a different practice as to evidence has been established there. But here I feel the greatest difficulty in deciding this question, or saying when the respondent should be entitled to make out his briefs. I cannot say that the Taxing Masters are wrong in their decision. I am not prepared to say the respondent is entitled to charge

for these briefs. If the respondents were not allowed to make out their briefs till the cause was set down for hearing, and it should so happen that there was no arrear of business in Chancery, and that a cause set down for hearing just before Term would be on for hearing the second or third day of Term, then the respondents not having their briefs made out, would not be ready to have the cause heard, and the court would have to adjourn for the first week of Term, for want of parties being ready. Again, if the respondent was allowed to make out briefs as soon as he files his answering affidavits, it might be a great hardship on the petitioner, who after seeing the respondent's affidavits in answer, might be willing to have his petition dismissed with costs, so that whatever way I decide it, there would be an objection on principle. I therefore feel the greatest difficulty as to the form of the order I should make. I do not think the position contended for on either side is right, though the line must be drawn somewhere.

Nov. 16.—His Honor now obtained the further certificate as follows :—

Further certificate of Taxing Masters, made 14th November, 1854.

"In pursuance of an intimation from the court, we have examined the briefs alluded to in the above certificate and charged for at No. 7 in the costs, and we are of opinion that the sum of £1 4s., disallowed at that item, was properly disallowed with reference to the briefs laid before Master O'Dwyer at the time; but inasmuch as he was then taxing 'the costs in the matter,' the solicitor should have then charged for two briefs of the cause petition, which by a misconception he did not do, but charged for them in the briefs at No. 41, the entire charge of which was, in our opinion (for the reasons stated in said certificate), properly disallowed, the solicitor should now have these two briefs of the petition in addition to the sum allowed on taxation at No. 7; and inasmuch as we find that the said petition contains twenty sheets of brief, which for two counsel being forty sheets, amounts to the sum of £4, we are of opinion that sum, viz. £4, should be allowed at the end of the costs, and Master O'Dwyer's certificate increased to that amount, which we humbly certify the 14th November, 1854.

"J. O'DWYER,

"EDWARD TANDY,

"THOMAS REILLY."

His Honor then said, as under the old system a party was not entitled to make out briefs until publication passed, and as I cannot see anything in the present system analogous to the passing of publication, I cannot decide the question raised. I cannot agree with the Taxing Masters that the respondent was not entitled to make out the briefs until the cause was set down, for then if the cause should happen to be heard the second day of Term, it would be impossible for the respondent to be ready, and so if there was no arrear of business, there might not be a single cause ready for hearing, and no business could be done for the first week of Term. I have, therefore, not decided the point, but will allow the parties to bring the matter

before the Lord Chancellor, by whom it must be settled by some arbitrary rule, for there is no analogy in the old system by which to be guided. The point when a petitioner may make out his briefs is not before me, but the principle applicable to a petitioner does not apply to a respondent, for the petitioner knows when he will set down the cause, and therefore may make out his briefs in proper time.

Nov. 16.—The following order was made:

"Whereupon and on reading the certificate of John O'Dwyer, Esq., Edward Tandy, Esq., and Thomas Reilly, Esq., the Taxing Masters of the Court of Chancery, bearing date the 6th November, 1854, and their further certificate bearing date the 14th of November, 1854, it is ordered and declared by the Right Hon. the Master of the Rolls, that the certificate of Master O'Dwyer be increased by the sum of £4, in pursuance of the opinion of the three Taxing Masters, as stated in the second certificate of the 14th November, 1854; and with respect to the residue of the costs of item 41 in the notice, and in the said certificate of the 6th November mentioned, the respondents admitting that they were not entitled to charge for more than two briefs, the court doth make no rule on the motion, being unable to form any opinion on the remaining question raised by the respondent, viz., as to the period at which a respondent is to be at liberty to make out his briefs, there being no proceeding in a cause petition analogous to the passing of publication in a suit by bill, and there being no general order or schedule of fees providing for the period when a respondent may make out his briefs, and let the petitioner and respondents abide their own costs of the motion of the 25th May last, and of this motion.

SYNGE v. SYNGE.—Nov. 18.

*Cause Petition—Abatement—Revivor—
Substitution of Service.*

A cause petition having abated by the death of a sole petitioner, after an order had been made for substitution of service thereof, an order was made giving the executor of the deceased petitioner liberty to file a petition of revivor, and to substitute service of notice thereof in the same manner as had been directed by the previous order for the substitution of service of the original petition.

THIS was an application on the part of Francis H. Synge, as executor of Francis H. Synge, deceased, for liberty to file a petition of revivor. The petition stated that on the 15th November, 1853, the said Francis H. Synge had presented his petition under the Court of Chancery Regulation Act, stating such matters as were therein more particularly stated. The petition also set out the prayer of said cause petition, and stated the several proceedings that had been taken there under, and that the said Francis H. Synge being entitled to set down the cause petition for hearing, died on or about the 24th of August, 1854, having first duly

made his last will, bearing date the 31st January, 1854, duly executed and attested, and thereby appointed the petitioner and Mary Anne Synge and Robert Synge executors, and that probate thereof was duly granted to the petitioner alone on the 14th October, 1854, and that the petitioner was thereby the legal personal representative; and that the petition having abated by the death of the said F. H. Synge, the petitioner was, as he was advised, entitled to have same revived as against the respondents. The petitioner then prayed as follows:—"May it therefore please your Lordship to order that the several proceedings may stand revived, and to hear the same with this petition, and to give to your petitioner, as the executor of the said Francis H. Synge, the relief prayed by the said petition, together with the costs of this proceeding as part of the costs of said original matter, and that the said ('respondents') may be deemed respondents hereto, and bound by the proceedings herein, and that your petitioner's executor may have such further relief in the premises as the circumstances of the case may require, and to your Lordship may seem fit." There was an affidavit stating that on the 23rd February, 1854, an order had been obtained that service of the cause petition on the solicitor of several of the respondents should be deemed good service, and that subsequently an order had been obtained, bearing date the 14th July, 1854, that service of notice of the petition on John Casey be deemed good service on William M'Mahon; the petitioner's solicitor also sending to the said William M'Mahon, through the post office, a copy of the notice and general orders, and of the notice of February 23, 1854; that some of these services had already been made and some not. The affidavit also stated the granting of probate to the petitioner.

Leslie, for Francis H. Synge, executor of the will of Francis H. Synge, deceased, the late petitioner in this matter, moved for liberty to file a petition of revivor in this matter, and that service of notice thereof in the same manner as service of the notice of the original petition was directed by the orders of 23rd February, 1854, and 14th July, 1854, as regards the respondents named in said orders, together with notice of the original petition and general orders, and said orders on the respondent, William M'Mahon, may be deemed sufficient.

La Touche, contra.—The notice of motion in this case should have followed the form of the order for a petition of revivor settled by the court, as in *Wray v. Pollard*, (2 Ir. Ch. Rep. 78,) and the order should be made without prejudice to costs.

MASTER OF THE ROLLS.—I will grant the order in the terms of the notice, let the costs be costs in the cause, and the service of this notice may be substituted in the same manner as service of notice of the petition was directed by the previous orders; and the respondent, Mr. M'Mahon, may be served by serving notice of the original petition and petition of revivor on John Casey, and transmitting a copy through the post to Mr. M'Mahon.

"Let Francis Synge, executor of the will of Francis H. Synge, deceased, late petitioner in this mat-

ter be at liberty to file a petition, in the nature of a petition of revivor, and let the said Francis H. Synge, when the said petition of revivor shall be filed, be at liberty to serve notice on Edward Synge, Lady Frances Fetherstone, Mr. Digges La Touche, Charlotte Frances Drury, the Hon. Charles Murray, Edward Kilton, and Anne, his wife; William M'Mahon, Lieut.-Col. Archdall, Robert Simpson, and John Fitzgerald, to show cause, within eight days after service of such notice, why the proceedings should not stand revived; and let the said Francis H. Synge be at liberty, after the expiration of said eight days, and upon a certificate of no cause shown, to enter a side-bar rule to revive, according to the form settled by the court, and let service of the notice of the said original petition and petition of revivor on John Casey be deemed good service thereof; on William M'Mahon, serving a copy of this order at the same time; and let petitioner also transmit a copy of the said notices and of this order, through the post-office, directed to said William M'Mahon, Manchester, and be it so on the rest of the notice."*

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1854.

CLEMENTS v. RUSSELL.—Nov. 10, 14.

Contract of affreightment—Charter party—Payment of dead freight.

A contracted with B by charter party to carry from X to Y a cargo of goods, at the rate of 15s. per ton of 20 cwt., "the said charterers thereby agreeing to pay for 240 tons whether that weight should be shipped or not, the said freight to be paid in cash on right delivery of the cargo." It was alleged in the declaration that said cargo was shipped on board the vessel at X and conveyed to Y, and that A there made a right delivery of the cargo. A sued for £33 0s. 9d., which was the balance, after giving credit for a payment on account of the freight on 240 tons. The defendant, by his plea, admitted the contract as alleged; that the vessel only received on board and carried to Y 194 tons; that it could have received and carried 35 tons more, but that the captain of the said ship, acting on behalf of B, refused to receive more than 194 tons, and that the money credited by A was sufficient to satisfy the freight on 194 tons. Held, that this defence was a good answer to the action, inasmuch as the readiness and willingness of A to carry the entire 240 tons was a condition precedent to his right to recover dead freight up to that amount, and the defence showed that freight had been paid for the quantity actually carried.

THIS was an action for breach of contract. The summons and plaint stated that by a charter party, dated 1st Oct., 1853, the defendants agreed to hire a certain vessel of Jas. Clements' (by whose admi-

* For form of order for petition of revivor see *Nason v. Peard*, (5 Ir. Jur. 347,) and *Long v. Long*, (6 Ir. Jur. 194.)

nistratrix the present action was brought), called the "Minerva," to carry from Belfast to Limerick a cargo of machinery, boilers, and other goods, at the rate of 15s. per ton of 20 cwt., the said charterers thereby agreeing to pay for 240 tons, whether that weight should be shipped or not, the said freight to be paid in cash on right delivery of the cargo; that said cargo was on or about the 10th November, 1852, shipped at Belfast on board said vessel, and thereupon conveyed to Limerick, at which latter place, on the 10th January, 1853, the said intestate made a right delivery of the cargo to the defendants; that the freight due to intestate by virtue of such charter party amounted to £180. of which the defendants then paid intestate £146 19s. 3d., leaving a balance due of £33 0s. 9d., which balance still remained due. The defendants pleaded that by the said charter party the intestate undertook to load at Belfast for defendants a cargo of machinery, boilers, and other goods, and to proceed with same to Limerick, and there (except as therein was excepted) safely deliver same agreeably to bills of lading, on being paid freight at the rate of 15s. per ton, defendants agreeing to pay for 240 tons, whether that weight should be shipped or not, the freight to be paid in cash on right delivery of the cargo; that on the arrival of the vessel in Belfast, the defendants tendered and offered to Andrew W. Hogan, the master of the vessel, and servant of said Clements, in charge of the vessel, a cargo of machinery, boilers, and other goods, and required him to receive same on board, to be carried from Belfast to Limerick, according to said charter party, and that Hogan refused to receive and carry same, but, on the contrary, received on board only a portion of said machinery and goods so tendered by defendants, amounting to the weight of 194 tons and no more, and absolutely refused to receive on board said vessel, to be carried according to said charter party, any other or greater portion of said machinery and goods than said 194 tons; and that said Clements did not, nor did any person in his behalf at that or any other time, ship on board said vessel, to be carried as aforesaid, any other or greater portion of said machinery or goods than the said 194 tons; that 38 tons, in addition to the goods so refused to be shipped and carried, could have been reasonably and safely received and stored as cargo on board said vessel, and carried safely from Belfast to Limerick, according to the terms of the said charter party; and the defendants paid to intestate £146 19s. 3d. for the quantity of said goods, &c., so carried as aforesaid, being at the rate of 15s. per ton for said 194 tons so shipped and carried, and which was sufficient to satisfy the plaintiff's demand. The plaintiff demurred to the defence, upon the following grounds, namely, that the contract mentioned in the summons and plaint, and admitted in the plea, was that the defendant agreed to pay for 240 tons of the cargo, whether that weight should be shipped or not; and nevertheless the plea did not allege or show that it was any portion of the said contract that Clements, before being entitled to be paid for 240 tons, should carry or receive on board said ship or vessel the said 240 tons, or so much

thereof as the said ship or vessel could reasonably and safely receive or store; and that by said contract it was a condition precedent that said Clements was bound to take and receive on board the said vessel said 35 tons of cargo in said plea mentioned; and also that said plea furnished no answer whatever in law or in fact to the non-payment by defendant for 11 tons of said 240 tons of said cargo.

W. M. Gibbon (with whom was *Napier, Q.C.*) in support of the demurrer.—The plea gives no answer to the action. Even if the defence be held good so far as the 35 tons are concerned, 11 tons were required to make up the 240 tons, for all that freight was to be paid in any event; and with respect to these 11 tons, no answer has been attempted to be given. The defendants were liable to the payment of freight for 240 tons under the terms of the charter party, and the remedy of the defendants for short loading was by a cross action. The defendants accepted from us at Limerick the cargo which we carried, whatever it was, and hence we have earned the freight under the charter party. Admitting that there was a breach of contract on the part of Clements, the intestate, that breach did not go to the entire consideration, and hence cannot be pleaded in bar to the action. That principle was established in the case of *Boon v. Eyre*, (1 H. Bl. 273, n.) That was an action of covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, with a stock of negroes on it, for an annuity of £160, and covenanted for title, and that he was lawfully possessed of the negroes; and the defendant covenanted to pay the annuity, the plaintiff well and truly performing all things on his part, he would pay the annuity; an action having been subsequently brought for non-payment of the annuity, a plea, alleging that the plaintiff, at the time of making the deed, was not legally possessed of the negroes, was held bad. Lord Mansfield, C. J.—“The distinction is very clear; where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one preceding the other; but where they go only to a part, when a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.” Mr. Sergeant Williams, in his note to *Pordage v. Cole*, (1 Wm. Saund. 320 b.) says—“When a covenant goes only to a part of the consideration on both sides, and a breach of each covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration,” and cites *Boon v. Eyre* in support of that proposition. Where the master of a vessel covenanted with a freighter that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery of the cargo, agreeably to the bills of lading, signed for the same, and so take in a home cargo, and make a right and true delivery thereof

at London, &c., in consideration whereof, and of everything above mentioned, the freighter covenanted, amongst other things, to load the vessel out and home, and pay certain freight per ton per month, and the remainder on the right and true delivery of the cargo, it was held that failure of the vessel to proceed with the first convoy was the ground of a cross action, but was not a condition precedent, the breach of which would have been an answer to the action; and also that a cross action would lie for any damage to the cargo by the conduct of the master and crew, but that the latter afforded no answer to the action for freight. *Davidson v. Gwynne*, (12 East, 381.) Lord Ellenborough there observed—"The principle laid down in *Boon v. Eyre* has been recognized in all the subsequent cases, that unless the non-performance alleged and breach of the contract goes to the whole root and consideration of the covenant broken, it was not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages." The same principle was recognized in the decision of the case of *Garrick v. Bradshaw*, (10 Ir. L. R. 129.) That was the case of a charter party, whereby the vessel was to proceed to Hull, take in a cargo, and proceed thence to Donegal, and there to discharge part of her cargo, and then should take on board a full complement of passengers, say three to every five registered tons; and being so loaded, should proceed to Quebec, and deliver the same, on being paid freight at the gross sum of £300. It was held on demurrer that the taking of the passengers on board the vessel was an independent condition, and not a condition precedent. [*Lefroy, C. J.*—Suppose that in that case there had been eighty passengers ready to go on board, and that the captain had refused to take them. That ingredient would have been necessary to bring that case up to the present.] We contend that it was no condition precedent here that we should load a full cargo. The fact that the freight here was reserved at so much per ton, does not vary the case from what it would have been if a bulk freight had been charged, because the tonnage is always stated in the charter party, and no deficiency in the capacity of the vessel was contemplated. We are clearly entitled to be paid for 240 tons on the stipulated freight, and they defendants may, if they choose, bring a cross action for any breach of contract on our part. [They also cited *Stavers v. Curling*, (3 B. N. C. 355); *Glazebrook v. Woodrow*, (8 T. R. 366.)]

T. Graydon and J. D. Fitzgerald, Q. C., contra.—It is not a reasonable construction of the present contract, that the defendant should be held liable to pay for 240 tons in any event, whether carried or not. The freight is declared to be payable on the right delivery of the cargo. The words "whether shipped or not," accompanying the stipulation about the 240 tons, clearly relate to the acts of the defendant; and if through their default the cargo is not shipped, then they become liable on that contract, but if on the other hand, the non-shipment is occasioned by the default of the ship

owner, they are not in that case bound to pay for the 240 tons, in consequence of the default of Clements in the due performance of the contract.—*Crosier v. Smith*, (1 M. & G. 415.) *De Silvale v. Kendall*, (4 M. & S. 42.) There Lord Ellenborough said, "By the policy of the law of England, freights and wages strictly so called, do not become due until the voyage has been performed; but it is competent to the parties, to a charter party to enter into an express stipulation, in such a manner as to control the general operation of law. If the charter party be silent the law will demand a performance of the voyage, for no freight can be due until the voyage be completed." *Grubb v. McKenna*, (1 Ir. Jur. 288.) The word "load" in this charter party is used in the sense by the ship owner, that he will receive and convey the cargo so loaded for shipment, and that the defendants should provide the goods to be carried or loaded by the former. The plea was that the ship could have safely carried thirty-five tons in addition, and therefore the default was that of the owner, and not of the defendants; and to hold them liable to pay for the 240 tons, would be in effect to make them pay for the default of the plaintiff. The breach of contract on Clement's part here went to the whole consideration, and is a good answer to an action founded on the special contract, and the only question which would then arise, would be relative to the right of the plaintiff to recover *pro rata*, but the plaint here admits a payment for every ton actually delivered. The case which is chiefly relied on is *Garrick v. Bradshaw*, but that will be found not to bear out the proposition now contended for. The question of non-performance of a condition precedent could not have arisen in that case, for the freight was to be paid at the port of loading. But, in addition to that, the declaration averred that the plaintiff was ready and willing to receive the passengers which the defendant tendered, and which was in fact an averment, that he performed the contract as far as it was in his power. Then on the other hand, there was an absolute refusal by the ship owner to perform his part of the contract. [*Lefroy, C. J.*—I recollect that in *Campbell v. Jones*, (6 T. R. 570), which was decided subsequently to the case of *Boon v. Eyre*, Ashhurst, J. recognises the distinction, that where a contract has been partially executed, in case it be divisible, the whole cannot be set aside, on account of the non-performance of the residue, and that will take the case out of the class of *Boon v. Eyre*. I made a note of that case in 6 T. R., when I was a student reading law in the Temple, soon after it had been decided; the distinction appeared rational, and it has been since recognised.] In the early case of *Bright v. Cowper*, (1 Brownlow, R. 21;) capture of part of the cargo by pirates, was held to be a good defence to an action on the charter party, and that case was recognised by Gross, J. in *Cook v. Jennings* (7 T. R. 381.) In *Ritchie v. Atkinson* (10 East. 295), Bayley, J. in holding that in that case the delivery of a complete cargo was no condition precedent to the payment of freight, distinguishes that from *Bright v. Walker*. "In *Bright v. Walker*, an entire sum was to be paid, and therefore, unless the plaintiff was entitled to receive the

whole, he could not receive any part. Unless there was a performance of the whole, for which that sum was to be paid, which there was not, he could receive nothing." He then shows that, in that particular case, there was no such intention apparent, as that the delivery of a complete cargo should be a condition precedent to the recovery of freight actually carried. Here the delivery of 240 tons, or as much thereof as was tendered for shipment, was a condition precedent to the right of action in respect to the freight. In *Abbott on Shipping*, 433, the rule is thus stated with respect to the case in which a *part* only of the stipulated sum may be claimed. "First, when the ship has performed the whole voyage, but has brought a part only of the merchant's goods in safety to the place of destination; and secondly, when the ship has not performed the whole voyage, but the master has delivered the goods to the merchant at a place short of the port of destination." After stating the opinions of several, that when a vessel is chartered at a specific sum for the whole voyage, no apportionment of freight can take place as the author observes. "But probably, if the question should arise again, the determination of it would depend upon the particular terms of the charter party; for without a very precise agreement for that purpose, it seems hard that the owners should lose the whole benefit of the voyage, when the object has been in part performed, and no blame is imputable to them." That is not the present case, where the owner of the vessel refused to receive part of the cargo. However, though we submit that there is no authority that an apportioned freight could be recovered under circumstances like the present, that question does not arise here. *Slavers v. Curling*, has been relied on by the other side, as an authority to show that the contracts are independent, but that case is not analogous to this; and then Tindal, C. J. observes: "The rule has been established by a long series of decisions in modern times that the question, whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties, as it appears in the instrument, and by the application of common sense to each particular case, to which intention when once discovered, all technical terms must give way." And he then cites Lord Ellenborough's words in *Ritchie v. Atkinson*, as to the mode of discovering that intention. He proceeds to show how unjust it would be, in the case then before him, that by reason of a small deficiency, all the profit should be lost to the ship; that the slightest carelessness should be visited with the loss of the entire contract. This present case was not one of mere carelessness, but of an absolute refusal to perform the terms of the contract. *Glazebrook v. Woodrow* was likewise a case, where according to the reason of the thing, the covenants were independent. But, if that principle applies here, even though he refused to carry 239 of the 240 tons, the plaintiff would be entitled to succeed in this action. At all events, the refusal to perform his part of the contract, ought to be held to amount to a rescission of it, according to the rule as laid down in 2 Smith's L. C.

13, and supported by *Robson v. Drummond*, (2 B. & Ad. 303.) in which case a *pro rata* freight would alone be payable. A sensible construction might be given to the present contract by holding it to be divisible into two parts—namely, first a contract for the conveyance of the goods generally at 15s. per ton; and secondly, a stipulation that at all events 240 tons should be shipped. The right to enforce the latter, would of course depend upon the performance to the owner of the condition precedent, of being ready to receive on board the cargo in question. He also cited *Ellen v. Topp*, (6 Exch. Rep. 422.)

Napier, in reply.—The principle of *Boon v. Eyre* fully applies to this case, as the breach relied on did not go to the entire consideration. The stipulation here was not to carry a full and complete cargo. The meaning of the contract was only to take such a cargo as the ship could reasonably contain, and for that the plaintiff was entitled to be paid a *pro rata* freight, provided that a round sum equivalent to freight for 240 tons were paid at all events. According to the argument of the defendants, we should lose as much for refusing one ton out of the 240, as if we refused to carry more than half that quantity. Had we received the thirty-five tons, which it is alleged that we refused, there would still have been eleven tons short of 240; and yet in that event, it is evident that we should have been entitled to freight for 240. The damage which we should suffer by being deprived of the benefit of this contract, would be greater in amount than what we should be liable to make good in a cross action, and that directly brings the case within *Boon v. Eyre*.

LEFROY, C. J.—This case comes before the court upon a demurrer taken by the plaintiff, to the defence pleaded by the defendants. This was an action brought for the recovery of certain freight alleged to be due on foot of a contract, to carry and deliver a cargo of 240 tons, and freight is demanded just as if that cargo had been carried. There is no allegation in the plaint that the owner was ready and willing, and had offered to carry a full cargo so as to entitle him to that sum; but that which is so omitted in the plaint, and might have been matter of demurrer, is specially alleged as matter of defence, as it was in *Boon v. Eyre*. The defendants in effect say this, "You, by your own default, have disentitled yourself to be paid for 240 tons; your right to payment must be regulated either by the general law of the land, or by special contract. We hired you to carry the full cargo she would carry; a certain portion of this only you took on board, and a portion remained over, which you did not take on board and carry, but on the contrary, you refused to carry and deliver the same; and accordingly you did not do that which, according to the law of the land, would have entitled you to freight." Is there anything in the special contract in its terms, entitling the plaintiff to the payment of freight, to which he would not be so entitled by the general law of the land? The construction of this instrument ought to be according to the rule laid down by Lord Kenyon, in one of the cases which followed after *Boon v. Eyre*,

nearly in the same terms in which Tindal, C.J. afterwards stated the same rule in *Stavers v. Curling*, namely, that the intention of the parties should be collected from the particular instrument. Now, what was that, and what were the relative duties of the parties here contracting? This was a contract for the carrying of articles of a peculiar kind, and which being cumbersome, the carriage would be estimated not so much by the weight, as by the size and form of them. It was therefore in reference to that very important, that the attention of each of the parties should be directed to the capacity of the ship for the stowage of goods of that kind and nature; the contract was not merely with reference to the weight of the goods per ton, but the capacity of the ship was taken into account, and while the one party was bound to carry such a cargo as the ship would carry, so the other was entitled to have such a cargo to carry as the ship was competent to carry. The owner of the ship was to take care that his ship did not go on a nugatory voyage, but should be assured of such a freight as would pay him for the use of the ship; and he therefore stipulated, that if the defendants should not provide a cargo to the extent at which he rated the capacity of his ship, he should be paid as for a cargo of 240 tons. He thereby secured to himself, that he should be paid for that cargo, and that the other should provide that cargo, or pay for the deficiency. But who was to be answerable for default? Surely it was the party who ought to have provided a proper cargo. But suppose that he did provide such, what then became the duty of the other? Why, to carry the cargo so provided and thus, whether it were more or less than 240 tons, to entitle himself, if equal or less, to payment at the rate of 240 tons, and if more than the prescribed limit, then to payment *pro rata*, according to the weight of the cargo. Thus, at all events, he was to be secured for 240 tons; and if it proved to be more, then to have extra freight. But was there any stipulation, that in case the loading of a cargo to that extent was prevented, the person refusing to carry the cargo so provided, should have the same security as if no cargo had been provided? Here such a cargo was provided; and was the one party to be deprived of the benefit of having that carried, and the other to be paid as if it were deficient? That would in effect pervert the meaning of the clause, which was intended by way of security, and we should misconstrue the real contract between the parties. As my brother Moore observed early in the case, this contract provided for the case of the contract falling short of 240 tons, without the default of the shipowner; and it also provided for the case of the cargo exceeding 240 tons, in which case the freight should be paid *pro rata*; but the two stipulations were quite consistent with each other; namely, the one providing for the shipment falling short of what the ship could carry, and the other giving additional remuneration if over 240 tons. The one was the *minimum*, but it was not to be construed to deprive the party of the *maximum*, in case the ship should carry over the *minimum* cargo. Now looking at the construction of this contract and the

general state of the law, we are of opinion that the plaintiff is not entitled, under the circumstances, as appearing to us on this demurrer, to benefit by his own default by availing himself of a proviso in the contract, which could only refer to a state of things to arise through the default of the shipper; but I would add, in accordance with the judgment of Ashhurst, J., to which I have already adverted, that when the contract is of that sort which is in part executed by the mutual concurrence of the parties, you may apportion it. The parties, by their own acts, may apportion the contract, and the demand can be reduced by what remains in the unfulfilled part of the contract. So here the defendants are entitled to say that the plaintiff was not entitled to more than a rateable portion of his demand, and this has already been paid. This demurrer must therefore be overruled.

CRAMPTON, PERRIN, and MOORE, J. J., concurred.

Demurrer overruled.

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

POWER V. THE POOR LAW COMMISSIONERS.

November 18.

Landlord and Tenant—Lease—Waste—Tend. v.—Condition—Covenant—Poor Law Commissioners.

A lease made by the plaintiff to the defendants for 21 years, contained the following proviso:—"Provided also, that if the said commissioners, their successors or assigns, shall be desirous to give up or surrender the said houses, messuages, lands and tenements hereby demised, at any time within the said period of twenty-one years hereby granted, and of such their or his desire shall give twelve months' previous notice thereof in writing to the said (plaintiff,) or on paying twelve months rent of said premises in advance unto the said (plaintiff,) and in such case all arrears of rent being duly paid, the covenants and agreements on the part of the commissioners, their successors or assigns, observed and performed, the lease and every clause, matter, and thing therein contained, shall at the expiration of the said twelve months in such notice expressed, determine, and be utterly void," &c. The lease also contained a recital that the premises were taken for the accommodation of paupers, and a clause to keep them in repair. The defendants having taken possession, made several alterations in the premises for that purpose, such as removing kilns and ices; but all these things were done with the knowledge of the plaintiff. Previous to the 1st November, 1852, the defendants gave twelve months notice to the plaintiff of their intention to give up the premises; upon that day the clerk of the union waited on him, offering him the rent, and saying that he came to give up the premises. The plaintiff having refused to take up the possession, upon the ground that the defendants had committed

dilapidations, the clerk refused to give the money, and the plaintiff brought an action to recover the rent due up to the 1st of November, 1853.

Held, that the alterations in the premises being necessary for the purposes for which the premises were taken, the defendants had complied with the terms of the lease.

Held also, that under the circumstances, the tender of the rent was a good tender.

THIS was an action upon a lease, bearing date the 9th December, 1848, and it was brought to recover the sum of £160, the amount of one year's rent, up to the 1st November, 1853, alleged to be due and owing out of a house, garden, plot of ground, and other premises, situate in the town of Cashel, and demised for the term of twenty-one years, from the 1st November, 1848, by the plaintiff to the defendants. The defendants pleaded that they had given twelve calendar months notice in writing, previous to the 1st November, 1852, to the plaintiff of their intention to surrender to him on the said day the demised premises, pursuant to a proviso contained in the said lease, whereby the said lease became void. The plaintiff replied that the lease contained the following proviso:—"Provided also, that if the said commissioners, their successors or assigns, shall be desirous to give up or surrender the said houses, messuages, lands and tenements hereby demised at any time within the said period of twenty-one years hereby granted, and of such their or his desire shall give twelve months previous notice thereof in writing to the said Michael Power, his executors, administrators, or assigns, or on paying twelve months rent of said premises in advance unto the said Michael Power, his executors, administrators, and assigns; and in such case all arrears of rent being duly paid, the covenants and agreements on the part of the commissioners, their successors or assigns, observed and performed, the lease, and every clause, matter, and thing therein contained, shall, at the expiration of the said twelve months in such notice expressed, or on payment of said twelve months rent in advance, determine and be utterly void to all intents and purposes, in like manner as if the whole of the said term of twenty-one years had been run out and expired, anything in these presents contained to the contrary in anywise notwithstanding;" and the replication further stated that the defendants covenanted to pay the yearly rent half yearly, on every 1st of May and 1st of November, and that they would, during the continuance of the demise, preserve, uphold, and maintain and keep the demised premises, with the appurtenances, and every part thereof, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition; and at the end of the term or other sooner determination of the demise, would so yield up the premises to the plaintiff. It further alleged that on the 1st of November, 1852, the sum of £80 became due for a half year's rent, and was not paid or tendered to the plaintiff on or before the last mentioned day; and further, that the defendants, up to the 1st of November, 1852, did not preserve the premises in repair and condition, but, on the contrary, severed

several fixtures and removed them, and that they continued so removed until the commencement of the present action; and further alleged that they had permitted considerable waste to take place in the garden and premises. The following issues were directed:—1st. Whether the proviso was as set forth in the replication. 2nd. Whether the defendants by the deed in question covenanted with the plaintiff as set forth in the replication. 3rd. Whether the sum of £80, or any other sum, was due to the plaintiff for rent on the 1st November, 1852; and whether such sum was paid or tendered before that day to the plaintiff. 4th. Whether after the making of the lease, and during the continuance of the demise, and before the 1st day of November, 1852, any and what fixtures, which were affixed to the demised premises, were prostrate and severed, or removed from the premises; and, if so, whether they continued to be so during the 2nd November, 1852. 5th. Whether on the same day the demised premises, or any part of them, were ruinous or in decay for want of needful and proper repairs, contrary to the provisions of the lease. 6th. Whether the defendants, upon that day, tendered to give up the premises in good and sufficient repair, according to the provisions of the deed, "and offered to pay the rent on said day" (the latter clause was added at the trial by leave of the judge). 7th. Whether the sum of £160, or any part of it, was due by the defendants to the plaintiff at the commencement of the action. The plaintiff went into evidence of the alleged dilapidations, and proved that the defendants had made several alterations in the building, and cut down trees growing in the plot of ground let to them; and it was proved that they had made these alterations to accommodate paupers, that being their object in obtaining the lease of the premises, and that these alterations were made with the knowledge of the plaintiff, who was himself a Poor Law Guardian. At the close of the plaintiff's case, it was urged on behalf of the defendants that the covenants in the lease should be construed with regard to the subject matter and object of the demise, and that no greater alterations or dilapidations had been made in the premises than were consistent with the terms of the lease, and the understanding between the parties when it was made. It appeared that the Clerk of the Union had waited upon the plaintiff with the rent, telling the latter that he wanted to surrender the premises to him, but that the plaintiff refused to accept the possession, and handed him a list of dilapidations; and that the Clerk of the Union did not give the plaintiff the rent, as he refused also to take up the premises. The jury found the first and second issues for the plaintiff; as to the 3rd, they found that upon the 1st of November, 1852, the sum of £80 was due to the plaintiff for rent; that said sum was not paid then, and that such sum was not tendered on or before that day, because, although it was offered by the defendants upon that day, their offer was accompanied with a condition that the plaintiff should accept possession of the premises. As to the 4th, that the defendants removed off the premises the kiln in question

some shutters, a rack, a manger, and a pump, for which, however, a tank was substituted. 5th for the defendants and 6th for the plaintiff. 7th, that £110 was due to the plaintiff at the commencement of the action. His Lordship reserved leave to the defendants to have a general verdict entered for them, if the court above should be of opinion that they were not bound to do more than yield up the premises in the state in which they had been put by the defendants for the purpose of an auxiliary workhouse, for which they had been taken. A conditional order having been obtained for this purpose,

R. Armstrong, Q. C., showed cause.—It was not competent for the defendants to have given up possession of these premises, leaving them out of repair. In *Friar v. Gray*, (5 Exch. 584,) the plaintiff demised to the defendant a coal mine for forty-two years, at a yearly rent, subject to certain covenants to be performed by the lessee, provided that in case the latter should wish to give up possession of the premises at the end of the first eight years of the term, he should give the lessor eight months notice, and then, "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessee having been observed and performed," that the lease should at the end of the eighth year be utterly void (but without prejudice to any security for breach of covenant); and it was held by the Court of Exchequer Chamber, that the performance of *all* the covenants in the lease was a condition precedent to the tenant's right to determine the lease. This decision was affirmed by the House of Lords, (4 H. of Lords Cases, 569). The proviso in the present case was exactly similar to that in *Friar v. Gray*. At the trial the case of *Doe d. Dalton v. Jones*, (4 B. and Ad. 126,) was relied upon by the other side, but that case is distinguishable as referring only to *permissive* not *commissive* waste, and that is the only case in the books at all supporting that view of the question. [*Pennefather, B.*—Although certain alterations were made in the premises by the defendants, it does not clearly appear that the materials were actually removed from the premises.]

E. Pennefather, (with him *Lynch, Q. C.*) contra.—At the time of making this lease, the plaintiff was a Poor Law Guardian, and it was well known to him that this house was taken as an auxiliary workhouse, and for that purpose only. The alterations made in the premises were absolutely necessary for the purposes for which it was taken; and it does not appear that the plaintiff made any objection to these alterations until the very last day before the rent was due, when the Clerk of the Union offered him possession. The case of *Friar v. Gray* is by no means identical with the present case, for that was a lease of a coal mine, a thing requiring extreme care; and in such cases regard must be had to the subject matter of the demise, for instance, in *Stavers v. Curling*, (3 B. N. C. 355), where the plaintiff, being captain of a South Sea whaler, undertook to go a whaling, and entered into certain covenants in reference to the cargo and conduct of the ship; and the defendant covenanted that upon the performance of these

covenants he would pay him a certain proportion of the cargo, it was held that the plaintiff's covenants were independent, and that the performance of them was not a condition precedent to the fulfilment of the agreement by the other party. A similar principle may be found in *Pordage v. Cole*, (1 Saund. 319, c.), *Young v. Mantz*, (6 Scott, 277). In *Doe d. Dalton v. Jones*, there was a covenant to keep the demised premises in repair, with a proviso for entry in case of breach; and although it was proved that the defendant made several alterations in the windows, doors, &c., yet it was held that no forfeiture was incurred. In that case the alterations made were not such as were contemplated at the time of the demise, whereas in the present case the premises could not have been used for the purposes for which they were taken, unless these alterations had been made. It would have been impossible to have put the premises in precisely the same condition they were in at the commencement of the demise. [*Greene, B.*—Is it clear that this was a good case of tender, the offer of the rent having been accompanied with a condition, viz, the taking up of the premises?] It was not considered at the trial as a simple case of tender; but the question was, whether or not the defendants had not the power to make these alterations, they having been made within the knowledge of the plaintiff?

J. Murphy in reply.—The only tender of the rent was thus made—"If you will take up the premises, I will pay you the rent;" and the plaintiff, considering the state of dilapidations, refused to take up the premises. [*Greene, B.*—The acceptance by the lessor does not appear to have been necessary in order to determine the demise. If the words were, as it appears—"I am come to pay the rent, and give up the possession," the payment of the rent could hardly be considered as clogged with a condition.] Payment of the rent was necessary; and in order to establish that, there must be evidence of a legal tender.

*PENNEFATHER, B.**—This case involves a question of considerable importance, at least to the Poor Law Commissioners. The action was brought to recover the amount of one year's rent up to the 1st of November, 1853, alleged to be due out of certain premises taken by the Poor Law Guardians of Cashel; and the question is, whether, in consequence of what has taken place between the parties on and before the 1st November, 1852, the lease in question has or has not been determined upon that day. It appears that in the year 1848, the plaintiff, being possessed of certain premises in or near the town of Cashel, of which no particular description is given in the lease, entered into a negotiation with the Poor Law Guardians of that district, who were desirous to take the house in question as an additional workhouse for the union; and accordingly an instrument was prepared, which, after reciting the purpose for which these houses were to be taken (which is a most important portion of the lease), and that the Poor Law Commissioners had agreed to pay the yearly

* Pigot, C. B. was absent.

rent of £116, and after providing that the demise should be for a term of twenty-one years, contained a clause for the purpose of determining the lease within a shorter period, providing that, upon service of twelve months previous notice to the lessor, his executors, administrators, and assigns, or upon paying twelve months' rent in advance, all arrears of rent being, and all agreements and covenants on their part being performed, the lease should at the expiration of twelve months become null and void. It appears that twelve months' notice in writing was duly served upon the plaintiff previous to the 1st of November, 1852, upon the part of the commissioners, stating their intention to surrender the premises, and pay all the rent then due; thereby intimating that all the covenants had been performed by them, as contained in the lease. Upon the 1st of November, 1852, the guardians gave directions to their clerk to pay to the plaintiff the rent that was due upon that day, and to give up possession of the premises to the plaintiff, and they gave him a cheque upon the bank for £116 to enable him to do so. The clerk of the union accordingly went to the plaintiff, and told him that he came to pay the rent, and give up possession of the premises; but the plaintiff, thinking it right to examine the state of the premises, proceeded to do so before accepting the rent. Unquestionably the plaintiff was not bound to accept the possession of the premises, except the rent had been tendered; and he had a right to examine whether or not the premises had been dilapidated; and if they proved to be out of repair contrary to the terms of the agreement as contained in the lease, he would not have been bound to accept the possession. Upon the other hand, if the premises were not dilapidated, and if they were in repair according to the terms of the contract, as entered into by the defendants with him, he had no right to refuse to take up possession, or to refuse to accept the rent upon the allegation that they were out of repair. Now let us consider what were the transactions between the parties, that is to say the clerk of the union and the plaintiff; and there appears to be no question as to the facts. The clerk went to the latter, intending to pay the rent due, and to give up possession of the premises. During his conference with the plaintiff he cashed the cheque, showing his full intention of paying the rent due, and offering the money to the plaintiff, who refused to take up the possession. Two things were to be done by the clerk, to pay the rent, and give up the premises. It was not like the ordinary case of tender, as there was something more to be done on both sides. The plaintiff had no right to incumber the commissioners with terms not contained in the lease, and on the other hand the clerk of the union had no right to clog the tender with unfair conditions. Let us consider what was done. The plaintiff says that he will not take up the possession; and he accordingly refuses to receive the money, insisting upon a condition to this effect, that the premises should be put into what he considered to be repair—that they should be restored to their former condition; and with that view he presents to the clerk of the union a list of

dilapidations, showing that he intended to hold the commissioners liable. If payment had then been made by the clerk, it might have been considered that he had yielded to the plaintiff's demand; but we cannot regard what passed between them as a condition annexed by the clerk to the payment of the rent, but rather as a repudiation by the plaintiff of the condition contained in the lease, the performance of which the clerk had a right to demand. If, instead of what the plaintiff did, he had said, "I will not receive this money until you give me security that the premises shall be repaired, and that the clerk had then refused to make the tender, could it be said that the clerk had imposed a condition, or that it had been imposed by the plaintiff? This leads the court to consider as to whether or not the state of the premises justified the plaintiff in adding such a condition to the terms of the agreement. Under the terms of the lease it appears that these premises were intended for an auxiliary workhouse; and I would say this, that by the contract itself, as it existed between the parties, all changes in the premises that might be necessary for the accommodation of paupers might have been made. There appears to have been wine-vaults and lime-kilns, which as such were useless to the guardians. There was a garden, which might have been necessary for the exercise or recreation of the paupers; and is it to be said that the commissioners were to take such care of the fruit-trees, and to shut out the paupers from the enjoyment of air and light. It is clear that they were not bound to do any such thing. Certain issues have been settled in this case; and I am sorry to be obliged to repeat an observation that I have made upon previous occasions, that really the settlement of issues by a judge, who cannot understand the relative right of the parties, must in many cases occasion a frustration of justice: and that if the parties cannot agree to settle between themselves what issues are to be tried, it is vain to suppose that a judge can do so in such a manner as to answer the ends of justice. As to the fourth issue (for I pass over the preceding ones), the object of it was to ascertain whether during the continuance of the demise any fixtures were prostrate or severed,—it does not say—contrary to the terms of the agreement as contained in the lease: therefore I must say, that the finding upon that issue appears to me to be immaterial to the question of the case: not leaving to the jury any question as to the effect of the demise, but proposing an absolute question as to whether or not certain articles had been prostrated or severed. The counsel who conducted the case for the defendants at the trial, contended that some alteration should be made, and this led the Chief Baron to make an alteration in the sixth issue. It is impossible to sustain the finding upon the fourth issue, having regard to the true construction of this lease: and we are also of opinion, that the verdict as found upon the sixth issue, must be changed into a verdict for the defendants. We are of opinion that the rent of these premises was substantially offered to the plaintiff, and that no condition was attached to the offer; but that a condition was annexed by the plaintiff, and therefore that his refusal

to take up the possession was altogether unwarranted. There must, therefore, be a general verdict for the defendants.

RICHARDS, B. concurred.

GREENE, B.—My brother Pennefather has dealt with the circumstances of the case so fully, that I feel it unnecessary to add anything more.

Rule accordingly.

ROLLS COURT.

[Reported by RICHD. W. GANBLE, Esq. Barrister-at Law.]

POOR LAW COMMISSIONERS v. FITZGERALD, (CALLED THE KNIGHT OF GLYN.)—November, 10.

Practice—Costs—Taxation—Briefs—Documents entered as read.

Where on a motion made in February to draw out purchase money which had been lodged in court by a public company, an order was made for that purpose, and several deeds referring to the title of the party applying were entered as read. Briefs of these deeds in full were allowed on taxation, and a motion in November to review the taxation, and amend the order by striking out the deeds, was refused.

The counsel who was first retained for the motion having become unwell, a second brief and fee was allowed, as the court does not approve of the practice of counsel handing over their briefs to another to move for them.

In this matter the Poor Law Commissioners had purchased some land from the Knight of Glyn, and had lodged the purchase-money in court, pursuant to the statute. The Knight of Glyn afterwards applied by petition to the Rolls for payment of the money so lodged over to C. H. Minchin in part discharge of an incumbrance vested in him, and affecting the lands purchased. On hearing of the petition the Master of the Rolls—to save the expense of a reference—directed an advertisement for claimants to send in their claims for such purchase-money. No claims having been sent in, the petition was re-entered for hearing, and a brief made out and given to counsel, but he became unwell, and could not attend, and another brief was given to another counsel. An order was made dated the 4th of February, 1854, directing that the purchase-money should be paid to the said C. H. Minchin, and that the Commissioners should pay to the Knight of Glyn the costs of the motion. No question was raised on the motion as to the title of the Knight of Glyn. When the costs were lodged for taxation two briefs were charged as briefs of the motion, each of 110 pages, which consisted of full copies of the several deeds relating to the title of the Knight of Glyn in the purchased property, the title to which was stated in the petition. These briefs were allowed on taxation, on the grounds that the deeds so briefed were entered on the order of February, 1854, as having been read on the motion.

B. Pennefather now moved for a review of the taxation as to item No. 35—Brief of 110 sheets, £11; No. 38—Brief of 110 sheets, £11; and, if necessary for the purpose of such review, that the order of February, 1854, might be amended by striking out

the several deeds taken down as read. These deeds were unnecessary, and were put into the brief contrary to what was required by the 157th General Order of 1843, which required that in no brief should long statements of deeds be inserted, without an actual necessity, and that in the taxation of the costs the Taxing Master should keep this order in view, and should look into every brief, and disallow all costs improperly or unnecessarily incurred in preparing the same or consequent thereon.

Hughes, Q. C.—It is admitted by the notice that a review of the taxation could not be granted without amending the order of the 4th of February, by striking out the deeds; but it would be an injustice to us to do so; for when a party comes to the court for liberty to draw money lodged in this way, your Lordship would not act on a mere statement of the party, but would require the deeds to be produced. It was recorded by the Register that the deeds were read; and, if so, there could be no question as to the propriety of charging them. As to the second brief having been given out, it was in consequence of the illness of the counsel to whom it was first given.

MASTER OF THE ROLLS.—So far as that part of the notice which seeks to have the order of the 4th of February amended, this application is made too late. It should have been made within a reasonable time after the hearing of the motion. According to the 98th General Order of Lord St. Leonards, this would not have been late, if made six days after motion. The Rule says that all applications to amend the notes of a decree or order shall be made not later than the sixth day after the same shall have been pronounced by the court. There are very substantial reasons for this rule; for when the application to amend is made within a reasonable time after the hearing of the case, the judge has all the facts in his recollection, and consequently knows how to deal with it. This case just shows how inconvenient it would be to adopt a different practice, for I cannot now remember the facts of the case as then moved, whereas if this application had been made in April or May last, I would recollect the facts, and be able to say if anything had been done inadvertently. Whenever I am satisfied that deeds are sought to be entered as read only to accumulate costs, I do not permit them to be entered. If in this case I had referred the matter to the Master for a report, instead of making the order which I did, all the deeds would have been set out in the schedule to the Master's report, and the expense would have been much greater. I made the order for an advertisement for claimants expressly to save the expense of a reference to the Master. It first struck me as strange that there should be two briefs, but that was accounted for by the illness of counsel. If this was a story trumped up to accumulate costs, it would be another matter; but this does not appear here, and I do not like the practice of counsel handing over their briefs to other counsel to move for them. I am not deciding that a public company should in every case be charged with copies of all such deeds; perhaps, under other circumstances, I would disallow them, but I cannot do it here. I must, therefore, refuse this motion with costs.

COURT OF COMMON PLEAS.

MICHAELMAS TERM, 1854.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

PHILLIPS v. M'EVROY.—November 17.

Practice—Motion without notice—16 & 17 Vic. cap. 113, sec. 50.

A motion that leave be given to the officer of the court to insert the name of the next friend of a lunatic plaintiff in the summons and plaint after it has been filed, must be on notice.

Sidney moved that the name of the next friend of a lunatic plaintiff might be inserted in the summons and plaint, which was already on the file. The defendant was not aware of the error, as he did not know that the plaintiff was a lunatic; and, as he would not be prejudiced by the step, no notice of the motion had been given to him.

PER CURIAM.—The motion should have been on notice, and must, therefore, be now refused.

No rule.

SHAW v. HARRIS.—November 17.

Practice—Motion to change venue—Costs.

Where a motion on behalf of the defendant to change the venue was refused, the costs were made costs in the cause if the plaintiff succeeded, but in no event was the defendant to get costs.

J. B. Murphy, for the defendant, moved to change the venue in this action from Dublin to Limerick, on the ground that the witnesses lived near the latter place.

Barry, contra, urged that there would be a great injury done to the plaintiff if the trial of the cause was postponed until the Spring Assizes, and cited *Flanagan v. Reynolds*, (5 Ir. Law Rep. 335.)

MONAHAN, C. J.—The question is as to the balance of convenience, and, where that is even, the right of the plaintiff must not be interfered with. As to the costs, in no case is the defendant to get them, but the plaintiff may if he succeeds.

Rule refused.

BYRNE v. MAGNETIC TELEGRAPH COMPANY.—November 20.

Practice—Several Pleas—45th General Order.

To an action for unliquidated damages for a breach of contract, the defendants pleaded that the contract being a qualified one, and not absolute, as stated in the plaint, was not broken, and that they had tendered a return of the consideration, which they had also lodged in court, in full discharge of the action. Judgment was marked by the plaintiff under the 45th General Order, as no rule to plead several matters had been taken out. Upon a motion to set aside this judgment, it was held, that the plea was double, and that the judgment should not be set aside except on terms.

THE cause of action stated in the summons and plaint was—"That the plaintiff, being the owner of a certain ship or vessel called the 'Success,' which had been put into dock at Ardrossan, in Scotland, for the purpose of having certain repairs

and additions made thereto, prior to a certain voyage on which it was intended to be sent by the plaintiff as soon as possible; and the plaintiff having employed Messrs. Barr & Shearer, ship-builders of Ardrossan aforesaid, to make such repairs and additions, and having, during the progress thereof, and in order to save time and expense, required to forward with the utmost possible despatch a message to said Messrs. Barr and Shearer relative to the repairing of the said ship, and to the effect that the vessel, meaning the said vessel, should be completed without the delay consequent on altering the decks; that the decks were not to be altered; that fir deal was a timber good enough for the repairs; that the ship, meaning the said ship, was not to be classed; and that a telegraphic reply was required. And the defendants, being contractors for transmitting and conveying messages by Magnetic Telegraph from and to Dublin and Belfast in Ireland, and Ardrossan in Scotland aforesaid, and several other places in Ireland, Scotland, and England, it was, on the 17th day of February, 1854, agreed between the plaintiff and the defendants that, in consideration of the plaintiff paying to the defendants the sum of nine shillings and nine pence sterling, the defendants would immediately, to wit, in the forenoon of said day, transmit and convey by telegraph to the said Messrs. Barr and Shearer, at Ardrossan aforesaid, the said message in the abbreviated form and words following, that is to say: 'Richard Byrne, Dublin, to Barr and Shearer, ship-builders, Ardrossan. Complete "Success" without delay; don't alter decks; fir ought to wear her out; no class; telegraphic reply;' and although, pursuant to said agreement, the plaintiff paid to the said defendants the said sum of money, and delivered to them the said message for such immediate transmission, &c., and did all other matters, &c., on his part, &c., yet the defendants, disregarding their said agreement, did not, nor would immediately, or at all on said day, transmit or convey by telegraph such message according to the tenor of their said agreement, and have not since done so, but, on the contrary, on the day aforesaid, and thence hitherto, not only failed and neglected so to do, but afterwards, to wit, on the same day, falsely and untruly represented to the plaintiff that they had duly transmitted and conveyed by telegraph the said message as aforesaid, thereby deceiving the plaintiff, and preventing him from having the said message otherwise transmitted and conveyed to the said Messrs. Barr and Shearer, by reason of which breach of contract and misrepresentation great additional and unnecessary expense in relation to the repairs of said vessel was entailed upon and borne by the plaintiff, and he was put to considerable loss, expense, and inconvenience, on account of the increased delay and detention of said vessel occasioned thereby, as well as by the deprivation of the benefit and advantage of having said vessel ready to go out to sea on her said intended voyage at an earlier period, to the plaintiff's damage of £500, the particulars of which are above set forth," &c. To this statement of a cause of action the defendants pleaded the following defence as a single plea: "That it was not agreed between

the plaintiff and said company that the said company would transmit the message in the summons and plaint mentioned in manner and form as the said plaintiff has alleged in his said summons and plaint. And said defendants further say the only promise and undertaking made by the said defendants in relation to the said message was, that said message should be transmitted if the state of the weather and atmosphere were such as that same would pass by the wires necessarily used for that purpose, and that said company would guard as much as possible against mistakes, but could not hold themselves responsible for any that might occur, and the defendants say they did duly transmit said message from Dublin to Belfast, being the first station in the route by which said message was to go, that said message being unintelligible to the servant of the company at Belfast, he endeavoured by a telegraphic communication with the Dublin servant to obtain an explanation thereof, that immediately after said message passed along the wires to Belfast as aforesaid, the state of the atmosphere became such that said wire would not convey said message for explanation, nor would the wires between Belfast and Ardrossan convey said message to its destination had same been intelligible to said clerk at Belfast, and in manner aforesaid it became and was impossible for said company to transmit said message to Ardrossan, without any neglect or breach of contract on the part of said company; and as to the alleged false representation in said summons and plaint imputed to said defendants, they say that said plaintiff was truly informed that said message had been duly transmitted from Dublin, but that as the wires had been deranged by the change of weather no reply was, or could have been received, and that it was presumed that said message had reached its destination, all which was true: *and the said defendants further say that afterwards, and before the commencement of this action, and so soon as they learned that said message, by the inevitable accident aforesaid, had not reached its destination, the said company tendered and offered to return to the plaintiff the said sum of 9s. 9d., so paid by him, and in the summons and plaint mentioned, but which he refused to accept, and the said defendants now bring said sum into court in full discharge of this action, and deny their liability to any further amount, and also deny that the plaintiff sustained any further or greater amount of damage by the failure of said message.* The plaintiff treated this defence as several, and marked judgment under the 45th General Order. The defendants now moved that the judgment be set aside as irregularly and improperly marked, as the matters of the plea constituted but one defence to each part of the complaint.

Fitzgibbon, Q. C., (with him *Lynch, Q. C.,*) for the defendant.—There is but one set of facts mentioned, and these constitute but one defence to the whole cause of action. The plaintiff should have moved to set the defence aside, and not have marked judgment in a case of this kind.

McDonough, Q. C., and *B. Cox, contra.*—The cause of action is single, but the defence is four-fold. First, there is a traverse of the contract; secondly,

a contract is alleged of a different nature from that stated by us, namely, a qualified and not an absolute one. [*Monahan, C. J.*—A denial of the contract, and a denial of any contract having been entered into in the manner alleged, would be a single defence and not a double.] Perhaps so, but it would be a bad pleading, as the latter would be an argumentative denial of the former. The third defence is, that the change of weather exonerated them from fulfilling the contract; the fourth defence is a tender. [*Monahan, C. J.*—We think the first three amount only to a denial of the contract as alleged; but we wish to hear what can be said on the fourth.] This is clearly a tender, and to the whole cause of action, and does not come under section 58 of the Common Law Procedure Act, for it is only where the tender is to part that it may be pleaded without leave. [They cited *Barrett v. Dearl*, (3 Dowl. P. C. 13); *Hodges v. Lord Litchfield*, (2 Dowl. P. C. 741; s. c. 3 Moore and Scott, 201.)]

Lynch, Q. C., in reply.—The first part of the defence is a statement of a contract, not a traverse. [*Per Curiam.*—We wish to hear you upon the question of tender.] There is no tender, but a willingness to return the money paid, as the consideration for it failed. It does not refer to general damages, but merely to the damages included in the contract pleaded. [*Monahan, C. J.*—The action is not brought to recover the 9s. 9d., but damages for a breach of contract. *Jackson, J.*—The plea amounts to this—you have suffered damage to the amount of 9s. 9d., and here it is.] It is not an answer to the damages, but a statement that the defendant did everything that he was bound to do. [*Torrens, J.*—Is there any case of unliquidated damages where there is a tender allowed. *Monahan, C. J.*—If the 9s. 9d., had not been brought into court, then it might not have been a tender.]

PER CURIAM.—We propose to set aside the judgment, but the defendants must pay the costs of the motion and take short notice of trial, and must furnish to the plaintiff a copy of the company's charter within three days, upon payment of scrivener's fees. The part of the defence relating to the tender must be struck out.

Rule accordingly.

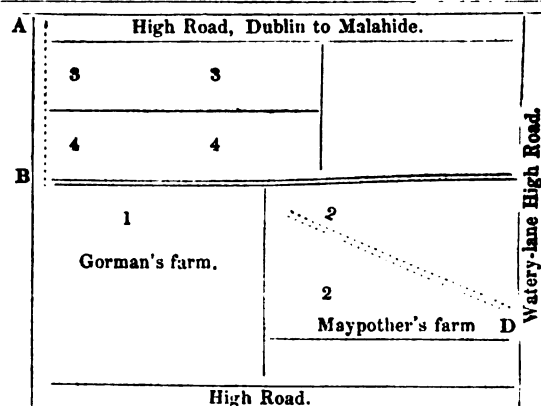
NUGENT v. COOPER—Nov. 22, 23, 25.

Right of way—Right of way of necessity.

A right of way of necessity, to land surrounded by other lands, is created, as well in the case where the grantor grants the reversion expectant on the determination of outstanding leases in the surrounding lands, himself retaining a similar reversion in the land surrounded, as where the grantor, being in actual possession, grants the surrounding lands themselves, retaining the lands surrounded; although at the time of such grant the tenant of the land surrounded has another way of access thereto, to continue during his lease.

In this case an action of trespass had been brought by direction of the Commissioners for the Sale of Incumbered Estates, to try the title of the defendant to a right of way over a portion of the lands

of Kinsealy to another portion of said lands called "Gorman's Farm," for the sale of which a petition had been presented to the Incumbered Estates Court. The date of the alleged trespass was the 23rd February, 1854. The defendant filed several defences, and the first of them—on the justification alleged in which the case was ultimately decided, was as follows.—"That, at the time of the alleged trespass, the defendant was the tenant and occupier of a certain other portion of the lands called Kinsealy, lately occupied by one Terence Gorman, next adjoining the land of the plaintiff, and then held and was possessed of his said portion of land as tenant thereof to the Earl of Leitrim and Lord Clements, and that one Austin Cooper, who died in the year 1830, was, at the time of his decease and of making his will as hereinafter mentioned, seized in fee-simple of both of the said portions of said lands, with their respective appurtenances; that said Earl of Leitrim and Lord Clements, upon the death of said Austin Cooper, became and were, under the will of said Austin Cooper, dated the 28th July, 1830, and signed and published by him in presence of three witnesses, pursuant to the statute, seized in fee of both said portions of land (subject to a leasing power); that Lords Leitrim and Clements being so seized, on the 6th January, 1848, by deed conveyed said portion of said lands in summons and plaint mentioned, together with other portions of said lands, as more particularly delineated in a map on the margin of said deed, and whereon is likewise delineated a certain way to the Dublin and Malahide high road (i. e. the way in dispute), to one John Wills in fee, whose estate in said lands the plaintiff now has; and that at the time of said conveyance the said Lords Leitrim and Clements, and their tenants for the time being of said portions of land held and occupied by defendant, not having any other way to said last mentioned portion of land otherwise than from and out of the said high road through and over the said plaintiff's portion of land; that by reason thereof, said Lords Leitrim and Clements, and their tenants, and defendant, as such tenant and occupier as aforesaid, after such conveyance necessarily had, and of right ought to have had, and still to have a convenient way to his said portion of land from said high road through and over the plaintiff's said portion of land; and that said Lords Leitrim and Clements, and the tenants and occupiers of defendant's portion of land, and defendant, as such occupier as aforesaid, after said conveyance had and were accustomed to have, and of right ought to have had, and defendant being still tenant and occupier of the said portion of land, still of right ought to have a certain necessary way for themselves and himself, their and his tenants on foot, and with horses and carts, through and over the plaintiff's portion into the defendant's portion of said lands, to go and return at all times for the necessary use and occupation of said defendant's land, the same being the nearest and most convenient way over plaintiff's land to the defendant's land." The following facts, bearing upon the point in this case, which appeared in evidence, will be more clearly understood by referring to the annexed plan:—



The fee-simple of the lands of Kinsealy had, prior to the year 1807, belonged to two different proprietors—the Earl of Dorchester and Mr. Tighe. Austin Cooper, in the year 1807, purchased the fee of Lord Dorchester's portion, of which Gorman's and Maypothor's farms were parcel, and on which is the way C D; and in the year 1823, also purchased the fee of Mr. Tighe's portion, whereof Quin and Williams's farms formed part, and on which is the way A B. The right to use this latter way was the matter in dispute between the parties.—That said Austin Cooper had devised his estate in all said lands to said Earl of Leitrim and Lord Clements. It further appeared that, previous to the year 1824, Terence Gorman, who then occupied the defendant's portion of said lands, as tenant to said Austin Cooper, was in the habit of using the way A B (that in dispute) as a mode of access thereto from the Dublin and Malahide high road, paying to John Quin, who then held the plaintiff's portion of said lands, as tenant to Mr. Tighe, 50s. a-year for the right of using said way; that by two leases of the 1st March, 1824, A. Cooper demised to said John Quin, for his life or twenty-one years, one part, and to one Hugh Williams, for a like term, the other part of the plaintiff's portion of said lands, over which the way A B lies, and that each of said leases contained a clause "reserving to said A. Cooper, his heirs and assigns, the right of passage by the private road on the south side of said demised premises;" that since the making of said leases said Gorman ceased to pay said Quin for the use of said way, but nevertheless continued to use it up to the year 1853, when he was evicted from defendant's portion of said lands for non-payment of rent, by the devisees of A. Cooper; that the terms for which these leases were made had determined before the period of the trespasses complained of; that the *locus in quo*, together with another portion of said lands of Kinsealy, called 'Maypothor's Farm,' which had been part of Lord Dorchester's estate, was sold to the late John Wills under a decree of the Court of Exchequer, and conveyed to him by deed of 6th January, 1848; that in the printed rental under which said lands were sold there was no mention of any right of way, nor was there any reservation of such right in the conveyance to Wills, although the way itself was delineated on the map which was on the margin thereof; that Wills had devised his estate to the

plaintiff; that, at the time of the conveyance to Wills, said Gorman was tenant in occupation of 'Maypothor's farm,' as assignee of the lessee's interest, under a lease of 18th June, 1799, and was also tenant in occupation of the defendant's portion of said land (i. e. Gorman's farm), under a lease of a date before 1799, for terms which were then respectively subsisting, but were afterwards evicted for non-payment of rent—the former in the year 1850, and the latter in April, 1853; that after the former eviction Wills stopped the way C D; that there were, at the time of said conveyance to Wills, two modes of access from public high roads to 'Gorman's farm,' viz.—the way A B and the way C D; that the way A B was the shortest and most convenient from Gorman's farm to Dublin, and that the way C D was the shortest from 'Gorman's farm' to the railway and other places, and that while Gorman continued in possession of 'Gorman's and Maypothor's farms' he was in the habit of using both said ways, although he mostly used the way A B, and that he continued to use it after he was evicted from 'Maypothor's farm,' and until he was evicted from 'Gorman's farm' in 1853; that in 1852 a gate was first put across A B, and that shortly after the eviction from Gorman's farm; in 1853 Wills stopped the way A B.

The jury, under the direction of the learned judge, found the following special facts, namely: That at the time of the conveyance to Wills, in 1848, the way A B was in fact used, and had been used for seventy years under the circumstances stated in the evidence—that it was the most convenient way for general purposes, and that no other way is now, or was at the time of the alleged trespasses open, Major Wills having, in 1850, stopped the way C D. This being in fact a verdict for the defendant, leave was reserved to the plaintiff to move the court to turn same into a verdict for the plaintiff, if the court should be satisfied, and a conditional order to that effect having been obtained.

O'Brien, Sergt., Lynch, Q. C. and William Smith, on part of the defendant, now showed cause, and contended, that inasmuch as after the conveyance by the devisees of Cooper to Wills they had no means of access, from any high road, to Gorman's Farm, save over the lands sold to Wills, they were entitled to a way across those lands from a high road, by the most convenient way, as of necessity, and that as the jury had found the way A B was the most convenient, they had a right to use that. [They cited *Pomfret v. Ricroft*, (1 Saund. R. 323); *Morris v. Edgington*, (3 Taunt. 24); *Holmes v. Goring*, (2 Bingh. 76.)]

Rollestone, Q. C., Hayes, Q. C., with whom was E. M. Kelly, in support of the conditional order, argued that the authorities cited for the defendant were inapplicable to the state of facts in this case, and that the defendant was not entitled to use the way A B as a way of necessity, upon two grounds: first, that at the time of the conveyance to Wills in 1848 there was in fact another way to Gorman's Farm, namely, the way C D, and that inasmuch as the necessity did not exist at that time there was

no foundation for the right of way claimed, which always derives its origin from an implied grant, founded on the necessity arising from the fact, that there is no mode of access to the land except by such a way, and such a right could not arise from circumstances occurring afterward; and secondly, that the cases cited were cases in which the grantors were seised and in actual possession of the several closes in respect of which the question arose, and by their grants in those cases dealt with and disposed of the actual possession of the land, whereas here, at the time of the conveyance to Wills the grantors were only seised of the reversion in the several parcels of land expectant on the determination of terms which were then subsisting. That the way of necessity being one by implied grant a man cannot be held to have impliedly granted that which he had no right to at the time of such grant, namely, an easement affecting the possession of the lands, the reversion in which alone was his during the subsistence of the outstanding demise. [They cited *Pomfret v. Ricroft*, (1 W. Saund. 323, c. in notes); *Thomas v. Thomas*, (2 Cr. M. & Ros. 34); *Chichester v. Lethbridge*, (Willes R. 72, n.); *Clark v. Cogge*, (Cro. Jac. 170); *Staple v. Heydon*, (6 Mod. 3); *Lord Darcy v. Askwith*, (Hob. R. 234); *Pinnington v. Galland*, (9 Exch. R. 1.)]

Cur. adv. vult.

Nov. 26.—The judgment of the court was delivered by the Chief Justice.

MONAHAN, C. J.—The facts of this case are shortly these. Originally and prior to the year 1750 Lord Dorchester was seised of an estate in the County of Dublin, bounded on one side by a sort of roadway called Watery-lane: adjoining to this estate of Lord Dorchester was another belonging to Mr. Tighe, bounded by the high road; both these roads led to Malahide and Dublin, and it must be taken that prior to 1790 the owner and occupiers of Lord Dorchester's estate had no right of passage across Mr. Tighe's estate, and that they went out by Watery-lane, and that Mr. Tighe went out by the other road. In this state of things Lord Dorchester made a lease of part of his estate bordering on Mr. Tighe's, reserving the intervening estate near Watery-lane. The cases decide that the effect of the freehold lease made by Lord Dorchester had the effect of granting a right of way across his own estate to Watery-lane, whether the grant was expressed or not, and Gorman, the lessee, used that way as a way of necessity, and as incident to his estate. Some years after Lord Dorchester made another lease for a term of years of the rest of his property there to a Mr. Maypothor, and no right of way was reserved in it. It is clear that would not derogate from the right which the grant to Gorman gave him, and he continued entitled to the same right of passage as before Maypothor's lease was made. Gorman, it appears, subsequently purchased Maypothor's interest, and thus became owner of the two closes. The result of this was, according to all the cases, not to extinguish but only to suspend his right of way, and therefore, if matters had continued so, and Mr. Tighe had remained owner of his estate, though Gorman's right of passage would have been sud-

pendent while in occupation of the two closes, he would still have had his right of way; and therefore, if Gorman's title to Maypothor's lease determined, though his right of passage was suspended while he continued occupier of the two, yet there can be no doubt it would arise again upon the determination of Maypothor's lease. In this state of things Gorman made an arrangement with Mr. Tighe's tenants, the effect of which was that though he had a right of way through the passage called C D, he purchased a right of passage across Mr. Tighe's estate, in order to go to Dublin, and continued to use C D for all ordinary purposes. In the year 1823, and while matters stood thus, Mr. Cooper purchased Lord Dorchester's estate and Mr. Tighe's—one lot of Lord Dorchester's and two of Mr. Tighe's, and thus became the owner of the three closes: the leases to Quin and Williams then ceased, and Mr. Cooper became owner in possession of the adjoining property of Mr. Tighe. A serious question would in this state of things arise, but one which we are not called upon to, and do not, decide, because it is not necessary to the present question, that is, what was the effect of acquiring that new adjoining estate on the right of way originally created as incident to Gorman's estate? We have no doubt but that at the time the lease was made to Maypothor, he being owner of Gorman's estate, that without any express reservation Gorman had a right of passage, and that if he had not acquired Mr. Tighe's estate in the meantime, he would have a passage from Gorman's farm as incident to the possession of the estate. There is no case expressly on this point, viz. whether if a man conveys in fee to another a close, he being owner in fee of the adjoining close, which is in the hands of tenants, a right of way of necessity is reserved to him and his tenants. But the principle which decides that if a man, being owner in fee of two closes, sells one, he reserves a right of way from the other, applies equally to the case of a man who sells one close, leaving the unsold close in the hands of tenants. We have no doubt that the effect of the grant to Maypothor was a reservation by necessary intendment of a right of way, subject to Gorman's express rights, but subject also to Mr. Cooper's rights, if he became occupier of Gorman's farm when that lease determined; but the fact of Mr. Cooper's having acquired possession of Mr. Tighe's estate, and thus become entitled to the possession of the adjoining estate subsequently, would raise a serious question. This question did not arise from the state of the facts here, for, as soon as Mr. Cooper became possessed of Tighe's estate, he demised to Quin and Williams, but reserved to himself, his heirs and assigns, a right of passage over the way A B, and the evidence shows that from that time he allowed Gorman to use that way, but only as a compliment. In point of fact, however, it was a way open and enjoyed in the year 1848, when Cooper sold to Major Wills. It was argued that at the time of this conveyance, as Mr. Cooper, who conveyed, had not an estate in possession in Gorman's land, the effect of that conveyance was, that no right of way of necessity was reserved. We have disposed of this objection, as we think that such a proposition cannot for a mo-

ment be supported, and we think that if the owner in fee sells part of his estate, the surrounding part being in the hands of his tenants for years or for life, he would have no right to exclude the purchaser from all access to his property. We think a right of way passes, but the only question is, whether it is a right of way of necessity across A B or C D. The jury found that A B was the most convenient way for ordinary farm purposes, and of that there is no doubt, for at the time Mr. Cooper was joint owner of Gorman's farm and of C D, this was the way used, therefore there is no doubt that if, at the time of the sale, Cooper was occupier in possession of the three closes, that though A B came by a different title than C D, still, A B being the most convenient in use at the time, the law would have reserved it as a way of necessity, had there been no special facts in the case. Then, are there any special facts to alter these rights? I allude to the fact, that Gorman, being owner, could insist on the use of A B as against Cooper. After giving the case our best consideration, we think that makes no difference—the way of necessity is created by present use and not by the abstract right of the occupier, independent of use. Major Wills purchased all the lauds in 1848, and in 1851 Maypothor's lease expired, and came into Wills's possession, who then shut up the way C D, leaving A B open, and it was used up to the time of the trespass. We think the party using A B cannot be a trespasser as against the purchaser, and therefore we think the defendant is entitled to judgment, and allow the cause shown.

Cause allowed with costs.

COURT OF EXCHEQUER.

HILARY TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

PRAEGER AND ANOTHER v. SHAW.—Jan. 13.

Oral slander—Privileged communication—Demurrer.

In defence to an action for oral slander the defendant, in pleading that the words complained of were privileged, must state not only that on the occasion they were spoken they were used for a privileged purpose, but also show that at the time the words were spoken and published he believed them to be true, and spoke and published them bona fide and honestly, and upon a lawful occasion, and he must likewise expressly negative the existence of malice at the time of speaking the words, and show that it was his interest or duty to make the communication.

THIS was an action for oral slander.—The summons and plaint stated that the plaintiffs, before and at the time of speaking the slanderous words, had been linen-yarn merchants, and still exercised and carried on the said trade or business, and were daily and honestly acquiring profits thereby, and maintained good credit with all the merchants and others with whom they were accustomed to have transactions in the course of their said business, yet the defendant, with the view to injure the said

plaintiffs in their said business, and to destroy their good credit with all the said merchants, and all those with whom they were in the habit of dealing, and to cause it to be believed that the plaintiffs were insolvent in their circumstances, in a certain discourse which the defendant had of and concerning the plaintiffs, and of and concerning them in their trade and business, falsely and maliciously spoke and published of and concerning the plaintiffs, and of and concerning the plaintiffs in their said trade and business, in the words following: "I (the defendant) would not take the bill of Praeger & Company (meaning the plaintiffs) for £20, nor would I credit them to that amount. A party had offered me two or three days ago a commission of 2½ per cent. if I would endorse as a guarantee the acceptance of Praeger & Company, but I considered them so bad a house that I declined, though it would have been an easy way to make a little money if they had been solvent;" (meaning thereby that the plaintiffs were in insolvent circumstances, and not worthy to be trusted in their business, and not able to meet their engagements, and on the brink of bankruptcy;) and, in a further discourse, he falsely and maliciously spoke of and published of the plaintiffs the words following, that is to say: "The firm of Messrs. R. and J. B., of Belfast, had sent to the stores of Praeger & Company, and carted away the yarns that had been sold by them to Praeger & Company, say five or six loads, back to B. & Company's own stores. They had been doing a large business with Praeger & Company, but had become afraid of their stability, and had thus got back the yarns sold by them, to save themselves from loss;" (meaning thereby, &c. &c.) and in a further discourse which the defendant had concerning the plaintiffs in their said trade and business, the defendant falsely and maliciously spoke and published of the plaintiffs the words following, that is to say: "It is the general opinion that Praeger & Company will go down in a few days, and I think they are clever people to have remained up so long;" (meaning thereby, &c.) by means of which slanderous words the plaintiffs have suffered in their credit and reputation, and are believed to be incapable of paying their just debts, and thereby also divers merchants, to whom the solvency of the plaintiffs were theretofore known, and also had theretofore trusted the plaintiffs in the way of their trade, and who otherwise would have continued to trust and deal with the plaintiffs, have, since the said speaking and publishing by the defendant, wholly refused to deal with or give credit to the said plaintiffs, and thereby also one T. M.M., and one A. H., and the firm of R. & Co., said persons being respectively linen-yarn merchants, and with whom respectively the plaintiffs were in good credit and repute, and who respectively supplied goods to the plaintiffs on all occasions on two and four months' credit, have, since the said speaking and publishing, wholly refused to deal with the plaintiffs as they had theretofore done, and wholly refused to sell any goods unless the plaintiffs would, before delivery, pay the price thereof in cash, and the plaintiffs, by means of the premises, have been

and are otherwise greatly injured in their credit as such traders, and the plaintiffs pray judgment, &c. To this the following defence was filed: "The defendant saith that the words were spoken by the defendant to one J. L., and to no other person, and that the same were not spoken maliciously by the defendant, but for a privileged purpose in the course of the transaction of business between the defendant and the said J. L., which rendered it proper for the defendant to use the words in the summons and plaint mentioned; saith that the said J. L. was, at the time of the speaking the words, a customer of the defendant, and of the defendant's partners, and indebted to them in a considerable sum of money, for goods theretofore supplied to him by defendant and his partners, and, on being applied to for payment, the said J. L. stated his inability to pay in consequence of the plaintiffs being indebted to him in a sum of money exceeding the sum of £600, whereupon the defendant, for the protection of himself and his partners' interest, spoke to the said J. L. the words mentioned, and, at the same time, apprized him that the same was intended as a private communication, and cautioned him against repeating them." To this defence the plaintiff had filed a demurrer on the ground that the same did not disclose any defence to the action good in substance, because the plaintiffs say that the words complained of are not by the said defence shown to have been privileged, or to have been used by the defendant on the said occasion for a privileged purpose, and because the defendant did not, by his said defence, state or show that when he spoke and published the said words he believed the same to be true, and spoke and published the same *bona fide*, and honestly, and upon a lawful occasion, and also that the said defence does not expressly show the absence of malice in the defendant when he spoke the words, and because it does not appear by the defence that the plaintiffs were required by L. to give him any further credit at the time the defendant spoke the words, or that L. then or at all stated that he was about to give the plaintiffs any further credit, or was applied to by them for such further credit.

W. J. O'Driscoll, (in support of the demurrer.)—The mere assertion that the words were not spoken maliciously is insufficient; that averment must be made concurrently with others, as for instance, that the words were spoken honestly and *bona fide*, and detailing the circumstances of the defence, and that the words were uttered on a lawful occasion. It must also be averred that such a relation existed between the parties holding the conversation as will warrant the use of the slanderous expression, and show that the disclosure of the statement complained of was necessary to guard the interest or credit of the one party or the other. Such an interest, as between traders, would render the communication justifiable if made on a lawful occasion. The defence in the present case is defective, as not being in accordance with the principles above laid down, and is shown to be insufficient by the authorities. In this case the plea is, that the words complained of "were spoken by the defendant to one J. L. and to no other person, and

were not spoken maliciously but for a privileged purpose, in the course of the transaction of business between the defendant and J. L., which rendered it proper for defendant to use the words." This is an insufficient defence. In the case of *Smith v. Thomas*, (2 Scott, 546,) which was an action of slander, a plea stating that the words were spoken in the course of a confidential communication to a person who had made inquiries respecting the solvency of the plaintiff, and that, at the time of speaking the words, the defendant believed them to be true, was held bad on demurrer; it should either expressly negative or state the communication to have been made honestly and *bona fide*, which would probably amount to an implied denial of malice, and Tyndal, C. J., in delivering judgment said: "with respect to the second plea it avers in substance that the words complained of were spoken in the course of a confidential communication between the defendant and a person who had made inquiries respecting the solvency and state of affairs of the plaintiff, whom the inquirer was about to trust in the course of his trade and business; and further, that at the time of speaking the words the defendant firmly believed the same and each of them to be true, and the argument is, that the defendant has not, by the allegation in his plea, sufficiently negated that the speaking of the words were accompanied with malice, in fact, so as to constitute a legal answer to the action." The plea is insufficient in law. The remarks of Tyndal, C. J., in pages 557-8, are most important in their bearing on the question. The defence must show that the party speaking the words had his own interest in peril. The reason given for speaking them, in the defence, is insufficient, as it was not for the purpose of saving himself or the other party from loss or fraud; the occasion here averred does not justify the words: an avowment of belief in their truth and of their utterance *bona fide* must concur with the lawful occasion. [*Pennefather, B.*—The question is, whether the occasion justified the statement made. *Greene, B.*—Just so; whether the words were used on a privileged occasion.] In the case of *Brooks v. Blanchard*, (3 Tyr. 844,) the plaintiff was an engineer to a railway company and superintended the works, but was discontinued by the company. The situation of civil engineer to another undertaking having subsequently become vacant, the plaintiff became a candidate. The defendant wrote to A introducing one B to him as a candidate. One L was elected, and his election was announced to the defendant by a letter, and the defendant replied stating "that the plaintiff whilst he had the superintendence of the railway, had by his mismanagement or ignorance cost the company a considerable sum of money." There was a subsequent vacancy in the office of engineer to the other undertaking, and the plaintiff again became a candidate, but was rejected by reason of the letter having been shown to the director. It was held that as the letter containing the libel was written by the defendant after the first election had ended and before the second was contemplated without his having been called on to give an opinion about the plaintiff, it was not a privileged communication. Lord Lyndhurst there says, "It is not

merely because a communication is confidential that it is privileged, if it is volunteered by the party making it."

Andrew Vance, with whom was *H. Joy, Q. C.*, contra.—The only question is, whether the defence sufficiently shows that the words were spoken on an occasion which the court considers privileged. Communications between traders where there exists—*prima facie*—an interest for mutual advantage have, from the earliest times, been considered privileged. If this and similar cases be not privileged occasions there is not a merchant in the country safe from an action for slander. If the statement be made by the defendant confidentially, and under an impression that it was well-founded, no action can be maintained. Buller's *Nisi Prius*, 8, n. b. If the statement be really believed to be true at the time it is made the defendant cannot be said to have acted maliciously, and with an intent to defame the plaintiff. *McDougall v. Claridge*, (1 Camp. 267-9.) The defence substantially states that the defendant applied to L for a balance of an account due to him, and L replied that he was owed by the plaintiffs a large sum, and therefore it was the interest of the defendant to warn L, quickly to recover the sum due to him by plaintiffs, in order that L might be enabled to repay him (the defendant) the amount of the account, and also to warn L not further to trust the plaintiffs. [*Pennefather, B.*—But L had already trusted the plaintiffs, and therefore that could not be remedied, besides he was not about to trust them further. As to the interest between them, all the world were as much interested in knowing defendant's opinion of the plaintiffs as L was. On what ground do you put the privilege?] The defence here discloses the fact that it was the interest of the defendant to apprise L in order that there might be no further dealings with the plaintiffs, and for the protection of the defendant himself and his partner. [*Greene, B.*—You do not state in your defence any facts whence it can be inferred that it was for L's interest that you should make the communication. You should show that it was the defendant's interest or duty to make the communication.] In slander or libel "privileged communication" is comprehended in all cases of communication made *bona fide* in pursuance of a duty, or with a fair and reasonable purpose of protecting the interest of the party uttering the defamatory matter. *Somerville v. Hawkins*, (10 M. G. & S. 583, 589, 590.) [*Pennefather, B.*—I must say that I think that case carries the law to its utmost extent.] In the present case where the communication arose between two persons, circumstanced as defendant and L were, it was defendant's duty to make the statement. [*Pennefather, B.*—How was it defendant's duty or interest to protect L? If you had stated that L was about to trust the plaintiffs, and defendant felt it to be his interest to protect his own debt by warning L, you would then be justified.] The judgment of Maule, J. in *Warman v. Ash*, (13 M. G. & S. 845,) is worth noting. By the courts in England the area of privileged communications has been much extended of late years; since the case of *Puttison v. Jones*, (8 B. & C. 578,) the law is settled.

Previous inquiry is unnecessary if the occasion be privileged. [*Pennefather, B.*—If the law says there is a duty, no previous inquiry is necessary.] The defendant here, who was a trader, is conversing with L, one of his customers, who owed him money, who had certain of his goods, and who had his money, at the very time, locked up in the hands of the plaintiffs; an interest at once arises to induce L to obtain his money from the plaintiffs, by apprizing L of the circumstances of the plaintiffs. This information would be likely to prove a strong inducement to cause L to adopt active measures to get his money from the plaintiffs. [*Pennefather, B.*—But that object might be completely obtained by defendant's stating that if L did not pay him at once he would proceed against him, and he ought not have endeavored to obtain his object by saying what he did.] [Counsel cited *Blackham v. Pugh*, (2 M. G. & S. 611-618,) and *Tuson v. Evans*, (12 A. & E. 783.)] [*Pennefather, B.*—In that case there was a direct interest.] If the money which ought to have been paid to my client, and which L owed, was in the hands of the plaintiffs there was a direct interest to make the communication. [*Pennefather, B.*—There is no such allegation in the pleading. If he had such a fund the defendant had means of coming at it other than the use of slanderous language. We agree that if he had had either a duty or an interest in making it, the communication was privileged, but, in this case, there was neither.]

*Demurrer allowed.**

[*Coram GREENE. B.*]

DAVIS v. REEVES.—Jan. 15.

Oral slander—Liberty to plead double matter.

The court will grant an application, in an action for oral slander, to plead first, that defendant did not compose and publish the words; secondly, that he did not compose and publish them maliciously, or in a defamatory sense; thirdly, that he was privileged in communicating them to his client, believing in their truth; and fourthly, that from plaintiff's acts he was led to believe in the truth of the statement.

Wm. Duggan for defendant, moved in this case—which was an action for libel and oral slander.—The summons and plaint stated that the defendant contriving and maliciously intending to injure the plaintiff in his character and credit as a merchant, and trader, and to cause it to be believed that the plaintiff was an absconding debtor, and had left the kingdom to go to Australia, with the view of delaying and defrauding his creditors, on the 11th day of October, 1854, at Liverpool, in England, falsely, wickedly, and maliciously composed, wrote and published, and caused and procured to be transmitted by means of a certain engine or instrument, called a Magnetic Telegraph, from Liverpool to the City of Dublin, a certain false, scandalous, libellous, and defamatory statement and message concerning the

plaintiff and his business as a merchant and trader in the words following, that is to say, "Mr. Saml. Davis, glass dealer, Abbey-street, Dublin, sailed for Australia by 'The Champion of the Seas,'" whereby the plaintiff was greatly damaged, &c. The second count was for oral slander, and stated that in a certain discourse which defendant had on the 11th of October, 1854, with one W. B., and in the hearing of divers subjects of the realm, he falsely and maliciously spoke and published of the plaintiff and concerning his business, "I saw Davis on board of the 'Champion of the Seas' in the Mersey. He told me that he was about to go to Australia. I remonstrated with him on the injustice of his evading his creditors, when he said that one or two hundred pounds would settle that," and "I was on board the 'Champion of the Seas' when she was about to proceed to sea, and I heard the names of the passengers called over when Davis in my presence answered to a false name." Counsel applied for liberty to file four pleas to the first count, firstly, that the defendant did not compose, write and publish, or transmit the statement and message or words in said first count mentioned; secondly, that he did not maliciously or in a defamatory sense compose, &c. the statement, &c.; thirdly, that defendant transmitted the message to one W. B. as his client in good faith, believing same to be true; fourthly, that defendant was from plaintiff's acts led to believe that the statement and message was true, and that he sent same, believing it to be true, to his client. Counsel sought also for liberty to plead three pleas to the second count: firstly, that defendant did not speak and publish the words in second count mentioned; secondly, that he did not speak and publish the same maliciously or in a defamatory sense; and thirdly, that as to the words in this defence mentioned, defendant spoke the words because they were true. The motion was grounded on an affidavit of defendant's attorney, that he was advised and believed that he had just grounds to traverse the several matters in the summons and plaint, and that the several matters proposed to be pleaded to the said summons and plaint by way of confession and avoidance are respectively true in substance and in fact. Counsel cited *Wilson v. Armstrong*, (7 Ir. Jur. 46.)

PER CURIAM.—Let the defendant have liberty to plead as required.

Rule accordingly.

O'LOUGHLIN v. EYRE.—Jan. 15.

Scire Facias—Security for Costs—Affidavit.

In a motion by defendant to stay proceedings until plaintiff—residing out of the jurisdiction—give security for costs, after plea pleaded, the affidavit must state explicitly and circumstantially that he has a good defence on the merits.

W. Duggan, for defendant, moved that the plaintiff do stay proceedings until he should give security for costs. This was a *scire facias* to revive a judgment. The defendant had pleaded payment. Counsel moved on the affidavit of the defendant, who stated that he did not owe any money on foot of the

* Pigot, C. B. was absent.

judgment, or otherwise, to the plaintiff, and that he had a just and legal defence on the merits against the proceedings to revive the judgment; that deponent had ascertained, that since the filing of deponent's plea in the cause, the plaintiff had left Ireland and was resident in Liverpool, out of the jurisdiction, and that he purposed to reside there permanently, and that plaintiff's father also informed deponent that the plaintiff had not any property whatever in Ireland.

Charles Shaw contra.—The affidavit stating that the defendant has a good defence on the merits is sufficient *before* plea pleaded, inasmuch as the court will not oblige defendant to disclose his ground of defence. It is consistent with the affidavit that the defendant has no defence on the pleadings, though he might have a defence on the merits, if it were properly pleaded. The only defence open to defendant is that of payment, and the affidavit should state that he had paid the money, giving both time and place.

PER CURIAM.—The affidavit should disclose facts sufficient to enable the court to judge that the defendant has a good defence on the merits, and especially as the application was made after plea pleaded. Is there any authority to show that an affidavit like the present one is sufficient after plea pleaded?

No rule on the motion, defendant to pay costs.

GUINANE v. THE HOPE INSURANCE COMPANY.

Amendment of Postea.

The court will confirm the amendment by the judge, who tried the case, of an error in the postea.

Charles Barry, on behalf of the defendants, applied for an order that the *postea* in this case might be amended under the following circumstances:—It was an action on a policy of insurance. The defendants had pleaded several defences, each going to the whole cause of action. The plaintiff, by leave of the court, replied, and demurred to some of the pleas. The issues directed the jury, if necessary, to assess contingent damages. At the trial the jury found for the plaintiff on all the defences save one, which was one of those demurred to, and on that defence they found for the defendants. The judge, Mr. Sergeant Howley, therefore directed the jury to find a general verdict for the defendants, and to assess contingent damages to meet the event of judgment being given for the plaintiff on the demurrer to the defence on which they had found for the defendants. This was accordingly done, but the Registrar, by mistake, returned the *postea* in the ordinary form of an absolute verdict, with damages. On the argument of the demurrer the court held the defence to be bad, and gave judgment for the plaintiff. A motion was also made by the plaintiff to set aside the verdict, and, pursuant to leave reserved by the judge, to enter a verdict for the plaintiff, or to allow the plaintiff to enter up judgment notwithstanding the finding. The court refused to interfere with the verdict, but gave liberty to the plain-

tiff to enter up judgment notwithstanding the finding of the jury. The defendants, being desirous to bring the case into the Court of Error, are proceeding to have the judgment made up, but the *postea*, being in form an absolute verdict for the plaintiff, may create embarrassment on the face of the record, and it was, therefore, necessary to have it amended by making it conformable with the proceedings at the trial. A very recent case, *Anon.* (2 Ir. Com. Law Rep. 119,) decides that an amendment of this kind in the *postea* is the peculiar province of the judge who tried the case. Application was accordingly made to Mr. Sergeant Howley, who, with his own hand, dictated the proper form of *postea*, and the amendment necessary to be made. Counsel now asked the court to sanction the amendments directed by the sergeant. The form of the *postea* might likewise affect the costs.

PER CURIAM.—That the judge who tried the case has certified the propriety of this amendment is sufficient to warrant the order sought for; therefore let the *postea* be amended.

Rule accordingly.

BROWN AND WIFE v. BROWN.—Jan. 13.

Action for assault—Lodgment of money in court—Common Law Procedure Act.

The court will set aside a plea to an action for assault, wherein the defendant relies upon the payment of money into court, and will give liberty to the plaintiff to mark judgment, as if no defence were filed, inasmuch as such a plea is irregular under the provisions of the 5th section of the Common Law Procedure Act.

THIS was an action for assaulting, beating, insulting, and annoying plaintiff's wife, and also for assaulting the plaintiff himself; the defendant had taken defence, and pleaded as to the first cause of action, that he did not assault the said plaintiff, Mary Browne; "and as to the assault in the plaint stated to have been made on the said plaintiff, Daniel Brown, the said defendant admits the same, and has paid into court the sum of twenty shillings, in satisfaction of the damages sustained thereby, and therefore," &c.

J. E. Walsh, for the plaintiff, moved that the defence pleaded by the defendant to the second cause of action in the plaint mentioned, and by which the defendant relies upon the payment of money into court, shall be set aside, and that the plaintiff shall be at liberty to mark judgment as to the second cause of action, or otherwise proceed as if no defence were filed thereto, on the ground that the action was not one in which money could be paid into court; and that the said defence, as regards the said second cause of action, is irregular in relying on such payment. [Counsel relied on the 75th section of the Common Law Procedure Amendment (Ireland) Act.] There was no affidavit of the facts.

M. Donogh, Q. C. (with whom was *Simple*), contra, contended that the court could not on this motion now deal with the plea, for *non constat* but

that the defendant is entitled, as a justice of the peace, to lodge money in court, for there is nothing on the record to disclose the character of the defendant. Counsel cited *Aston v. Parker*, (15 M. & W. 385). [*Walsh*—The defendant is described in the record as a pawnbroker; the plaintiff relies on the authority of the very case cited on the other side]. The motion is unnecessary, for the parties must, notwithstanding, go to trial on the first issue. It is not necessary to set out on the record that the defendant is a justice of the peace. The plaintiff can only obtain an interlocutory judgment, and must go before the sheriff to assess damages. Under the peculiar circumstances of the case—an action between relatives—the motion ought to be refused.

GREENE, B.—The case in 15 M. and W. is plainly distinguishable from, and is no authority to govern this case. If this defence were to be allowed by the court to stand, there would be no meaning in the exceptions made in the 75th section; the court would be virtually repealing the section. The defence must be set aside with costs; the defendant, however, to be at liberty to plead within two days.

Rule accordingly.

CONSOLIDATED CHAMBER.

Coram BALL, J.

REDMOND v. CRAWFORD.—Dec. 15.

Judgment—Satisfaction—Order of the Court to enter up a Memorandum of Satisfaction.—16 & 17 Vic. c. 113, s. 144.

When a judgment had been given as a collateral security with a mortgage, and the mortgage had been paid off without the judgment being satisfied, there being now no legal personal representative of the conusee of the judgment, the court ordered a memorandum of satisfaction of the judgment on the record to be entered up by the Master.

THIS was a motion for an order of the court to enter up satisfaction of a judgment upon the record, pursuant to the Common Law Procedure Act.*

* 16 17 Vic., c. 113, sec. 144.—“It shall be lawful for the court or a judge to order a memorandum of satisfaction to be entered upon the record of any judgment, judgment rolls, or judgment books, if it shall clearly appear to said court or judge, that the debt or damage for which the said judgment was obtained have been fully satisfied and discharged.”

It appeared from the affidavit that the judgment was of Easter Term, 1847, for the sum of £3200, and that it had been entered up on a bond of 1846 that this bond had been given as a security collateral with a mortgage bearing equal date therewith. The bond had been legally assigned to a Miss Bailie, and by the recital in the deed of assignment, it appeared that it had been intended to assign the judgment also, but from some oversight this had not been done. The mortgaged premises had been lately sold by the representative of the mortgagor and the consor of the judgment, and the entire amount of the mortgage and collateral judgment had been paid off out of the proceeds of the sale. And now, in order to make out a title to the premises, it was necessary to have the judgment satisfied upon the record, but owing to the death of the original conusee abroad, and there being no legal personal representative in this country, there was no person who could legally execute a warrant to satisfy the judgment.

T. K. Lowry now moved for an order under the 144th section of the Common Law Procedure Act, directing a memorandum of satisfaction to be entered on the record of the judgment, and submitted that a clear case had been made out, that the amount of judgment had been paid off, and that there was no one who could be got legally to execute the warrant to satisfy. It was a proper case for the court to exercise the jurisdiction given them by the 144th section.

J. Ball.—I think a sufficient case has been made out for exercising the authority of the court under the act, so let the Master enter a memorandum of satisfaction upon the record of the judgment.

“On motion of Mr. Thomas K. Lowry of counsel, for Margaret Bailie, the equitable assignee of the plaintiff, who moves that the Master of this court be at liberty to enter satisfaction upon the record of the judgment in this cause, and on hearing affidavits of the said Margaret Bailie read. By the Right Honourable Judge Ball, it is ordered that the Master of this court be at liberty to enter a memorandum of satisfaction upon the record of the judgment entered in this cause in Easter Term, 1847, in the penal sum of £3200.

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at Law.]

HAMILTON v. SYNGE, SIMPSON v. SYNGE.
November 22 and 28, 1854.*Creditors' suit—Salvage costs—Contribution—
House of Lords' costs—Taxation.*

The owner of certain lands by a marriage settlement granted them in trust, among others, to pay certain debts which were set out in a schedule attached thereto. The creditors, having instituted a suit, obtained a decree in Chancery, establishing their rights. From this there was an appeal to the House of Lords, which was resisted by the principal creditor only, and their Lordships differing in opinion, the decree below was affirmed, but no order was made as to the costs. It appeared also that if the appeal had succeeded, none of the schedule creditors would have obtained anything on foot of their demands. Held, that each of the creditors in the schedule to the deed should contribute ratably to the costs of resisting the appeal. The proper course for seeking the costs against the defendant is to set down the cause for hearing before the Chancellor upon the House of Lords' order.

An application may be made for an order to the Tasing Master here to tax House of Lords' costs.

By a marriage settlement of the 17th of April, 1818, Francis Synge, upon the marriage of his son John Synge, put his estates in settlement, and charged the same with certain bond and other debts, which were set out in a schedule annexed thereto. In 1848 a bill was filed by the owner of certain bonds therein mentioned, praying that these bonds might be declared to be the same bonds as were referred to in a schedule to the indenture of the 17th of April, 1818, annexed, and that said bonds might be decreed to be well charged by said indenture and schedule on the lands in the pleadings mentioned, also praying an account of the sum due on foot of the bonds, and an account of the real and personal estate of Francis Synge and John Synge, now both deceased; also an account of the charges and incumbrances affecting the lands so charged by the settlement; also an account of the mortgage and other debts affecting the real and personal estate of John Synge, deceased, at the time of his death, and praying that the trust of the will of the said John Synge might be carried into execution, and that the bonds aforesaid might be declared to form part of those directed by the will to be paid; and for a sale of the lands and a payment thereof of all the demands affecting the same, plaintiff offering to redeem all such incumbrances as the court should think right. In June, 1849, a decree was pronounced by the Lord Chancellor, declaring that the bonds were the same as those contained in the schedule to the indenture of settlement of April, 1818, and that John Synge took the lands therein comprised, subject to the payment of interest on said bonds, but reserving the question as to the principal sums secured by the bonds; also ordering an account to be taken of the real and personal estate of Francis Synge and John Synge, and an account of the charges and incumbrances affecting the trust

lands comprised in the settlement of April, 1818. The several schedule creditors, whose demands were reported, proved under the decree. The lands were subsequently sold in the Incumbered Estates Court, and the most part of them were purchased by the owner, F. Synge. The purchase-money was insufficient by £30,000 to pay the incumbrances. A petition of appeal from the Lord Chancellor's decree was then presented in the House of Lords by the defendants, and it was opposed only by the Rev. J. E. H. Simpson, the owner of the two bonds. When the matter came before the House of Lords the Lord Chancellor was of opinion that the decree should be reversed, and Lord St. Leonards was for affirming it. The result was that the decree of the Lord Chancellor below was affirmed, but no order was made as to costs. The draft allocation report was now filed in the Master's office, by which the funds were allocated, as stated in the schedule.

Hughes, Q. C., for the plaintiff in the second cause, the Rev. J. E. H. Simpson, now moved for an order that the Master in proceeding under the allocation orders should allocate to the plaintiff in the second cause, out of the several amounts now due to the schedule creditors as in the schedule annexed to the notice, the several sums therein mentioned, (that is, a proportionate part of each of said sums so allocated,) in part discharge of the sum of £750, being the amount of the costs paid by the said plaintiff in the defence of the appeal lodged by the defendants, Marcus Sinnott and others, in the House of Lords against the decree of the 15th of June, 1849, said several sums so to be contributed amounting in the whole to £524 18s. 3d., the said sum of £750 being a salvage payment in respect of the demands included in the schedule to the deed of 1818. First, when a plaintiff puts an estate in the way of being administered, he is entitled to his costs in the first instance. *Fisher v. King*, (11 Ir. Eq. Rep. 460); *O'Dowda v. O'Dowda*, (Id. 464.) [*Master of the Rolls.*—The distinction is, that such costs are given only in the case of personal estate.] In the latter case Lord Chancellor Brady said, "it appeared to him that the result of all the authorities was, that in a case, such as the present, though not strictly an administration suit, the plaintiff was entitled to his costs in the first instance, where he puts a personal estate into a train of administration, and where there is no doubt that the plaintiff's exertions would enable the personal estate to be ultimately realised." [*Master of the Rolls.*—In suits concerning real estate the costs always go with the demand, unless in the case of salvage costs.] *Stanton v. Hasfield*, (1 Keene, 358,) decides that the extra costs of the plaintiff will be directed to be paid *pro rata* by the other creditors, although there is a surplus fund. The suit was there instituted to set aside a fraudulent deed which stood in the way of all the creditors, and it was considered just that the creditors who derived the benefit of the suit should contribute to the extra cost incurred in setting aside the deed. That was a case similar to the present, and it was cited and approved of in the cases of *Newby v. Drew*, (10 I. E. R. 58); *Jameson v. Ferrar*, (3 I. E. R. 513); *Corporation of Dublin*

v. the Attorney-General (9 Bligh, N. S., 395); *O'Ferrall v. M'Cann*, (1 F. and K. 635.)

La Touche for the Governors of Mercer's Hospital.

W. Smith for other creditors opposed the motion.

Otway, Q. C., (with *Hughes, Q. C.*) in reply, cited *Wedgewood v. Adams*, where the Master of the Rolls said, "If, through the exertions of a plaintiff, the court is enabled to distribute a fund or make a decree of the rights, if necessary, for an administration, then, although plaintiff may fail in his claim, the court will not permit the other parties to carry off the fruit of his exertions without defraying his costs out of the fund." [They cited *Wedgewood v. Adams*, (8 Beav. 103); *Nelson v. Brady*, (41 E. R. 359); *Kelly v. Kelly*, (1 I. E. R. 319.)]

MASTER OF THE ROLLS.—The notice in this case has not asked for the costs against the respondent, Francis Synge; but if I thought the parties entitled to this, I would allow the notice to be amended. As to this question, then, the case cited from 9th Bligh's Reports has no application, because there an interlocutory decree had been made reserving the question of costs; the meaning of that was not that the question of costs should go back to them. Sir W. M'Mahon always held that when a final decree was given it decided that the party who obtained it was entitled to costs, but there is a question whether such a rule included House of Lords' costs. The order of the House of Lords here said nothing about the question of costs, therefore I do not see how that rule bears on this case. Under the House of Lords' order the decree was affirmed, then either of two consequences followed, either the post costs were payable under the original decree or they were not, if they were carried by the original decree then it is not necessary to make any decision about them; but if not, and I think that decree did not carry post costs, and there is nothing said in the House of Lords' order about costs, then the plaintiff should set down the cause to be heard upon the House of Lords' order, and this would have brought the case within the principle of the case of *O'Ferrall v. M'Cann*, (1 Fl. & Kelly, 635); but if, as I say, he is already entitled to the costs under the first decree then he need not come here, for the Taxing Master will give them without any further order. I have not the means of deciding that part of the motion here, not knowing anything about the case. I have no authority to decide it. If the case was set down before the Lord Chancellor he may hold that the respondent is entitled to the costs he has incurred in resisting this appeal. I do not offer any opinion upon it. The Lord Chancellor might consider it then came within the case in 9th Bligh. As to the application made by the notice—viz., for an order on the creditors to contribute, the parties have a right to come here, for it is a matter collateral to the suit, and I am bound to decide it. Justice seems in support of the application; for on the appeal to the House of Lords, it appears that the Lord Chancellor of England was of opinion that the decree should be affirmed, but that Lord St. Leonards thought it should be reversed, and he gives as his reasons for this opinion—first, that the settlement of 1818 was a mere arrangement made

by Mr. Synge and his son for the payment of the debts set out in the schedule to the deed, but that there was no contract with the creditors, nor any communication with them, and that therefore they never could take advantage of it, nor enforce the fulfilment of such arrangement; that for the creditors to take any right under that deed would be contrary to the well-established principle, "that a trust created for the creditors, without bargain or communication with them, cannot be enforced by them;" 2nd, he thought it was an attempt to bring the case within the case of *Garrard v. Lord Lauderdale*, and *La Touche v. Lord Lucan*, from which it was clearly distinguishable, because, he says, no distinct act of dealing with the creditors was shown, such as should have taken place in order to entitle the creditors to enforce the trusts. Now from this it is clear, that if the appeal to the House of Lords had been successful, neither Mr. Simpson nor the other creditors would have obtained a farthing from the estate. It is therefore only reasonable, that all the parties who obtained a benefit from the resisting of the appeal should contribute rateably to the costs incurred in resisting it. Such being the abstract justice of the case, I must consider whether the law goes with it. In the case of real estate the rule is settled, that the puisne creditor gets nothing if the fund is deficient, but there is an exception to this in the case of a sale, for the puisne creditor is there allowed the costs of the sale; but in the case of personal estate it is different, because the fund is of a perishable nature. The case of *Stanton v. Hatfield*, (1 Keene,) seems to be an authority for granting you the order, that all the creditors pay their rateable proportions of the costs. I will consider the case, and if I see that I have a sufficiently established legal principle to go upon, will grant this part of your application.

Nov. 28.—His Honor now delivered a further written judgment, in which, after stating the facts of the case, he declared his decision in substance the same as given above, holding that the plaintiffs in the second matter were clearly entitled to be reimbursed so much of the costs of the appeal, and that the schedule creditors should contribute to the payment thereof in proportion to their demands; he stated that the case of the *Corp. of Dublin v. Attor. Gen.* (9 Bligh, 395) did not apply, but that the principle of the case of *Stanton v. Hatfield*, (1 Keene, 358) was applicable. His Honor also referred for a proper exposition of the doctrine, to the judgment of Lord St. Leonards in the case of *Nelson v. Brady*, (2 Dr. & War. 146,) where he says, "I am clearly of opinion that whatever has been beneficial to the plaintiff in the original cause must be paid for, I do not mean the common costs of working the cause, but the costs of such acts as were plainly for his benefit; for instance, counsel's opinion on the abstract of title, the Master's report approving of conditions of sale, &c., all such are to be repaid, for all these costs must have been incurred by the other party. I draw a distinction between those proceedings in the cause as a cause, and those steps which were necessary for the working of the cause beneficially for the other side." [A question here arose

as to whether the Taxing Masters here would tax House of Lords costs, when Mr. Adair, as *amicus curiae*, mentioned the case of *Ludlow v. Kingdom*, (11 Beav. 401,) where the three Taxing Masters in England had given their certificate, that "under the common order to tax a solicitor's bill, the Taxing Masters would tax a bill for Parliamentary business upon the scale of Parliamentary allowances." His Honor then said, that he would make it part of his order that any of the creditors might apply for an order to the Taxing Master to have his costs taxed.

The following order was made :

It is ordered by the Right Hon. the Master of the Rolls that J. J. Murphy, the Master in these causes in proceedings under the allocation orders, do allocate to said plaintiff, the Rev. J. E. H. Simpson, out of the several amounts now due to the schedule creditors, as in the schedule hereunto annexed mentioned, the several sums therein also mentioned, in part discharge of the sum of £750, being the amount of the costs paid by the plaintiff in defence of the appeal lodged by the defendant, M. Synnott, and others in the House of Lords against the decree of 15th of June, 1849, said several sums to be contributed amounting in the whole to the sum of £524 18s. 3d., the said sum of £750 being a salvage payment in respect of the demands included in the schedule to the deeds bearing date the 17th of April, 1818. This order to be without prejudice to any application the said several parties or any of them may make to have said costs taxed, or the proper amount payable ascertained, and let any of such parties, if so advised, be at liberty to serve notice during the present sittings for such purpose."

SCHEDULE TO WHICH THE FOREGOING ORDER REFERS.

Names of Schedule Creditors.	Amount due to them.			Sums to be contributed by each creditor therout, being 1s. in the pound on their respective debts, as per said consent.		
Francis Synge.....	7111	4	7	355	11	3
Mercer's Hospital....	895	2	1	44	15	0
W. Sneyd, R. Stuart & J. Hardcastle..	2205	16	4	110	5	9
E. Johnston, Admx. of S. Blundel.....	206	5	8	14	6	3
	10,498	8	8	524	18	3*
	2758	4	1†	225	1	9
	£13,256	12	9	£750	0	0

MARTIN v. COOPER.—Jan. 15.

Filing further Affidavits—Costs of motion.

Petitioner, after having set down the cause for hearing, and when it was in the Chancellor's list of the day, applied for leave to file further affidavits. Leave was given to file them, petitioner to

pay £4, costs of the motion, and this to be without prejudice to the respondent applying to the Chancellor for the costs of the day.

THIS was an application, on behalf of petitioner, for leave to file additional affidavits, although the cause was in the Chancellor's list, as there were facts which it was necessary to bring before the court before the hearing of the cause.

Hemphill applied for the costs of the motion, as the petitioner had set down the cause for hearing himself, which he should not have done unless he was prepared to go to a hearing. The case is actually in the list of the Chancellor for this day, and respondent is anxious to have it heard, and will be considerably delayed by this application being now granted. If ever there will be a case for giving costs of a motion for liberty to file affidavits, it is this one.

MASTER OF THE ROLLS.—The petitioner is so entirely in default in this case that I must make him pay the costs of this motion, and as the cause is in the Chancellor's list, and must be postponed, this order is not to prevent the respondent asking the Lord Chancellor for the costs of the day.

The following order was made :

"Be it so, filing same on or before to-morrow, and let the petitioner pay to the respondent £4 for the costs of this motion; and it appearing that the cause is in the Lord Chancellor's list for to-day, this order to be without prejudice to the respondent applying to the Lord Chancellor for the costs of the day; and let the respondent, if so advised, be at liberty to file affidavits in reply to said affidavits to be filed on behalf of petitioner, within fourteen days from the date of this order."

COURT OF QUEEN'S BENCH.

HILARY TERM, 1855.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

EYRE v. BALDWIN.—Jan. 18.

Practice—Rescinding order for Security for Costs—Return of Plaintiff within Jurisdiction.

An order had been granted that A, the plaintiff in an action, who was then absent in America, should give security for costs, and in the meantime that the proceedings should be stayed. A subsequently returned, and no security having in the meantime been given, applied to the court to rescind the order in question, inasmuch as his absence had been only temporary; that he was now residing here with his family, which had never quitted Ireland; that he did not return to get rid of the order, and that he had no intention of leaving Ireland. His affidavit was silent upon the question of merits, and the affidavit of the defendant in reply sought to establish that the cause of action was not a just one. The court, without entering into the latter question, granted the application upon payment by the plaintiff of the costs of the motion for security for costs, and of the present one.

Chatterton moved on behalf of the plaintiff, who had, by an order of the court dated 10th May, 1854,

* Sums to be allocated to petitioner Simpson.

† Proportion to be borne by Rev. J. E. H. Simpson, being 1s. 9d. in the pound.

been ordered to give security for costs, that the said order should be rescinded, and that the plaintiff be allowed to proceed with said action as if said order had never been made upon the grounds stated in plaintiff's affidavit. By that it appeared that the order for security for costs had been made by reason of the plaintiff being then resident in America, out of the jurisdiction of the court; that his absence from Ireland was only temporary, having left his wife and family in Ireland; that since the making of the order plaintiff had returned to this country, and had been for several months past residing with his family at Borrisokane, in the County of Tipperary, and that he did not return to this country in consequence of said order, or to get rid of its effects, but in the ordinary course of his business, and that he had no intention whatever of leaving Ireland. This affidavit on the part of the plaintiff was met by another by defendant, stating his belief as to the embarrassed circumstances of the plaintiff, and alleging that the claim for rent for which the action was brought was fully countervoided by a previous loan to the plaintiff by him, and also generally swearing to merits. It did not, however, controvert the facts stated in plaintiff's affidavit. Counsel submitted, that upon the uncontroverted statement of facts in the plaintiff's affidavit, the motion should be granted.

J. E. Walsh, and F. Falkiner contra.—The fact of the plaintiff having returned within the jurisdiction is no reason for setting aside the former order. *Badvall v. Haylay*, (4 M. and W. 534). [*Perrin, J.*—The affidavit here states that the plaintiff's absence was merely temporary]. [*Moore, J.*—In the case which you cite, security for costs had actually been given] The party who has not complied with the order of the court should not be in a more favourable position than one who has. We have in our affidavit not only deposed to merits, but shown a case of oppression on the other side, unless the mere naked fact of a party coming back is sufficient to induce the court to rescind the former order. [*Crampton, J.*—If the plaintiff returned for the purpose of residence, should the court hold him still bound?] All that he states in his affidavit is, that he does not intend to go away again. In *Woodley v. Woodley*, (3 Ir. L. R. 86), the defendant stated in his affidavit that he had not meant to go away permanently; yet there the court refused to set aside the order for security. It does not appear that security had already been given in that case. [*Moore, J.*—I remember that there the order sought for was refused because the party had come back, for the purpose of getting rid of the former rule.] The court ought in making an order like the present to require two things: first, a just cause of action; and secondly, an assurance that the protection of the former order is no longer requisite. The petitioner's case here is deficient in both these points, for it appears not only that his case is destitute of merits but it is not stated in his affidavit that he means to reside permanently, or at least during the suit, within the jurisdiction. He merely deposes to the fact of his intention to do so, but that may be true of the present time and he may change his mind hereafter.

Chatterton replied.

PER CURIAM.—The order sought must be granted, but it must be upon payment of costs of the former motion and of this present application.

Rule accordingly.

REG. v. THOMPSON.—Jan. 19.

Certiorari—Excise Prosecution—Appeal from dismissal of Complaint—Crown Practice—7 & 8 Geo. 4, c. 53.

In a prosecution by information before justices at the petty sessions of the borough of L, for the recovery of penalties for an alleged breach of the excise laws, the magistrates dismissed the complaint, and an appeal was taken on the part of the Crown against the adjudication, pursuant to 7 & 8 Geo. 4, c. 53, ss. 82, 83. The Recorder of L, before whom the appeal came on for hearing, refused to entertain it on account of an assumed informality in the service of notice upon the Clerk of the Peace for the meeting of the borough. A writ of certiorari having been sued out by the Crown, upon the fiat of the Attorney-General to return the proceedings with the view to quash the adjudication of the Recorder and to make an order to enter continuances and hear the appeal, it did not, upon the face of the depositions as returned to the court, appear that any proof had been given or offered that notice of the appeal had been given to the defendant six days previous to the day of holding the quarter sessions. Held, that although the appeal had been rejected by the Recorder upon a different ground, the want of proof of service of such a notice, or of an averment that such evidence had been tendered, was a fatal defect in the record before the court, and prevented the propriety of the rejection of the appeal from being called in question.

Held also, that it is the practice of the court in such cases as the foregoing, where the adjudication below has been quashed on the return to a certiorari, to make an order upon the justices to enter continuances and proceed to hear the complaint, without a writ of mandamus being required.

THIS was a certiorari to return a certain information, adjudication, and order of dismissal upon the hearing of the original complaint, together with the judgment or order of dismissal upon the hearing of the appeal, and the evidence given on the hearing thereof, with all notices and documents relating thereto, and the grounds thereof, &c., in a complaint preferred before the justices of the city and county of Londonderry, at the instance of the Commissioners of Excise, against the defendant below. The charge against the defendant was, his having in his possession a quantity of chicory prepared and manufactured for the purpose of being in imitation of coffee. That complaint was dismissed by the justices at petty sessions, and their decision was appealed from to the Recorder of Londonderry. Upon the evidence taken on the appeal, it appeared that on the 1st of April last, and immediately on the order of dismissal being pronounced, notice of the appeal was served on the presiding justices, and service was

also effected upon the defendant after the adjournment of the court about 7 o'clock of the same day, at his place of business. A copy of the notice was also served on Monday the 3rd April, at the office of Mr. Gregg, Deputy Clerk of the Peace for the county and city of Londonderry, in Pump-street. It was admitted that Mr. Gregg was Town Clerk as well as Clerk of the Peace, and that his office as Town Clerk is in Pump-street, whereas he transacts the duties of Clerk of the Peace at the court house in Bishop-street. The court were of opinion that the notice of appeal was not served on the Clerk of the Peace pursuant to the statute 7 & 8 Geo. 4, c. 58, and that they had not jurisdiction to hear the appeal. No further service appeared to have been effected. The points noted were: first, that the decision of the magistrates in dismissing the appeal was erroneous, inasmuch as sufficient evidence was given before them of the lodgment of the notice of appeal with the clerk of the peace for the justice of the peace, pursuant to the 7 & 8 G. 4, c. 58, s. 83; secondly, that the appearance of the defendant by his attorney on the appeal, was a waiver of any such objection, supposing such to have existed.

R. Jebb (with whom was *Smyly, Q.C.*) on behalf of the Crown.—This is an appeal pursuant to 7th and 8th Geo. 4, c. 83, which provides with respect to the preliminaries of the appeal, as follows, viz.: that no such appeal shall be allowed unless the party or parties appellants shall, at or immediately upon the giving of the judgment appealed against, give notice in writing of such appeal to the commissioners of excise or justices of the peace respectively from whose judgment such appeal shall be made, and also to the adverse party or parties on such appeal, and shall lodge such notice at the office or with the commissioners of appeal or with the clerk of the peace, for the justices of the peace at such general quarter sessions as aforesaid, by and before whom such appeal is to be finally adjudged and determined; and no such appeal as aforesaid shall be heard, unless the party or parties appellant on such appeal shall, within one week at least, before such appeal is to be finally adjudged and determined, give notice in writing to the adverse party or parties on such appeal, of the time and place where such appeal is heard." The question is, whether Mr. Gregg, in his office of town clerk, was not the proper officer to be served, within the meaning of the above Act. The town clerk is the clerk of the peace for the justices of the borough under the Municipal Corporation Act, (3rd and 4th Vic., cap. 108, secs. 157, 163, 166, 168, 173, 176). At all events, the same person filled both offices, and service upon him at one place was as good as at another.

M. Causland and Fitzgibbon, Q.C., contra.—The course taken by the Crown is irregular, as this was the case for a *mandamus* and not a *certiorari*. There is in fact no order to be quashed. What jurisdiction does the court possess on a *certiorari* to make an order upon the magistrates to do certain acts? [*Lefroy, C.J.*—The best way for us to proceed is, to ascertain what is the form in the office in cases like the present; whether, as a matter of course, the court can direct the magistrates

to proceed. It would seem to me extraordinary that a cause should be set down for argument on the return to a *certiorari*, and that the court should adjudge that the justices were wrong, and set aside their decision, and notwithstanding that it should be necessary to wait for the issuing of a *mandamus* to order the justices to proceed. It really seems to be incidental to our jurisdiction that we should be able to order magistrates to proceed rightly. Had the magistrates refused contentiously to entertain the appeal, a *mandamus* might have been had to compel them, but here it does not appear that they acted contentiously, but for a supposed informality]. [*The Clerk of the Crown* referred to the cases of *R. v. Read* and *R. v. Conan*, both of Michaelmas Term, November 5, 1850, where a similar practice had been adopted.] In those cases it does not appear that the appeals had not been originally heard upon the merits. [*Crampton, J.*—The entries are quite inconsistent with that supposition.] The authorities show that such a jurisdiction does not exist. [*Crampton, J.*—We always act upon the principle that where a party comes before us on a practice already established, such must be observed, and if erroneous, we subsequently alter it by a general rule.] The justices at quarter sessions exercised a discretion in making this order, and the court has no jurisdiction to set aside an order made under those circumstances. The clerk of the peace for the county and city of Londonderry, was the officer contemplated by the 83rd section, and the place of service was not his office for transacting the business proper to that function. Suppose, however, that they gave a wrong reason for pronouncing the judgment in question, at all events that decision was right. It is by the 82nd section that the right of appeal is given, and the 83rd requires not one notice only to the respondent, but two; the first to be given immediately after the pronouncing of the magistrate's decision, and the other six days prior to the holding of the quarter sessions. Now, the evidence here returned to the court is silent as to the latter of these notices having been given. [*Smyly* objected that this point had not been noted on the part of the defendant.] [*Perrin, J.*—I am of opinion that it is competent for the defendant to rely on this point, without having noted it for argument, for, even though the point which the Crown has noted may be with them, it does not follow that the decision of the magistrates on the whole is wrong.] An appeal is *stricti juris*. The words in the section being in the negative, are mandatory and not directory.

Smyly in reply. [*Lefroy, C.J.*—The last proposition advanced on the part of the defendant appears to me to be quite decisive. You had better confine yourself to that first.] The Court of Appeal decided that they had no jurisdiction to entertain the appeal before the proper time came to make the necessary proofs which we were prepared to offer. [*Moore, J.*—It would be very inconvenient if this course were pursued, as you might thus be nonsuited twenty times in succession. *Crampton, J.*—I think you ought to have tendered evidence of the service of the further notice; if

they had refused to receive it, then you might proceed, but except from your statement at the bar, I cannot infer that you intended to offer any further evidence. *Lefroy, C. J.*—The negative words used in this (83rd) section of the Act render it as incumbent upon you to serve the further notice upon the party against whom the appeal is taken, as any other of the notices specified. How can you say that the Recorder was wrong in not proceeding, when it does not appear that such evidence was tendered to him, or that there was even an intention of offering such evidence. We are bound to presume that this adjudication was right. *Moore, J.*—The question is, whether upon the facts before us, we can say that the adjudication was wrong.]

PER CURIAM.—*Order of Sessions affirmed.*

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

HILARY TERM, 1855.

NORTON v. JOHNSON.—*Jan. 13.*

16 & 17 Vic. c. 113, sections 53 and 241.

A literal adherence to the forms given in this Act is not necessary, and a defence to an ejectment varying from the form, but embodying a good defence, held sufficient.

Exham applied to set aside the defence, and for liberty to mark judgment. It was an ejectment for nonpayment of rent, and the defence, taken by a tenant on the lands, was in the following form:—"J. D., one of the defendants, by J. K. his attorney this day appears and takes defence for all the houses and lands in the plaint in this cause mentioned, and says that the said houses and lands in the plaint stated were not held from or under the plaintiff, by virtue of any lease or agreement for a lease, or any other document, minute, or contract in writing containing an actual demise, and therefore he defends," &c. This defence is not according to the form given in the Act; it does not tender any material or substantial issue, and is calculated to embarrass the plaintiff, inasmuch as the lands are in fact held under a lease made by a third party, under whom the plaintiff derives, and the averment in the defence is that the defendant does not hold under the plaintiff.

Woodroffe contra.—The defence is good, and the fact put in issue is the existence of a lease, or minute in writing. We are not bound implicitly to adhere to the exact form given in sections 53 and 241 of the 16th & 17th Vic. c. 113.

PER CURIAM.*—We think the defence a perfectly good one. It puts in issue the fact of a lease, minute, or contract in writing, and the sections of the Act referred to do not require a servile adherence to the forms given.

MEADE v. MORROW.—*Jan. 16.*

Pleading—General issue—Nunquam Indebitatus.

* Torrens, J. was absent.

A plea that the defendant never was indebted to the plaintiff in the sum demanded by the summons and plaint is a plea of the general issue, and comes within 16th and 17th Vic., c. 113, s. 70.

Martin v. M'Hugh, (6 Ir. Jur. 279,) distinguished.

Phillips applied to set aside the defence, as amounting to the general issue.—It was an action on a bill of exchange by the indorsee against the drawer. The defence was, that the defendant never was indebted to the plaintiff. He cited *Cock v. Mahony* (6 Ir. Jur., 301).

Coates contra.—This plea is given by the English Com. Law Procedure Act (15th and 16th Vic. c. 76), and there is no substantial difference between the Irish and English Acts. In *Cock v. Mahony* the defence was "that he is not and never was indebted. He cited *Martin v. M'Hugh*, (6 Ir. Jur., 279); *Smith v. Grant*, (6 Ir. Jur., 317).

MONAHAN, C. J.—This defence clearly amounts to the general issue, because under it you could prove either that you never drew the bill or that the acceptor paid it, or that you did not get notice, also that the plaintiff got it fraudulently. You must traverse some one material fact. In *Martin v. M'Hugh* the defence of "never was indebted" was pointed to a particular item, and that case does not apply here.

Defence set aside with costs.

PHILLIPS v. M'EVROY.—*Jan. 20.*

Practice—Pleading—16th and 17th Vic. c. 113.

Where in an ejectment for non-payment of rent the defendant pleaded in the form given to an ejectment on the title. Held, that such plea was a nullity.

R. Armstrong, Q.C., moved to set aside the defence in this case as a nullity. It was an ejectment for non-payment of rent, and the defence pleaded was in the form given for a defence to an ejectment on the title.

Coffey contra.—The defence is merely an irregularity, and not a nullity: it is in substance that we are not their tenant, and a good issue can be taken upon it; the form used is objectionable, but it only amounts to an irregularity, and their notice does not point out where we are irregular. He referred to the 179th Rule.*

MONAHAN, C. J.—The defence is a nullity, and no issue can be joined in the terms of the plaint.

Defence set aside with costs.

IN RE WILLIAM H. HYLAND.

Admission as an attorney—Apprenticeship—Fatality.

The court will in certain cases admit a gentleman to practise as an attorney where he has not served his full term of apprenticeship.

* 179th Rule.—"No application to set aside proceedings for irregularity shall be allowed unless made within a reasonable time; nor if the party applying, or the opposite party, have taken a fresh step after knowledge of the irregularity, and every notice of such motion shall point out the irregularity complained of."

The Attorney-General (with whom was *Harris*) applied that William Hall Hyland might be admitted to practise as an attorney of this court, notwithstanding that he had not served his full term of apprenticeship. He relied upon the affidavit of Mr. Hyland, which embodied the following facts:—That he was twenty-three years of age, a Bachelor of Arts of Trinity College, Dublin, and had been bound to his late father for three years, one of which he had served as an apprentice; that he had been for six years managing his father's business, and had as much experience as if he had been bound during that period; that one of his father's clients, whose business the petitioner had been managing, was most anxious he should continue to manage it during a new trial which was to be held at the approaching Spring Assizes. The affidavit further contained the names of several persons who were anxious that the petitioner should continue to act as their attorney. The principle on which the court always acted in applications like the present was—fatality, and incompetency for the office through previous service. The fatality here was, the sudden death of this gentleman's father, and the fact that the petitioner alone was fully cognizant of the business of his late father's clients. The following cases were cited:—*Grady's case*, (2 L. R., N. S., 13); *in re Symes's case*, (7 I. E. R., 339); *M'Nally's case*, (6 Ir. Jur., 63); *Anonymous*, (12 I. E. R., 237). The Law Society had been served with notice, and did not oppose the application.

PER CURIAM.—We think you have made out a case for admission, therefore let this gentleman go before the Examiner, and upon his certifying his competency, let him be admitted.

Claim admitted.

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq., Barrister-at-Law.]

SIR R. A. O'DONNELL v. RYAN AND OTHERS,

November 20, 23.

Ejectment—Judgment recovered—Estoppel—Mines—Pleading—Defence—Form of judgment—13 Vic., c. 118; 16th and 17th Vic., c. 113.

*In an action of ejectment upon the title brought to recover possession of certain mines, and commenced in July, 1853, the parties agreed to a special verdict, and the verdict below (which was for the plaintiff) was reversed by the Court of Common Pleas, and judgment given for the defendant in the usual form, "that the said defendants do go thereof without day," &c. The present action was brought in the month of June, 1854, between the same parties, to recover possession of the mines in question, and a verdict was given for the plaintiff, although no accrual of title to the latter since the former judgment had been marked was given in evidence at the trial. Held, (*Greene, B. hesitante*), that the action of ejectment under the provisions of the *Procedure Act* being assimilated to other actions a judgment in ejectment is equally conclusive between the parties as a judgment in another form of action.*

Held also, that the judgment in the former action of ejectment was conclusive, although not pleaded as an estoppel, the provisions of the Procedure Act limiting the defendant to a particular mode of defence.

Wilkinson v. Kirby, (2 E. C. L. R. 1395,) approved of.

THIS was an action of ejectment upon the title, brought to recover certain mines. There had been a former ejectment for the same cause of action brought against the defendants in the present suit. The latter had been tried at the Castlebar Assizes upon the 21st of July, 1853, before the Chief Justice of the Court of Queen's Bench; and upon a special verdict the following facts, among others, were found: That in the year 1776 J. T. Medlicott being seised in fee simple of the lands in question by indenture of that date, reciting that he had in the year 1775 executed a lease of the lands with their appurtenances to P. M'Loughlin his heirs and assigns for the sum of £650 by way of fine, and at the yearly rent of £100, for the term of three lives therein named, and with a covenant for perpetual renewal upon payment of a peppercorn as a renewal fine, and also reciting that the said P. M'Loughlin had been in the actual possession of the lands, and that there was an informality in the lease of 1775: for the purpose of preventing any future controversy, for the considerations, fines, and reservations in the lease of 1775, demised to the said P. M'Loughlin, his heirs and assigns, the said lands, and all their rights and appurtenances, and all mines and minerals, trees and timber, (reserving to the lessor the rights of fowling, fishing, hawking, and hunting,) with a covenant for perpetual renewal. That by indenture made in the year 1777, P. M'Loughlin demised to J. M'Loughlin and his heirs and assigns the said lands, mines, and minerals, trees and timber, (reserving the above-mentioned rights for the benefit of the lessor,) for lives therein named, with a covenant for perpetual renewal. That by indenture bearing date the 16th of July, 1785, J. T. Medlicott conveyed all his interest in these lands to Sir Neal O'Donnell, with all the rights, royalties, and privileges connected with them. That previous to and upon the 28th of September, 1832, all the interest and estate of J. D. Medlicott and Sir Neal O'Donnell in these lands had become vested in the plaintiff Sir R. A. O'Donnell; and that all the interest of the said P. M'Loughlin therein, subject to the lease of 1777, had become vested in the Rev. P. Browne as trustee for the Marquis of Sligo. That all the persons named as *cestui que vies* in the lease of 1776 had died before the 28th of September, 1832. That by indenture of the latter date Sir R. A. O'Donnell, in consideration of the covenant for perpetual renewal contained in the lease of 1776, demised to P. Browne all these lands, reserving all mines, minerals, timber trees, and rights of fowling, fishing, hunting, hawking, to the said Sir R. A. O'Donnell, his heirs and assigns, for certain lives therein named, with a covenant for perpetual renewal. That the Marquis of Sligo, (for whom P. Browne had been named trustee,) paid the rent reserved upon the renewal of 1832 to Sir R. A. O'Donnell up to the gale day next preceding the present action, all the *cestui que vies* being

still alive. That previous to the 14th of March, 1846, the said P. Browne died, and that his interest in these lands vested in his son P. Browne, jun., and also that all the interest of J. M'Loughlin, deceased, had vested in his grandson, J. M'Loughlin, jun., who is still alive. That by indenture bearing date the 14th March, 1846, P. Brown, jun., demised the lands in question to J. M'Loughlin, his heirs and assigns, (excepting as in the indenture of 1777) for the lives therein named, with covenant for perpetual renewal; that all the latter lives are still living, and that, by indenture bearing date the 11th of June, 1850, and made in pursuance of an Act of Parliament of the 13th year of her Majesty's reign, entitled *The Leasehold Conversion Act*, P. Brown, junior, granted these lands to J. M'Loughlin, together with all mines, minerals, timber, and trees, reserving to the grantor his heirs and assigns, the rights of fishing, hunting, shooting, and hawking; to have and to hold to the said J. M'Loughlin for ever, as and for an estate in fee-simple, at the yearly fee-farm rent of £193 3s. per annum, with the usual power of entry, distress, and re-entry, in case of non-payment of the fee-farm rent, with a covenant for quiet enjoyment, and that the lessee, and his heirs and assigns, might fell timber, and also a covenant on the part of the lessee for payment of the rent. That by a deed bearing date the 25th January, 1851, the Commissioners of the Incumbered Estates Court in Ireland did grant to W. McCormick, for the consideration of £150, certain lands (being part of the same premises), to hold the same to him, his heirs and assigns, for ever, subject to the rent of £193 3s., and the covenants and reservations contained in the fee-farm grant above mentioned, and also subject to such tenancies as appeared in the schedule thereunto annexed, and to such yearly tenancies as existed at the time of the same. That no tenancy in any mines or minerals appeared in the schedule or rental annexed to the latter deed of conveyance. That, by indenture bearing date the 10th February, 1852, W. McCormick demised to P. B. Ryan, his executors, administrators, and assigns, the lands so conveyed to W. McCormick, and all mines and minerals therein, with leave to work such mines, for the term of 999 years, the said P. B. Ryan yielding to the lessor and his assigns one-sixth part of the profits to be derived out of the premises. That these mines so demised are the mines which are in the declaration in the present suit mentioned; and that they were open at and prior to the commencement of the present action, and are in process of being worked by P. B. Ryan, W. McCormick, and C. Lyall, the defendants; but whether or not the defendants, upon the whole of the matter, have wrongfully assumed the possession of these mines and premises the jurors are ignorant, and pray the advice of the court. A verdict was entered for the plaintiff, subject to the decision of the Court of Common Pleas upon the special verdict, and, the case having been argued, the court gave judgment for all the defendants upon the 3rd May, 1854, and accordingly, in the same month, judgment was entered for all the defendants. The judgment was as follows: "It is considered by the Justices of our Common Bench here that

the said R. A. O'Donnell (and the other plaintiffs) take nothing by their said bill, but that they and their pledges to prosecute for their false claim thereof, be in merey, and so forth; and that the said defendants do go thereof without day, and so forth;" with an award of a sum for costs. The defendants in the above action of ejectment were, W. McCormick, C. Lyall, and P. B. Ryan. The present action of ejectment was brought in the month of June, 1854, by the plaintiffs in the above action and others against the above defendants and others to recover possession of the mines and minerals which were the subject of the former action, and was tried on the 22nd of July, 1854, before Mr. Justice Moore, and a verdict was found for the plaintiff according to the directions of the learned judge, subject to the following exceptions. That the recitals annexed to the conveyance of the Commissioners of the Incumbered Estates Court were not admissible in evidence as a part of the plaintiff's case; that evidence that Sir R. A. O'Donnell had no notice of the proceedings in that court in reference to the above conveyance, was not admissible; that the learned judge should have directed the jury to find for the defendants in the absence of any evidence that title had accrued to the plaintiff subsequently to the commencement of the former action, in which judgment had been recovered by the defendants, such judgment being otherwise conclusive evidence of the defendants' title at the time of the commencement of the present action; that upon the construction of the deeds of 1776, 1777, 1832, 1846, 1850, and the conveyance of 1851, the defendant, W. McCormick, was seised in fee-farm of the said mines, and that, by virtue of the deed of 1852, the other defendants were entitled to the mines.

D. R. Pigot, in support of the exceptions.—The judgment in ejectment previously recovered is conclusive.—*Armstrong v. Norton*, (2 Ir. Law Rep. 96); *Reg. v. Blakemore*, (2 Den. C. C., 410; s. c. 21 L. J., M. C. 60). That case was followed by *Reg. v. The Inhabitants of Houghton*, (1 Ell. and Bl., 501), and its authority recognised. The same principle appears in *Noulan v. Gibbon*, (12 Ir. L. R. 7), decided in this court. [*Greene, B.*—How do you get over the authority of *Vooght v. Wynch*?] That case is distinguishable, for in it the judgment recovered might have been pleaded, but was not, and upon those grounds it was held, that it could not be relied upon as matter of estoppel, otherwise it might be evidence to go to the jury; that case was followed by *Doe v. Huddart*, (2 Cr. M. and R. 316), but it was subject to the same distinction: but still the judgment is evidence to go to the jury, and upon the authorities conclusive evidence between the same parties. [*Pennefather, B.*—Provided there be no distinction between the action of ejectment and other actions. *Greene, B.*—Under the Procedure Act.] There can be no doubt as to the admissibility in evidence of the judgment recovered in the former action, although as an estoppel it may not be conclusive, *Doe v. Strobe v. Seaton*, (2 Cr. M. and R., 732), and that being so, it was for the jury to say how far such evidence was conclusive. The nature of the ac-

tion of ejectment must be regarded as altogether altered by the provisions of the late Act. The 15th and 16th sections of the Process and Practice Act provide that this action is to be commenced against the real defendant, and shall be, as to its mode of procedure, as nearly as possible, the same as other actions; and by the general orders made in pursuance of that Act, the use of fictitious parties was abolished; and s. 225 of the Common Law Procedure (16 and 17 Vic. c. 113) provided that the effect of a judgment in ejectment under that Act shall be the same as the effect of a judgment in ejectment as previously used. The present action was commenced under the Process and Practice Act, and terminated under the Common Law Procedure Act, and therefore comes within the operation of the former, thus adopted by the latter Act. There can therefore now be no occasion for distinguishing a judgment in ejectment from a judgment in any other action, the mode of procedure, which alone constituted the ground of distinction, being made the same in both. Under the corresponding English Act, the judgment in ejectment is identical in effect with a judgment recovered in another action, that is to say, *inter partes*. *Wilkinson v. Kirby*, (2 Eng. C. L. R. 1395.) [*Pennefather, B.*—A judgment in ejectment cannot do more than it professes to do—that is, to decide as to the right of the plaintiff to the possession *at the time*.] But it must be regarded as conclusive, unless the other party proves something to the contrary, which has not been done in this case—the title relied upon by them being anterior to the former recovery in ejectment. It is under these circumstances that this judgment is relied upon as having the effect of an estoppel. [*Pennefather, B.*—May not the words “heretofore used” in section 225 of the Procedure Act refer to the old practice?] That cannot be so, for the former Act having changed the practice, the Legislature would have used more explicit language if it had been intended to repeal its provisions. The second question for the consideration of the court is, whether the demise of 1832 can have the effect of taking out of the granting part, and inserting in the excepting part, the mines and minerals, which were expressly granted under the lease of 1776, of which the lease of 1832 was merely a renewal. The latter lease recites the former, and recognises the covenant for renewal; but a covenant to renew is a covenant for perpetual renewal, and a renewal must follow the terms of the lease which it professes to renew, otherwise it is no renewal. *Atkinson v. Pillsworth*, (1 Ridg. P. C. 461); *Walsh v. Trevanion*, (15 Q. B., 5); *Luttrell v. McCreery*, (1 C. L. R., 13); *Earl of Cardigan v. Armitage*, (3 Dow. and Ryl., 421); *Bullen v. Denning*, (5 B. and C., 842); *Shep. Touch.*, 100. A fee-farm grant made in pursuance of a covenant for perpetual renewal will be fed from any estate that shall subsequently come to the grantor, (12th and 13th Vic. c. 105). Thirdly, the effect of the conveyance of the Commissioners of the Incumbered Estates Court was to give these mines to the defendant, that grant reciting that it was made subject to the fee-farm grant, under which the mines were not reserved. [*Pennefather,*

B.—It will only be necessary for the court to go into this portion of the case, unless they are against you upon all the preceding questions.] The question of jurisdiction in the Commissioners cannot be controverted, the powers conferred by the Act being very extensive. It is not easy to find express authorities upon this subject, but the cases of Commissioners established for similar purposes may be regarded as analogous. *Philips v. Maile*, (7 Bing. 133); *Doe d. Manning v. Gore*, (2 M. & W. 320); *Goodtitle d. Baker v. Milburn*, (2 M. & W. 853); *Turner v. Blaquierre*, (1 Drew. 402.) [*Pennefather, B.*—How was the judgment entered?] “That the said defendants do go thereof without day, and so forth.” It has been decided that this form is conclusive in *Overton v. Harvey*, (9 C. B. 38,) in which Maule, J. says, “Where a court of competent jurisdiction has given judgment that a defendant go without day, and that judgment remains unrevoked, it must be taken to have been rightly given, and the plaintiff cannot have a second action for the same cause.”

G. O. Malley, (with him *Fitzgibbon, Q.C.*) contra. Upon the construction of these title deeds and the covenants they contain, and especially the recitals of the deed of 1832, it will appear that the parties did not intend to grant the mines and minerals; and if that be so, the conveyance of the Commissioners did not convey more than the lands as so demised. *Co. Lit.* 47, a.; *Shep. Touch.* 8. It is plain that a former judgment in ejectment could not hitherto operate as an estoppel; and therefore, it is to be considered whether a party can now rely upon a judgment in an ejectment *inter partes*. It is said that such is the effect of the Procedure Act, section 225; but the action was not brought under that Act, but under the Process and Practice Act. The judgment is “that the defendant do go thereof without day,” but that cannot be regarded as conclusive upon the question of title; it amounts merely to the Scotch verdict “not proven,” and the successful party is entitled to say “although I did not establish my title then, I am now able to do so.” [*Pennefather, B.*—It is the judgment of a court, and not the grounds of that judgment, that constitutes the estoppel.] It is submitted that these judgments are not more contradictory than if the former had been a judgment of non-suit. The judgment only decides that the plaintiff had not entitled himself to a judgment, and therefore that he should take nothing by his bill. [*Richards, B.*—That is what you must establish. We must suppose that you had a good case at the time of the judgment of the Court of Common Pleas.] There is no estoppel when the thing averred is consistent with the record. *Trevivan v. Lawrence*, (2 Sm. L. Cas. 438, n.) In the case of a special verdict, the court is limited to the facts before them; and therefore, the judgment of the Court of Common Pleas can only be taken as deciding that upon the facts stated the plaintiff was not entitled, but not as precluding him from establishing his title upon a different state of facts. No case can be found deciding that a judgment in ejectment for the defendant is an estoppel; but on the contrary in *Doe d. Wright*, (10 Ad. and Ell., 777,) Denman, C. J., says, “a judgment is no bar to any number of ejectments by the same parties,

and for the same premises." An estoppel must be mutual; but how is the defendant estopped by the judgment? Neither the Process and Practice Act, nor the Procedure Act, contain any provision to the effect that a judgment in ejectment shall have more efficacy now than it had formerly.

Robinson, Q. C., in reply.—[*Greene, B.*—This is a most important question, viz.: whether the effect of a judgment in ejectment continues the same as hitherto before the passing of these Acts, or whether an Act of Parliament, merely altering the form of the action, and containing a clause such as section 225 of the Procedure Act, can have this effect.] It is submitted that no accrual of title to the plaintiff having been established since the entry of the judgment of the Court of Common Pleas, that judgment is conclusive. There is a clear difference between that and a judgment of non-suit.—*Ferguson's Forms*, 443–445. The Procedure Act provides that the effect of a judgment in ejectment shall be the same as under the former Act, the effect of which was, to assimilate that action to other personal actions, and in the latter such a judgment is an estoppel. 2 Sm. L. Cas. 442. It is conclusive as a plea when it can be pleaded, and when it cannot, it may be given in evidence.—2 Sm. L. Cas. 445. The question therefore is, could the defendant have pleaded it in this case. The present action was brought in July, 1854, since the passing of the Procedure Act, and under the provisions of that Act it would not have been pleaded, for section 198 prescribes a particular form of defence in such cases, and the defendant could not depart from the form prescribed.—Sections 199, 200, 227.

*PENNEFATHER, B.**—This case brings before the court, for the first time since the passing of the late Act, a question as to whether or not a judgment in an action of ejectment is conclusive as between the same parties in a subsequent suit. The case has been very fully discussed, but it is a matter of such importance that we are very desirous that the question should be put into such a shape that it might be submitted to the consideration of another court. We are called upon to say whether this judgment, which I will assume to have been between the same parties and upon the same subject matter, is conclusive as between those parties in the present ejectment. The exceptions in support of the conclusiveness of this judgment have been very ably argued by Mr. Pigot, who opened the case, and Mr. Robinson, who replied; and the decision of the court will depend upon two questions. First, as regards the nature of the judgment in the former ejectment; and secondly, as to the manner in which it was offered for the purpose of concluding the plaintiff in the present action. Before the passing of the Process and Practice Act a judgment in ejectment, although matter of evidence between the same parties, was not conclusive evidence as to the subject-matter of the action. Several reasons have been assigned for this; but probably the true cause of it was that the real and nominal parties were different. However that may have been, it has been always so held hitherto,

and therefore the first question for us to consider is, whether the case has been altered by the provisions of the Procedure Act. In the first place it does away with all the fictions of ejectment in the same manner as the Process and Practice Act had previously done; and therefore the action of ejectment is now a proceeding between the real parties to the suit, and the question, therefore, is, whether this action is different from other actions between the real parties. It has been argued that the judgment in question does not decide a question of right, but this is an argument in which I cannot agree. The judgment pronounced by the Court of Common Pleas decides that the plaintiff was not, and that the defendant was, entitled to the possession in dispute. We cannot look into the means by which the court arrived at this conclusion, but we must simply receive it as such, without questioning whether it was right or wrong. An argument has been urged as to the form of this judgment, and it is said that it has merely the effect of a judgment of nonsuit, but the effect of a judgment of this form—"that the defendants do go thereof without day"—is clearly established, and it has been held that it is an adjudication between the parties to the suit when made in their presence, and therefore decisive as to the matter in issue between them. Now, if this be so, supposing the same question were to come into controversy between the same parties the next moment, is not some effect to be given to this judgment; and, if so, the effect will be this, that unless the parties can show some accrual of title since that judgment was pronounced, it must be a conclusion of law that the title which existed at the time that judgment passed still continues. If, therefore, this be so, and if there be, under the recent legislation, no distinction between a judgment in ejectment and any other personal action, the only question that remains for the court to consider is, whether this judgment has been offered in such a manner, and at such a time, as that it can be treated as an estoppel. I must make an observation as to the effect of section 225 of the Procedure Act, which raised considerable difficulty in the mind of my brother Greene, and which certainly deserves full consideration; but I conceive that we are considerably relieved as to the effect of that section by the English authority cited by Mr. Pigot, upon the conclusive effect of a judgment in ejectment under the corresponding section of the English Procedure Act, and therefore this being a judgment between the real parties, must have the same effect, and when section 225 provides that the effect shall be the same as in the case of a judgment of ejectment "heretofore used;" and when the judges in England have decided that the effect to be given to a judgment in ejectment under the present practice arose from a corresponding legislative provision, substituting the real for the fictitious parties, then the judgment under consideration being a proceeding between the real parties must have the same effect for that reason, and when the clause uses the words "heretofore used" it must be taken to refer to such judgments. I think, therefore, that the difficulty as to the mean-

* Pigot, C. B. was absent.

ing of this section is thus removed; and the only remaining question for us now to consider is, whether or not this judgment should have been pleaded in the second action. It is clear that when a party has had no opportunity of pleading such a judgment as an estoppel, he may give it in evidence. Now the Procedure Act gives a form of defence in such cases, and that is the only plea that he can put upon the record. No court will allow a second plea. It is tantamount to the plea of "not guilty" under the old practice, and therefore the defendant had no opportunity of pleading this judgment to the second ejectment by way of estoppel, and for that reason he has been obliged to offer it in evidence, and the authorities show that it is to have the same effect in such cases as if it had been pleaded. I think all the cases go to this; the decision in this court is quite an authority, and the cases in England are to the same effect; and it is therefore clear that the defendant had no opportunity of pleading this judgment as an estoppel, and that being so, and the judgment having been offered in evidence, it is to have the full effect that it would have had if he had pleaded it; and therefore I conceive that it should have been treated as an estoppel at the trial, and that the judge should have taken the case from the consideration of the jury, by telling them that such was the effect of the judgment, and that they were bound to find for the defendant, his right having been conclusively established. We have arrived at this conclusion unwillingly; we would, if we could have done so, have decided the case more fully upon the merits; but it would have been useless to have heard all the arguments at length; public time would have been wasted, and our conclusion the same as now; and it is desirable that this case should be decided with as little expense as possible. We shall, therefore, order that there shall be a *venire de novo*, and leave the case to be tried by another judge; but if the parties do not arrange the matter between themselves, it may be made the subject of a special verdict, setting forth the judgment of the Court of Common Pleas, and thus the question whether or not the defendants are entitled to judgment may be brought before a Court of Error. Perhaps the parties would decide to make such an arrangement; it would be exceedingly desirable that they should do so.

RICHARDS, B.—I fully concur in the judgment that has been pronounced by my brother Pennefather. The present is a novel case, and this is the first time that a judicial decision has been pronounced upon this subject in this country. It would be, therefore, very desirable that the case should be submitted to the consideration of a court of appeal, and I hope that the suggestion that has been made will have weight with the parties. As to the question upon which the judgment of the court is founded, I so fully concur in what has been said that I need only say a few words. It is an elementary principle of law that all questions decided by a court of competent authority shall not be impeached by a court of coequal authority. This I conceive to be a sensible and salutary rule, and conducive to the public good, as the reargitation of questions so

decided would lead to much confusion, and, therefore, the rule of law is, that if an action be brought for a personal chattel, no matter how great the value of it be, the judgment in such an action is conclusive, unless it be shown to have been erroneous. Now, I can see no reason for making an exception to this rule in the case of lands; or why a suit for a small portion of land should be subject to a different rule from that regulating a suit for a valuable personal chattel. The reason for this exception in the case of lands is given in the decision of the English judges in the case referred to by my brother Pennefather, and it is this, that the parties named upon the record in suits for the recovery of land, were not the real parties, but merely fictitious characters, and that there was a difficulty in showing that the parties were the same, in case of a second action for the same thing; and, therefore, it was held that the judgment in ejectment was not conclusive; but now that these fictions have been swept away, and the action of ejectment placed upon the same footing as other actions, there is a very good reason for holding that a judgment in that action should have a similar effect to a judgment in other personal actions. I think that the distinction taken by the defendants is fully supported by authority. This is a case of the first impression, and for that reason may give rise to some little hesitation, but I fully concur in the decision. It is said that we do not decide this case upon the merits, but I think that we do; for there has been a special verdict, and upon that special verdict the question has received a judicial decision; therefore, I think we must be regarded as entertaining this question upon the merits, and for that reason I do not feel the force of this observation very much.

GREENE, B.—I have arrived at the same conclusion as the rest of the court, but with considerable difficulty and much hesitation. My difficulty arises from the words of a section in the Procedure Act (section 225), which I felt altogether at a loss to explain, and it was not until the latter end of the argument that I felt at all disposed to arrive at the present conclusion; but if the decision of the Court of Common Pleas in England be what I suppose it to be, then, notwithstanding the section to which I have referred, the action of ejectment has been so far changed, and is so far assimilated to other actions in this respect; and as to the latter, there can be no question. I should be very well pleased if this decision could be reviewed in a court of appeal, and perhaps the parties may be disposed to take the opinion of the Court of Error upon this question, as to which, but for the decision of the English judges upon the question, I cannot say to what conclusion I should have arrived: but I have felt coerced by that case.

Venire de novo.

HILARY TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

MAHONY v. FALVEY—Jan. 12.

Bill of Particulars—Process and Practice Act.

The plaintiff must furnish an explicit, full, unem-

barrassing, and non-illusory bill of particulars, in order to afford the defendant an opportunity of knowing the specific demand made in the summons and plaint, and of preparing his defence, if any, thereto.

De Moleyns, on behalf of defendant, moved that the plaintiff be ordered to furnish particulars of the sum indorsed on the summons and plaint as £28 16s. 9d., cash alleged to have been paid by the plaintiff for the use and account of the defendant, and to specify the items of which said sum was made up, giving the dates and particulars of the several items, and that the defendant should have four days' time to file his appearance and defence to such summons and plaint, after the furnishing of the said particulars, and for the costs of the motion. It appeared from the affidavit of the defendant's attorney, on which counsel relied, that the summons and plaint in the cause, served on the defendant in February last, but not filed or proceeded with until December, was brought to recover a sum of £66, of which £37 3s. 3d. was alleged to be due by defendant's acceptance of plaintiff's bill of exchange, bearing date May, 1848, and the residue for money alleged to be due for money paid at defendant's request. The indorsement of the particulars on the summons and plaint, after setting out the acceptance merely stated an amount of money previously paid by plaintiff for defendant's use—£28 16s. 9d., without giving any dates or items of such payments, or the times when, or the persons to whom, or how they were paid. It was further sworn that the said particulars were insufficient to enable defendant to plead and proceed to trial, and that he was totally unacquainted with the particulars of the said payments, the correctness of which was unascertained, unless the plaintiff was compelled to furnish the particulars as required. A notice was served, on the 23rd of December, on plaintiff's attorney, demanding the desired particulars, which was not replied to. The present application was not made for the purpose of delay, and the defendant had a good defence on the merits. Subsequent to the swearing of the above affidavit, plaintiff's attorney served a notice, purporting to give additional particulars of the item indorsed on the summons and plaint, but which gave no dates or items of the alleged payments; and the defendant consequently served another notice, requiring plaintiff to furnish a full and proper bill of particulars, in reply to which a notice was served, giving but one date and item

only, of £10, part of the sum of £28 16s. 9d. indorsed on the plaint, and specified as being paid to the National Bank, Killarney, on the 22nd of January, 1848, on foot of some alleged bills; and the plaintiff stated his inability "to furnish the particular items for interest, charges, and sums paid to the branch of the National Bank, Killarney, in liquidation of defendant's bill for £60, as the payments were made generally on account of principal, interest, and charges for renewal for the balance, and because such payments were made by persons then, but not now, in plaintiff's service." This amended bill of particulars was not sufficiently explicit, as it did not state the dates or items of the sums alleged to have been paid to the National Bank, nor to what branch, and was calculated to embarrass defendant's defence. Such a bill of particulars was contrary to the spirit of the Practice and Process Act, which required full and true particulars; and the second bill furnished in the cross notice was more illusory than the first. Defendant did more than he was required to do, for he served a notice, although such was not requisite. [Counsel cited *Neville v. Gollock*, (6 Jurist, 232,) and the judgment of Mr. Baron Pennefather, in the Court of Exchequer, in the case of *Neville v. Brown*, (not yet reported.)]

Charles Barry contra.—This is a sufficient bill of particulars. [*Greene, B.*—Have you made an affidavit that you cannot give fuller particulars? This appears, *prima facie*, not to be a compliance with the Act.] The defendant must make an affidavit, specifically stating that he cannot prepare an adequate defence without fuller particulars. [*Greene, B.*—He need not do so, but the plaintiff must comply with the terms of the Act, and furnish full and sufficient particulars]. The particulars given in the cross notice are specific, and we have an affidavit that we cannot furnish a fuller statement.

GREENE, B.—That is unsatisfactory. If the plaintiff have no cause of action he ought not to sue; if he have, he should know the items and the times at which the alleged payments were made, which must be within his knowledge. The bill of particulars as furnished is illusory, and we cannot suffer such a non-compliance with the Act. You mention at the bar that the plaintiff had not as yet an opportunity of examining the bank books to verify the payments. You should have stated so in the affidavit. The motion must be granted, and with costs.

Rule accordingly.

COURT OF CHANCERY.

IN THE MATTER OF CASEY'S TRUSTS (TRUSTEE ACT, 1850.)

EX PARTE EUGENE SULLIVAN AND WM. SHAW.*

Marriage settlements—Limitation over on insolvency of settlor—Public policy.

A limitation in a marriage settlement, giving a fund,—the property of the settlor,—to the settlor for life, with remainders over in the event of the bankruptcy or insolvency of the settlor, is void on grounds of public policy, and the settlor having conveyed this fund to assignees, in trust for creditors, they are, upon his insolvency, entitled to retain the fund during the life of settlor, in preference to the objects of the limitation.

THIS case came before the court on an appeal motion from the decision of his Honor the Master of the Rolls, reported in 3 Ir. Ch. Rep., p. 419. The question arose upon limitations contained in two settlements executed upon the first and second marriage of William Casey. The material portions are sufficiently stated in the judgment of the Lord Chancellor. The Master in Chancery having reported in favour of the limitations, on motion to vary the report, his Honor the Master of the Rolls declined to make an order to vary the report.

F. Fitzgerald and R. R. Warren for the appeal.

O'Reardon in support of the report.

The following cases were referred to and commented on:—*In re Birmingham Benefit Society*, (3 Sim., 421); *Brandon v. Robinson*, (18 Ves., 429); *In re Murphy*, (1 Sch. & Lef., 44); *Higginbotham v. Holmes*, (19 Ves., 88); *In re Beahan*, (1 Sch. & Lef., 179); *Gill v. Magun*, (Smyth's Reports, 60); *Hall v. Cooper*, (1b. 168); *Phipps v. Lord Ennismore*, (4 Russ., 131); *Synges v. Synges*, (3 Ir. Chan. Rep., 362); *Delastet v. Smith*, (1 Keen., 161.)

January 22.—**LORD CHANCELLOR.**—This case comes before me on appeal from the decision of his Honour the Master of the Rolls, who declined to vary the report of Master Brooke made in the matter of this trust. The motion is made on behalf of Eugene Sullivan and William James Shaw for payment to them of a portion of the trust fund for the ascertainment of their rights in which, they presented a petition in this matter. They claim as assignees of William Casey under a deed of the 24th March, 1848, whereby two annuities were assigned to them in trust for creditors. The facts of the case are long in detail, but the substance of them is plain. A person named William Casey (who derived his interest in two funds under the will of Thos. Casey) was, under the provisions of that will, interested in the reversion in two annuities; one of these has ceased to be reversionary, the reversion in the other still exists. It appears that Wm. Casey was twice married, and that a settlement was executed upon each occasion. On the 20th of July, 1833, he intermarried with Miss Margaret Murphy, and then settled his reversionary interest in an annuity of £50 a-year, dependant upon the death of his mo-

ther, Anne Casey, who has since died. On the 27th of January, 1846, Wm. Casey married Miss Esther Andrews, and, upon this occasion, he settled another annuity of £50 a-year, dependant on the death of his sister, Alice Casey, who is the petitioner in the matter of the trusts of that settlement. So far as is necessary for the purpose of the questions before the court, the trusts of these settlements are similar. They are fully set out in the report of the Master, and in the first settlement were thus. William Casey thereby transferred to trustees, after the death of his mother, an annuity of £50, "and the principal sum out of which said annuity then arose, to hold the same from the decease of the said Anne Casey (his mother) upon trust, after the solemnization of the marriage, to pay to the said William Casey the said annuity for his life, or until he should become bankrupt or insolvent, and from the term of his death, or of his so becoming bankrupt or insolvent, in case the said Margaret Murray would be then living, in trust to pay the said annuity to the said Margaret Murray for her separate use, whether the said William Casey should be then living or dead, if the said William Casey should have previously become bankrupt or insolvent," with limitations over. There were two children issue of that marriage, both of whom are parties to this petition. William Casey is still alive, and his assignees are entitled to this annuity, unless the limitations of the above settlement confers rights upon some other person. The second settlement contained trusts of a similar nature, the limitation being to William Casey, "until he should fail in his circumstances, or become bankrupt or insolvent." These words are more extensive, but they come to the same thing. There is one child of the second marriage, who is before the court, and the second wife is dead. The parties claiming the fund, as against these children, are the assignees in trust for the benefit of creditors under the deed of the 24th of March, 1848, which recites both settlements. The Master, by his report, has found it to be a fact, that on the 24th of March, 1848, William Casey had "failed in his circumstances, and was then insolvent within the meaning of the said settlement of the 20th July, 1853," and that Margaret and Thomas Casey, the children of the first marriage, and Richard Casey, the child of the second marriage, were, on the said 24th day of March, 1848, entitled to the fund, and that the assignees were not entitled to set up the deed of the 24th day of March, 1848, and that same had no validity or operation against the rights of the said Thomas, Margaret and Richard Casey, the children." This is the portion of the report objected to by Messrs Shaw and Sullivan, and the question arises, whether William Casey had any control over these annuities in his life time, and could give any rights to his assignees. I have read a report of the judgment, in this case, of his Honor the Master of the Rolls, which has been furnished to me. I see by it that a question was argued at the Rolls which has not been raised here, viz., that the limitation in the first settlement only pointed to the actual insolvency of William Casey, his Honor was of opinion, and I agree with him, that actual insolvency in the Insolvent Court is not the interpre-

* *Ex relatione* JOHN BLACKHAM, Esq. Barrister-at-Law.

tion to be put on this limitation. The next question is, what is the effect of this provision; and a third question was argued provisionally here, namely, that the limitation meant insolvency after the actual perception of the annuity by William Casey, and as in one case, it has happened that the insolvency took place before William Casey became possessed of the annuity, and while the annuitant was alive, that the assignees were not entitled to the fund. The cases of *Jones v. Wyse*, (2 Keen, 292,) and *Kekewich v. Manning*, (1 De Gex, Mac. & Gor., 182), decide this question. The real question is, whether a person, who, on his marriage, makes a settlement of a sum of money payable in *présenti* to himself, and to go over in the event of his bankruptcy or insolvency, on the happening of either of these events, loses his control over the funds during his life. I am to decide this question as if the settlement were in the words of the Master's report, "that William Casey had failed in his circumstances." It is remarkable how little authority there is on cases arising out of limitations over a case in insolvency, though the decisions in cases of bankruptcy are abundant. *Phipps v. Lord Ennismore*, (4 Russ. 131,) is a strong authority upon this question. There certain premises being vested in A for life, A on his marriage conveyed the premises to trustees for ninety-nine years to secure a jointure to his wife, and it was thereby declared that if A should at any time sell or incur the premises, or attempt to do so, the trustees of the term should receive the rents and profits and apply them as they might think fit for the maintenance and support of A, or his wife, or children, or issue. That proviso was held to be fraudulent and void by Lord Lyndhurst. If a limitation over, pointed as in that case to the execution of an instrument, which the settlor might or might not execute, and the estate in which was vested in third parties, be declared void, how much stronger is that than the case where the party has the apparent ownership? and is it to be said as to parties who have purchased from the insolvent, as under this deed, that their rights are to be defeated? and, because the vendor had been insolvent in his circumstances two or three years previously, those claiming under this limitation can defeat the rights of either purchasers or creditors? As far as the printed authorities go, those reported in Smythe's Reports show that this limitation is not void in cases of insolvency. Doherty, C. J. there says, p. 188, "The principle question is, whether a settlement of an annuity out of the husband's property upon the wife, to arise and take effect upon the contingency of his taking the benefit of the Act for the Relief of Insolvent Debtors, is void at law. Now, whatever may be the law as to such a limitation in the Court of Bankruptcy, no case has been produced to show that the same rule extends to insolvency. This point was discussed in *Gill v. Morgan*, (*ubi supra*,) and the Bar were invited to furnish us with any such case, but they have failed to do so. There are several reasons why the rule should not extend to insolvency, some of which were mentioned in the argument of the former case." The learned Chief Justice gives no reason for the opinion he expressed, except by reference to the

argument in the previous case, where I do not see any sufficient reason stated to create a distinction between the cases in bankruptcy and those in insolvency. A decision in the case of *Ferguson v. Ryan*, (not reported,) before Lord Plunket, C. was cited on the relation of Mr. McDonald, Q. C., who was counsel in the case. This authority was not mentioned to his Honor. I have got the bill and other documents in that case from the officer. It was a bill by the wife and children claiming under a deed of settlement, by which the fund settled was to go over in the event of the failure or insolvency of the husband. The case was fully argued before Lord Plunket. It appears that in that case there were two funds—an annuity, and a sum of £1000. The creditors, from motives of compassion, did not claim the annuity, but they resisted the wife's claim to the £1000. Lord Plunkett said that the case in the Common Pleas was not a binding authority, and that the settlement was void on grounds of public policy. Under these circumstances, on the authority of that case, and not being able to distinguish it in principle from the decision in *Phipps v. Lord Ennismore*, I think the claim of the assignees must be allowed; but, as this was a fit case to bring before the court, and as the parties opposing the appeal had the benefit of the opinion of his Honor, who had not before him the decision of Lord Plunkett, I will give no costs.

Order of Rolls reversed.

[Reported by BROWN L. FLEMING, Esq., Barrister-at-Law.]

KELLETT V. FARRELLY.—Jan. 17.

Contract—Conditions of sale—Purchase money—Interest—Abstract of title.

A purchaser of lands by public auction agreed to pay the purchase money in March, 1852, and fulfil the conditions of sale, one of which was, that the purchaser should be entitled to the rents and profits from the 1st November, 1851, and if the completion of the purchase should be delayed "from any cause whatsoever" beyond March, 1852, that he should pay interest on the purchase money from November, 1851. The vendor agreed to furnish an abstract of title within four days, but it was not sent within the specified time, and the title was not completed until January, 1854. The purchaser had, previous to March, 1852, drawn the amount of the purchase money out of the funds, and lodged it in bank to be ready for payment, but received little or no interest upon it; and, in the beginning of the latter month, he sent an agent to the vendor, offering the money, and declining to pay interest upon it after that date, but the vendor refused to receive the principal until the title should be completed, and in the latter end of the same month the purchaser wrote a letter to the vendor stating that if the abstract of title should be furnished within one week he was ready to complete the contract, provided that his right to the rents and profits should not be interfered with, and that he should not be asked for interest upon the purchase money. No direct

reply was given to this letter, but negotiations were continued, and finally a petition having been filed by the vendor to compel the purchaser to complete the purchase, and pay interest upon the purchase money, Held, that the purchaser was not liable for interest upon the purchase money, the vendor having been in default.

Held also, that the purchaser was entitled to the rents and profits of the lands.

In this case the respondent had entered into an agreement with the petitioner, to the effect that he had purchased from the latter certain premises by public auction for the sum of £1410, and had paid £280, portion thereof, into the hands of the petitioner's solicitor, (for which he received a promissory note as security,) and undertaking to pay the remaining portion on or before the 1st of March, 1852, and fulfil the conditions of sale. The third condition of sale contained the following provision: that the purchaser should be entitled to the rents and profits of the estate from the 1st of November, 1851, and that if the completion of the purchase should be delayed, "from any cause whatsoever," beyond the 1st of March, 1852, that the purchaser should pay interest at the rate of £5 per cent. from the 1st of November, 1851, till the purchase money should be paid. That the vendor should, within four days after the sale, deliver to the purchaser an abstract of title to the premises sold. An abstract of title was made out after the sale, and sent to the respondent, (but not within the specified time,) but it was objected to on behalf of the respondent, and the objections were not finally cleared up, and the title approved of until the month of Jan., 1854. The purchaser refused to pay £5 per cent. interest on the purchase money. This petition was filed by the vendor to compel the purchaser to fulfil the contract in question, and pay £5 per cent. interest upon the sum of £280 from the 19th of January, 1852, and upon the sum of £1130, (the balance of the purchase money,) from the 1st of November, 1851. The respondent in his answering affidavit alleged that he had been led to believe from the conditions of sale and a conversation with the vendor's attorney, that the conveyance of the property would have been complete on or before the 1st of March, 1852, and that he had in consequence sold out Government $\frac{3}{4}$ per cent. stock, to be ready to meet the purchase, to the amount of the purchase money, which, in the beginning of March, 1852, was tendered to the petitioner's solicitor by the respondent's son, who told the former that the respondent had sold out stock for that purpose, and that he would not pay interest after offering to pay the principal; this, however, the other party declined to accept until the title should be settled, stating that although the conditions of sale provided for the payment of £5 per cent. on the purchase-money, yet that the vendor never meant to insist upon the payment of it, and promising that the title would be speedily adjusted. Upon the 26th of March, 1852, the respondent's agent transmitted through the post a letter to the vendor's agent, stating that the latter was ready to proceed with the sale, if the abstract of title should be furnished within a week: provided that his right to the rent should not be

interfered with, nor any interest upon the purchase money demanded, he having been ready to perform his part of the agreement within the stipulated time. A letter, dated also the 26th of March, 1852, and which appeared to have been written upon the same day as the above letter, was received by the purchaser's agent from the vendor's agent upon the following day, containing the abstract of title, which, however, was not approved of until several further communications between the parties had taken place. The purchase money had been lodged in the Bank of Ireland by the purchaser, where it bore no interest; but he drew it out in the month of Jan., 1853, and lodged it in the Royal Bank in Dublin, where it bore interest at the rate of $1\frac{1}{2}$ per cent. per annum.

Deasy, Q.C., in support of the petition.—The question in this case is, which party is entitled to interest upon the purchase-money while the title was being made out. [*Lord Chancellor*—Why did not your client reply to the letter of the 26th March, 1852?] The abstract of title was sent by the petitioner upon the same day. *De Visme v. De Visme*, (1 MacN. and G., 350,) may be considered as an authority for the other side; but in that case it is to be observed that no compensation was awarded to the purchaser for having sold out his stock before the purchase was completed. The rents payable to the purchaser out of the lands must be viewed as amounting to such compensation, which he cannot be entitled to in addition to the interest on the purchase money. The agreement containing the conditions of sale being in writing under the Statute of Frauds, cannot be varied by parol, *Goss v. Lord Nugent*, (5 B. & Ad., 58.) In *Powell v. Martyr*, (8 Ves., 145,) it was held, that when a purchaser is let into possession of the rents and profits, he must pay interest upon the purchase money, and that a strong case must be made out to relieve him from such liability: merely drawing his money out of bank, when it bears interest, not being sufficient. *Winter v. Blades*, (2 Sim. and Stu., 393,) was to the same effect. The distinction in that case, which also appears in the present case, is, that the purchaser has been making use of the purchase money during the time that elapsed between the contract of sale and the delivery of a complete abstract of title.

Christian Sergeant, (with him *O'Brien Sergeant*, and *E. Lawless* contra).—The respondent does claim both the rents and profits of the lands, and also exemption from payment of interest upon the purchase money. There was a waiver of the third condition of sale in the present case as was also the case in *De Visme v. De Visme*. The cases relied upon are distinguishable upon this ground, that the respondent derived no actual benefit from the purchase money while the vendor was making out the title,—a distinction which is taken in *Sug. Vend.*, 490, (11th ed.) The petitioners have, by their delay, disentitled themselves to a specific performance. In *Denning v. Henderson*, (12 Jur., 89), one of the conditions in the sale of an estate was, that the purchase money should be paid upon a certain day, and that if, "from any cause whatever," the money should not be paid,

the purchaser making default should pay interest from that day until the time of payment; and the abstract of title proving defective, and there being a consequent delay, the purchaser was allowed to pay the purchase money without interest. There is a case that is relied on by the other side, *Sherwin v. Shakspeare*, (23 L. J. Ch., 180,) but in that case a distinction is taken between the non-furnishing of an abstract of title and the non-performance of the contract of sale. The respondent is willing to pay as much interest as the money produced from the time he drew it out of the funds, but no more.

Escham in reply.—The purchase was finally agreed upon in September, 1854, and a consent entered into to that effect, and it would be unfair that the purchaser should be entitled to his rents and profits of the estates except he be liable to pay the regular interest upon the purchase money, according to the third condition of sale. It is a principle of law, that under an agreement of sale of real property, a purchaser is not entitled to compensation in case the vendor should be unable to make out a valid title to the estate at all. *Flureau v. Thornhill*, (2 W. Bl., 1078.) There was no wilful default on the part of the vendor; and the subsequent consent between the parties will enable this court to act as it may deem fit; at all events the vendor is entitled to interest upon the purchase money from the time the title was accepted by the purchaser.

THE LORD CHANCELLOR.—In this case there appeared at first to be some difficulty, but in point of law there can be no doubt as to the rights of the parties. The question is this, whether the purchaser of this estate is liable to pay interest upon the purchase money, and if so, from what period. It is contended that he is liable to pay interest from the 1st of November, 1851, that is to say, from the time of the contract for sale of the lands, and that the case depends on the particular provisions of the conditions of sale; by which it was provided, that in case the completion of the purchase should be delayed from any cause whatsoever beyond the 1st March, 1852, interest at the rate of £5 per cent. should be paid until payment of the purchase money. This is the ordinary provision in cases of the kind, in which the time for payment of interest on the purchase money is fixed to commence from the time of the contract for sale. It is admitted that if there has been a default in this case, it has been committed altogether by the vendor, and not by the purchaser; for we find here a contract for the sale of this estate made in the year 1851, and not carried out or completed until the year 1854, and all this through the default of the vendor, who set up an estate for sale, and was not able for three years to make out a clear and valid title. It next appears that in the month of March, 1852, the purchaser, in order to be able to fulfil his part of the contract, and before the time that the purchase money was to be paid, put himself in such a position as to be able to pay the amount, and about the same time gave notice of this fact (although no doubt the notice was a verbal one) to the solicitor of the vendor. As to whether or not a portion of the actual money was

presented at the time to the vendor's agent, I need not consider, for it was not necessary, there being a written notice sent to him upon the subject, which was not disputed, and the terms of which were clear and not to be mistaken. We have therefore here, the case of a person in no default, and ready for the period of two years to hand over the purchase money to the vendor, and it would be going altogether against the current of authorities to say, that he should, under such circumstances, be liable to pay interest upon the purchase money from the actual day of the contract of sale. But as to the interest, it is alleged on behalf of the vendor that the other party had not his money idle during all this time, but that he had lodged it in the bank, and that it was not therefore unproductive. It does not appear that the purchaser had a current account at the bank, but he seems to have placed his money in the Bank of Ireland merely as a deposit, upon a deposit receipt, but nevertheless ready to be drawn out and paid to the vendor at any time that he might think fit to demand it. I am not aware of any case deciding that such a state of things was equivalent to making money upon such a deposit, or that it can be regarded as traffic for the benefit of the person making the deposit; but there the purchase money lies, and it appears to have been known to be so by the other party, for he actually borrowed a portion of it upon his promissory note, and it would be a strange proposition to hold that such money was made profit of by the purchaser. It would be hard to say to the lender, "You have lent me this money, and therefore you have made profit of it, and must pay me the interest;" and I cannot regard the case in this light. These matters must be therefore treated as altogether out of the case, except so far as showing where the money was during the time that the vendor was unable to make out the title: and unless there be very clear authority upon the subject, of which I am not aware, I will not hold that what occurred amounted to a making of money by the purchaser upon this sum. In *De Visse v. De Visse*, which has been referred to in the argument, such a lodgment was made by the purchaser, as in the present case; but it appears that the case was not decided upon that point, no stress was laid upon that fact, nor did the argument turn upon it at all. Therefore, under these circumstances, there is no grounds for holding that upon these facts the purchaser would be liable to pay interest upon the purchase money. Then it is contended that under the terms of the third condition of sale he is liable; it being provided as follows. [His Lordship read the third condition of sale.] The words "from any cause whatsoever," are relied upon. Now whatever may have been the effect of the authorities previous to *De Visse v. De Visse*, that case decides that those words are open to explanation, and that if the court is of opinion that the delay has been occasioned by the default of the vendor in not having performed his portion of the contract, it is at liberty to hold that this is not such a delay as is contemplated in the conditions of sale. That case came before the court in a singular manner. It appears that the purchaser had actually paid the purchase money, and interest thereon at 5 per cent. under the order

of the court, and the application, which was the subject of the case then before the court, was a petition by the purchaser for compensation for loss sustained by him, being the difference between the interest paid by him upon the purchase money, and the per centage made by him upon that sum during the investigation of the title: and the court held that it was a proper case for an inquiry, and directed that the Master should ascertain from what time a good title was made out, directing that interest should only be payable from that time. The Lord Chancellor in the latter part of his judgment says:—"I think it is carrying the principle out strictly to postpone the time for paying the purchase money till the time a good title is shown. The vendor would be entitled, to the rents and profits up to that time, and the purchaser's liability to pay interest would commence from that time, and the Master must inquire when that time was." That case has been followed by several others, in which the same construction has been put upon the words "from any cause whatsoever." The conditions of sale in *Robertson v. Skelton*, (12 Beav. 363), contained this provision:—"but in the event of the purchase not being completed from any cause whatsoever, and the purchase money not being paid before 12th November, 1846, the purchaser was to pay interest on the purchase money." The Master of the Rolls in that case says:—"The vendor asks for interest from the 12th November, 1846, at which time it was contemplated that the purchase would have been completed. On the other hand the purchaser resists this, because the vendor did not show a good title until March, 1849, and he produces the case of *De Visme v. De Visme*, in which the Lord Chancellor seems to have held, that if the delay in completing arises from the vendor's not making out his title, the purchaser is, under such a condition of sale, only liable to interest from the time a good title was shown;" and his Lordship made his order accordingly. In a latter case, reported in page 476 of the same book, *Rowley v. Adams*, the case of *De Visme v. De Visme*, is recognised. *Couper v. Bakewell*, (13 Beav. 421,) was another authority to the same effect. There is also a later case *Weddall v. Nixon*, (17 Beav. 167,) not altogether bearing upon this point, but recognising the principle upon which the former authorities depend. The latest case upon the subject, that I know of, is *Wallis v. Sorel*, (5 De Gex & Sm. 430.) In applying these authorities to the case before the court, we must look closely to the terms of the contract in the present case; and it is to this effect, that the purchaser is to be entitled to the rents and profits of the estate from the 1st November, 1851, and that if the completion of the purchase should be delayed from any cause whatsoever beyond the 1st of November, 1852, the purchaser should pay interest at the rate of 5 per cent., per annum, from the 1st March, 1851, until the purchase money should be paid. The first portion of this clause amounts to a positive declaration that the purchaser should be entitled to the rents and profits of the lands from a certain date; not making his title to them at all dependant upon the payment of interest specified in the latter part of it: and the latter

part of the condition only specifies that interest is to be paid upon the purchase money under certain circumstances, setting forth those circumstances, and the reason why it should be so payable. Thus it is provided, that at all events the purchaser is to be entitled to the rents and profits of the estate from the 1st November, 1851; and the title of the vendor to interest upon the purchase money is a separate matter altogether. Therefore according to the express terms of this contract the present case is, to a certain extent, different from the other cases I have alluded to. The purchaser bargained for the rents and profits of the estate from a certain specified day, and that the purchase money was to be paid on a certain day, but that if it was not paid upon that day, that the vendor should be entitled to interest upon it, giving as a reason the stipulation that the purchase money was to be paid upon a certain day. In point of actual amount the rents and profits exceeded the interest payable under these circumstances upon the purchase money, and therefore it would have been for the benefit of the vendor to delay the delivery of a perfect abstract of title as long as possible, if he was to be entitled to the rents and profits in the mean time. When I consider the acts of the parties, the case appears to me to be free from all doubt. The purchase money was ready to be paid over, and the agent of the purchaser had an interview with the agent of the vendor, tendering him the purchase money, and subsequently a correspondence took place between the parties, the purchaser praying for a completion of the contract; and this was after the time fixed for the completion of the contract. Apologies for the delay were sent by the vendor, to which the purchaser replied that he was, notwithstanding the delay, ready to proceed with the purchase if the abstract should be furnished within a week, and provided that his right to the rents should not be interfered with, nor any interest upon the purchase money demanded. Nothing can be more explicit than these proceedings on the part of the purchaser. No answer was given to the latter proposition, which was contained in a letter sent by the respondent to the other party; and therefore the former proceeded upon the assumption that the terms of this proposal had been acceded to. The answer offered to this argument is, that in point of fact the letter of the purchaser containing these terms was crossed upon the way by another letter from the vendor to him, containing an abstract of the title, and that the latter document had not been sent to the purchaser in consequence of the receipt of the letter sent by him to the vendor; and therefore, that, upon receipt of the vendor's letter, containing the abstract of title, the purchaser should have written another letter in reply; but I think that is carrying the matter too far. It certainly may have been the more regular method of transacting business; but, in the absence of such a reply, I do not think that any blame for default is to be attributed to the purchaser after the very clear proposition contained in their former letter. There appear to have been several meetings between the parties up to the month of January, 1854, and it is said that in consequence of these meetings the final arrange-

ment as to the title was delayed; but it appears that what was contended for by the respondent on these occasions was in accordance with the terms of that letter, and, therefore I must regard it as independent of these latter negotiations, and its contents as fully known to the opposite party. For these reasons I must refuse so much of the foregoing petition as relates to the payment of interest upon the purchase money, except that as to the interest upon this money from the time the title was completed, the vendor is entitled to it; and I shall order that the latter is to pay the costs.

Decree accordingly.

ROLLS COURT.

[Reported by RICHD. W. GAMBLE, Esq. Barrister-at Law.]

BOWES v. WATSON.—*Jan. 12.*

Petition of revivor and supplement—Marriage of sole petitioner.

A cause petition having been filed by a minor by her next friend, and the minor having married and made a marriage settlement, an order was made giving liberty to file a petition of revivor and supplement, bringing before the court the husband of the minor and the trustee of the settlement.

THE petition in this matter was filed by Letitia Bowes, a minor, by David Armstrong, her next friend, for the administration of the estate of Thos. Bowes. The respondent, William Watson, who was one of the executors alone, proved the will, and subsequently lodged in court funds sufficient to meet his liability. The petitioner, Letitia Bowes, attained her age on the 4th of August, and then intermarried with Thomas Corrin, with whom she was now residing in the Isle of Man. Previous to the marriage a settlement had been executed, whereby Letitia Bowes transferred the sum of £4000, part of her rights in the suit, to Henry John Watson, in trust for her sole use, and for other trusts as therein.

Philips now moved for liberty to file a petition by way of petition of revivor and supplement, for the purpose of bringing before the court the said Thomas Corrin and Henry John Watson, and for the purpose of bringing before the court the rights of the parties arising from the subsequent facts.

MASTER OF THE ROLLS.—If you prepare the order you require, according to the form of order given in other cases, I will make it for the purpose you require.

The following order was made:—

“Let the petitioner, Letitia Corrin, otherwise Bowes, by David Armstrong, her next friend, be at liberty to file a petition of revivor and supplement, for the purpose of bringing before the court as respondents Thomas Corrin, the husband of the said Letitia, and also Henry John Watson, the trustee named in the deed of settlement of the 13th day of September, 1854, made upon the intermarriage of the said Letitia with the said Thomas Corrin, and for the purpose of setting forth the rights occasioned by the said deed and the said marriage, concerning the funds and property, the subject matter of the suit. And when the petition of

revivor and supplement shall be filed, let the said petitioner be at liberty to serve notice on the said Thomas Corrin and Henry John Watson, and also on the respondent Wm. Watson, to show cause within eight days after service of said notice why the proceedings should not stand revived, and let her be at liberty, after the expiration of the said eight days, and upon certificate of no cause shown, to enter a sidebar rule to revive, according to the form settled by the court. And it is further ordered that upon the suit being duly revived it be referred to William Brooke, Esq., the Master to whom the original cause petition stands referred, to consider the matter of the said petition of revivor and supplement, and to proceed thereon together with the original petition. And it is further ordered that the costs of this motion and of the petition to be filed thereunder do abide the result of the other costs in the cause; and it is further ordered that a copy of this order be served on the several respondents when the said petition shall be filed; and let the said petition of revivor and supplement be annexed to the original cause petition.”

COURT OF QUEEN'S BENCH.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

HILARY TERM, 1855.

TUOMY v. FORMEY.—*Jan. 11.*

Amendment of Pleadings—Venue—Costs—
16 & 17 Vic. c. 113.

Where the summons and plaint, as filed and served, omitted the venue in the margin, as required by 16 & 17 Vic. c. 113, s. 10, and the plaintiff, upon being served with notice to set same aside, offered to pay the costs incurred up to the service, upon the terms of being permitted to amend by the insertion of the venue and the re-service of same, the court refused defendant his costs of the motion.

Pallas, for defendant, moved that the writ of summons and plaint, and all the proceedings thereon, be set aside for irregularity, on the grounds that the writ contained no venue in the margin, as required by the 16 & 17 Vic. c. 113, s. 10. The venue was omitted from both the original and the copy as served.

Osborne, for the defendant.—The question is simply one of costs. The plaintiff, upon receiving notice of the motion, tendered a consent, offering to pay all costs incurred up to the service of the notice, upon the terms of the plaintiff being allowed to amend the writ and serve it anew. The defendant having been offered all that he could be entitled to by motion, will not now be allowed the costs of this motion, *Corcoran v. Wills*, (5 Ir. Jur., 249.)

PER CURIAM.*—We will give no costs of this motion. Liberty to the plaintiff to amend upon the terms contained in the consent.

* Crampton and Perrin, J. J.

[*Coram* PERRIN, J.]

HICKIE v. REYNOLDS.—January 20.

Practice—Double Pleading—Form of Affidavit—
16 & 17 Vic. c. 113, s. 57.

D. C. Heron moved for liberty to plead several pleas.—The affidavit upon which the motion was grounded was precisely in the form given in *Ferg. Com. Law Proc. Act*, p. 87.

PERRIN, J.—I cannot give you a rule to plead double upon that form of affidavit. It is not a form given by the Act. It is loosely drawn. I doubt whether perjury could be assigned on it. You must have an affidavit either an echo of the pleas, or stating positively facts on which the pleas may be supported.

SMYLY v. HUGHES.—Jan. 27.

Practice—Special jury—16th & 17th Vic., c. 113, s. 112.

An application was made, in an action for assault, for liberty to try the cause with a special jury panel, under the former practice, pursuant to 16th and 17th Vic. c. 113, s. 112, upon the grounds that the plaintiff was a Protestant and defendant a Roman Catholic clergyman, and that in consequence of the different religions of the litigating parties the case had been made the subject of party feeling; that a trial had already been had in the cause, wherein the jury did not agree; and that under the new system it was impossible to exclude from the jury persons entertaining a strong party or theological bias. Held, that the above grounds were insufficient to justify the court in granting the application.

Ball, Q.C., (with whom was *Exham*), moved for liberty to strike a special jury according to the former practice of the court, upon the grounds stated in the affidavit of the plaintiff's attorney. That stated that the action had been brought for an assault alleged to have been committed by the defendant, who is a Roman Catholic clergyman, upon the plaintiff, who is a clergyman of the Established Church, and Vicar of Drumcar, in the County of Louth; that deponent believed, that in consequence of the different religions of the litigating parties, this case had been made the subject of party feeling, and that a trial had already been had in the cause, on which the jury did not agree; that said jury was a special jury, returned by the sheriff under the new system, and that in consequence thereof it was not in the power of either party to remove any person who might entertain strong party or theological opinions and feelings. The affidavit then stated deponent's belief that there would not be a fair and satisfactory trial in this cause unless the special jury were struck under the old system, so as to enable each party to strike off those persons of either religion whose party feelings were so strong as thereby to be likely to prejudice their judgments, and prevent their calmly and dispassionately doing justice. This is one of those cases for which the reservation in the 112th section intended to provide. In the recent case of *Douling v. Brutne*, not reported,

which was an action for libel, brought against the editor of a local newspaper, Mr. Baron Pennefather made an order similar to that now sought for, upon the grounds of the political prejudices likely to operate upon the minds of the special jury panel. This application is based upon the ground of political and religious prejudices being likely to influence the minds of jurors. It is hard to say to which of the cases the Act of Parliament should apply. It was quite obvious, from the inability of the last jury to find a verdict, notwithstanding the remonstrance of the Lord Chief Justice, that unless every person be put off the jury whose opinions were such as to lead to a disagreement, justice will be defeated.

J. D. Fitzgerald, Q.C., (and *T. O'Hagan, Q.C.*, contra.)—Both parties in this case complain of mutual assaults. There was a contrariety between the testimony of the plaintiff and the defendant, and it was a question for the jury, to which story they would give credence. It was likely that some on the jury considered one version, and others, the other version the more accurate one, and that such a diversity of sentiment should have existed on the part of the jurors is no ground for impeachment. There is at present a preponderance of Protestants upon the special jury panel, and the probability is, that out of the forty-eight names to be returned under the old system, no more than twelve Roman Catholics would appear. Such an order as this would enable the plaintiff to have a jury exclusively of Protestants, which would be very unjust to the defendant. There is a striking similarity, in that point of view, between the present case and that of *Reg. v. O'Connell and others*. The fact of the former jury having been unable to agree to a verdict is reason for granting this motion. [*Lefroy, C. J.*—I must disclaim the imputation of having done so unconstitutional an act as that of expressing a disapproval of one view of the case and an approval of the other; what I did was, to press upon the jury the necessity of arriving at some view of the case, without in the slightest degree intimating by my charge what that view should be.] Even supposing that this case assumed a theological aspect by the fact of the bill, plaintiff and defendant belonging to the clerical profession, the constitution of the jury in a particular way will not tend to involve such questions. In the case of *Harrison v. Lynch*, (6 Ir. Jur., 302; s. c. 3 Ir. Ch. Rep. 256,) the Court of Common Pleas, in refusing the order for a special jury according to the former practice, observed, that the motion was premature until the sheriff had made his return of the special jury panel, under the new practice, as it was impossible to say till then that any fair objection would arise.

Exham in reply.—With regard to the case in the Common Pleas, the observation relating to the time at which the application was made did not necessarily arise out of the argument, and must be regarded as an *obiter dictum*, which would not have been uttered had the attention of the court been directed to the difficulty which such a requirement would entail on the parties. The sheriff does not return this panel until seven days prior to the day

for opening the commission. Then the order must be obtained from this court, and the old practice requires that a four day's summons should issue to the sheriff to return the list of 48 names; and after all, the jury must be summoned six days before the assizes. Thus, to obtain a special jury according to the old practice would become morally impossible, and that would be a denial of justice. It appears from the Report of the Common Law Commissioners that the inconvenience which resulted to the jurors themselves was the reason for the change in the law, not any injury which the parties themselves suffered from the old system. It will not be necessary, in order to secure the probability of an agreement, to choose a jury of one religious belief, as in a case which was tried at the late Cork Assizes, involving a question of a sectarian character, the second jury, which consisted of six of each faith, properly acquitted the traverser.

LEFROY, C. J.—We are unanimously of opinion that this motion ought to be refused. It is quite true that the Legislature has entrusted the court with a discretionary power to allow parties to resort to the ancient law with respect to the striking of special juries; but there must be grounds, judicial grounds suggested to the court, which shall rest on sound and general principles. The court will act only on tangible and legal grounds, for permitting that exception, just as much as if they were carrying out the ordinary system, because the law entitles the opposite party in general to have the case tried by such a jury, as it usually appoints. Have sufficient grounds been shown to us in this case for taking it out of the general rule? It has been said that the last jury disagreed. Well, are we in every case in which the first jury impanelled under the general law shall disagree, to have recourse to this exception? Why, the very case referred to by Mr. Exham shows that although a jury may differ in the first instance, it is not hopeless to find a jury which may hereafter agree. Then with respect to the other ground suggested; it has been said that the parties here are both of them clergymen. I confess that it would add to the "benefit of clergy" if upon this ground the case of such were to be taken out of the operation of the general rule. Again; the parties differ in religion. Are we, because of this difference of religion, and the first jury not having agreed, to dispense with the general law, and to adopt the exception? That, indeed, is not such a ground as could safely be rested on as a general ground for the adoption of this course. The law thinks it better to submit to a particular mischief than to obtain a present object through the medium of what may prove a general inconvenience. Such would result from our holding that where a difference of religion exists between the parties, that should be a ground for dispensing with the general law. One case has been put to us by counsel, where we made an order of this kind in a case, which was to be tried in a particular county, under the influence of particular prejudices, and in which it would otherwise have been impossible to get an impartial jury. Those were general grounds of a wholly different character to the present. Then we were referred to an unreported case said to have been

decided by Baron Pennefather. Certainly no higher authority can be cited of an individual judge; but the grounds of the decision in that case are not before us, and, while we refuse this present application, it must not be understood that we desire to conflict with the decision of that learned judge. In this case the jury must be selected in the ordinary course. I may add that but for the last cited case, upon which it is probable that the plaintiff relied in making this application, we should have refused the motion with costs. We shall, however, do so without costs. *Rule refused.*

COURT OF EXCHEQUER.

HILARY TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

O'LOUGHLIN v. EYRE.—Jan. 11.

Scire Facias—Change of Venue.

Liberty granted to enter a suggestion to change his venue from the county where plaintiff resides, to the sheriff of which place the scire facias was directed pursuant to the 171st General Order, (under 13 & 14 Vic., c. 18,) on an affidavit that the venue in the original action was laid in Dublin, that the plaintiff resided there, and that the evidence could be more easily obtained there.

C. Shaw, moved on the part of the plaintiff, for an order that the trial in this case do take place in the County of the City of Dublin, the venue being there laid in the original action; or, in case the Court should decline to make such an order, that the plaintiff might be at liberty to file a suggestion that the trial may be more conveniently had in the County of the City of Dublin than in the County of Galway; and that the proper officer, on the filing of such suggestion, do issue the jury process and record accordingly. It appeared from the affidavit of Mr. J. Faris, plaintiff's attorney, on which counsel grounded this application, that a judgment had been obtained against defendant, in Trinity Term, 1846, on a plea of confession; and that, defendant having omitted to pay the entire of the judgment debt, a *scire facias* to revive the said judgment was issued, directed to the Sheriff of the County of Galway (in pursuance of the 171st Rule of the General Orders, under 13 and 14 Vict. c. 18), where the defendant, an attorney, resided, to which *scire facias* the defendant put in a plea of payment of the entire of the debt, though the balance was still due; that, in order to try that issue conveniently and inexpensively, the deponent was anxious to change the venue from the County of Galway to the County of the City of Dublin, where the plaintiff resided, and where the evidence in the case was obtainable, and where the transactions upon which the judgment was obtained arose. Counsel stated that this motion had been previously made before Mr. Justice Ball, sitting in chamber for all the courts, who reserved the case for the full court inasmuch as the Court of Queen's Bench, in the case of *Kearse v. Drew*, (2 Ir. Com. Law Rep. 846,) entertained a contrary opinion to that of the

Court of Exchequer in *Gilheoley v. O'Neill*, (2 Ir. Com. Law Rep. 158). Counsel cited the above cases, and also *Murphy v. Hawkes*, (6 Ir. Jur. 111,) and *Hearn v. Hayden*, (2 Ir. Com. L. Rep. 225.)

Duggan contra.

PER CURIAM.—Let the plaintiff have liberty to file a suggestion that the trial may be more conveniently had in the County of the City of Dublin than in the County of Galway, without prejudice to any application the defendant may be advised to make to change the venue on special grounds. The costs of the motion to be costs in the cause.

HASSARD v. CAULFIELD.—Jan. 12.

Common Law Procedure Act—Service of bill of exceptions—Computation of time.

A bill of exceptions must be served, in pursuance of the 84th and 85th General Rules, ten days before the next Term after the one in which the trial has been had; and, in computing the ten days, care must be taken not to include the days fixed as holydays under the provisions of the 232nd section of the Common Law Procedure Act.

Macdonagh, Q. C., moved the court that the settling of the draft bill of exceptions taken on the part of the defendant upon the trial at the sittings after last Michaelmas Term, and furnished by defendant's attorney on the 27th of December, 1854, might be proceeded with *nunc pro tunc*, notwithstanding the order of adjudication pronounced by Greene, B. on the 6th of January, instant. Counsel grounded his motion on the affidavit of defendant's attorney, whence it appeared that the trial of the cause commenced on Saturday, the 9th of December, and terminated on the Monday following, the 11th of December, in a verdict for the plaintiff for £300 damages, with 6d. costs. Before the verdict was handed in, counsel for the defendant tendered to Greene, B. the dominical of the bill of exceptions to the learned Baron's charge, and he received same. Defendant's attorney, (relying on some information which he had received on the 22nd of December, that the holydays did not count against him, and that he would be in time to serve the draft exceptions at any time within the then next week,) caused the draft bill of exceptions prepared by counsel to be duly served on Wednesday, the 27th of December, on plaintiff's attorney, requiring him by notice to return same approved of on plaintiff's behalf in the usual time, in pursuance of the 84th General Order. The draft exceptions not being returned in pursuance of said notice, defendant's attorney caused a summons to be issued on the 3rd of January, 1855, to settle said bill of exceptions before Greene, B.: and in pursuance thereof, the respective counsel and attorneys attended on Friday the 5th, before the learned judge, on which occasion the plaintiff's counsel, for the first time, raised the objection that the defendant had lapsed his time in the service of the exceptions. The objections having come by surprise, the case was adjourned until the following day—the 6th instant—when the case having been argued by O'Mahony

of counsel for plaintiff and E. Hayes, Q. C. of counsel for defendant, the learned Baron made the following ruling:—"In consequence of the objections made on the part of the plaintiff, [that the 84th and 85th General Rules had not been complied with, and that the defendant was not entitled to proceed in his bill of exceptions, reference being had to section 232 of the Common Law Procedure Act, inasmuch as the draft bill of exceptions and notice accompanying same had not been served until the 27th of December, 1854, which was a holyday, and therefore, either the service of the draft and notice was a nullity, or, if the succeeding holydays are to be excluded, the draft and notice must be considered as not having been served until the 3rd of January, which would be less than ten days before the commencement of the Term," I declined to settle the draft of the exceptions; without prejudice to the defendant's applying to the full court.

McDonagh, Q. C. (with whom were E. Hayes, Q. C. and Semple.)—The question arises under the 6th and 84th Rules, coupled with the 232nd sec. of the Common Law Procedure Act. The 84th rule states that "When any party shall have taken exceptions at a trial, he shall, ten days before the next succeeding Term, if the trial shall have been had at the Assizes, or in the sittings after Term, or two days after the trial, if in Term, or in the sittings after Easter Term, furnish a draft of the bill of exceptions to the opposite party, with a notice calling on him to return the same in four days, settled on his behalf."* Defendant, by serving the bill on the 27th day of December, substantially complied with the rule, although the plaintiff contends that the days should not be holydays. The general regulation of the business of the Superior Courts of Law is settled by the 232nd section of the Common Law Procedure Act, which prescribes the holydays as follows: "The following and none others shall be observed and kept as holydays in the said Superior Courts and the offices thereof, and the Court of Exchequer Chamber, and in the office of Registrar of Judgments: that is to say, every Sunday, Christmas day, and the seven days following that day, Good Friday, Easter Eve, Monday and Tuesday in Easter-week, Whit Monday, and Whit Tuesday, any day appointed for a public fast or thanksgiving, and when they do not occur in Term time, the day appointed to be kept as the birth-day, and the day of the accession of her Majesty the Queen, or of any of her successors; and the said holydays shall not be reckoned or included in any notices or other proceedings, except notices of trial and notices of inquiry in any of the said courts; and Sunday shall not be reckoned or included in any notice or proceeding whatsoever; and where the last day included in any such notice of trial or notice of inquiry shall happen to fall on any of the

* 85th Rule.—"On the expiration of four days from the furnishing of such draft, whether the same shall be returned or not, the party excepting shall issue a summons to settle the same before the judge who tried the cause, whereupon the same shall be settled and signed by such judge at such time as he shall think proper; and within two days thereafter the party excepting shall file the same, and proceed to make up the paper-books for the judges," &c.

days hereby appointed to be observed and kept as holydays, in such case the following day, or, where there shall be consecutive holydays, the day following the last of such holydays shall be considered the last of such days; and the days from and including the 1st day of August to the 28th day of October inclusive in each year, shall not be reckoned days within which any summons and plaint, defence, or other pleading should be filed, nor shall any such pleading be filed or received upon such days except a plea of confession or consent for judgment." This matter of the mere service of a draft bill of exceptions is not such "a proceeding" in the cause as is contemplated by the true construction and meaning of the 6th rule, which evidently points at an ordinary proceeding in a cause, or a step with which the court or its officers have to be concerned, and does not refer to intercommunications between the two attorneys to settle or adjust facts, or the interchange of notices. The 84th rule was framed for the ease and convenience of the judges and officers of the courts. [*Richards, B.*—Suppose the trial ended on the 24th December?] That was the argument I was about to urge on your Lordships. The Statute of Westm. 2nd, 13 Edw. 1, cap. 31, treats of the bill of exceptions as a matter altogether between the party tendering it and the judge; and in the argument in *Reg. v. Rowley*, (2 Dowl. n. s., 338,) it is likewise so treated. *Hewson v. Jack*, (6 Dowl., P. C., 611.) The construction contended for on the other side would lead to injustice and inconvenience. According to the 1 & 2 W. 4, c. 31, s. 1, Michaelmas Term ended on Saturday the 25th of November; by section 3 of the same Act a limitation is enacted as to the days for Nisi Prius Sittings after Term—"not more than twenty-four days, exclusive of Sundays, after Michaelmas Term." Accordingly, from the Monday following, i. e., the 27th of November, the twenty-four days mentioned in the Act would begin to be reckoned, and the last of the twenty-four, according to this computation, would be Saturday, the 23rd of December, until which day the Nisi Prius Sittings might legally have continued. Christmas-day was Monday the 25th, and holydays continued till the 2nd of January inclusive. If the plaintiff's construction of the rule be correct, no draft bill of exceptions could be served in a case tried on the 23rd of December. The judges made the rule appreciating the existing state of the law. But supposing that the defendant was mistaken in his construction of the rule, now, for the first time, to receive judicial interpretation counsel submitted that it was a case for relief and for enlargement of the time. *Reg. v. Rowley*, (2 Dowl. n. s. 339,) and *Pattison's, J.* judgment therein; *Lloyd v. Kirkwood*, (1 J. & S. 499); *Lessee Dunson v. Bell*, (2 Ir. L. R., 292.) The only question in the case is, whether the ten days are to be exclusive of holydays? What are the objects of these holydays? Manifestly for the ease of the officers of the court, who have nothing to say to the serving of these bills of exceptions, as they have to do with the filing of summons and plaints, and other pleadings. Suppose, as might happen—for the 232nd section contemplates the probability of such an occurrence,—a

day appointed for a publicfast or thanksgiving were suddenly ordered, manifest injustice would be done, for, by the construction contended for on the other side, the right of serving the bill of exceptions would be lost. The rule refers to the ordinary proceedings in the cause. What are ordinary proceedings appears from *Harrison v. Tate*, (6 Dowl. P. C. 611.) This transaction is one out of court, with which the officers of the court have nothing to do. The words of the statute point expressly to notices and other proceedings, and the service of the bill of exceptions comes not within the statute. In the case of *Peter v. Betty*, which was tried in the Common Pleas last Term, the trial was had on the 8th of December, the bill of exceptions was served on the 28th, and Monahan, C. J., signed it on the 3rd of January, and no such objection was made as has been urged here.

O'Hagan, Q.C., (with *Lynch, Q.C.*) contra.—This is not a case for granting indulgence to a party who has deliberately violated the rule. The case cited as having occurred in the Common Pleas is of no authority, for, admittedly, the point was not there raised. The important dates in the case are the 11th December, when the trial concluded; the 22nd December, when the defendant's attorney directed his clerk to obtain the information in the office of the court; the 27th December, when the bill of exceptions was served; and the 3rd of January, when the summons was issued. [*Reads the rule.*] If he excludes the holydays, he is wrong with respect to the service on the 27th, and violates the 84th rule, for the service should have been on the 12th. If he includes the holydays as counting-days, he is wrong with regard to the service of the four-day rule required by the 85th section, because he did not serve it till the 3rd of January, which was six days from the day of service on the 27th. The holydays are allowed as well for the solace of the bar and the attorneys as for the officers of the court. [*Pennefather, B.*—Suppose the draft bill of exceptions served on the 27th December, and the notice on the 4th January? What notice is to be served with the draft? That under the 84th rule, requiring it to be returned settled on behalf of the party within the usual time—namely, four days, the defendant's attorney did not serve this conformably with the statute, and as the 85th Rule requires. The days within the rules mean days of business, and not holydays. The 6th Rule of the judges settles the case [*reads it.*] These Rules are of equal validity with, and derive their efficacy from the statute [he reads 233rd section of the Common Law Procedure Act.] *Greene, B.*—The 6th Rule weighed so much with me, that I declined to decide the case without the opinion of the full court; holding that it referred to the 84th and 85th Rules and to the 232nd section of the Act, and was governed by it, and incorporated therewith.] The 6th Rule is a distinct declaration by your lordships to that effect. The attorney has no right to indulgence, for he had from the 11th December to make up the bill of exceptions, and there has been a second trial in the case: besides by means of a new-trial motion they can obtain a second investigation before your lordships, for

they are within the time. So that if your lordships decide with us that the rules have been violated, no misfortune can occur. In *Lloyd v. Kirkwood*, cited on the other side, it is expressly stated that the time was enlarged in consequence of the illness of the counsel. The party here lay by from the 11th. to the 22nd December, and has given no reason for so doing; and it is not pretended that even on the latter day the bill of exceptions was ready; there was therefore no case of fatality, and the party exercised no diligence to entitle him to favour. Nothing can be clearer than the 6th Rule, and then follows the 84th Rule, manifestly referring to days to be computed under the 6th Rule. They are wrong in attempting to distinguish between a bill of exceptions and any other "proceeding" in a cause; for it is a most important proceeding, as is evidenced here by the struggle they make to get it in. They can come in and argue their point of law—*quantum valeat*—on the new-trial motion, and consequently cannot be damned by the rejection of this application.

Hayes, Q. C. in reply.—This motion is not grounded on *fatality*, for the ordinary course of the calendar cannot be called a fatality, and that course has been referred to, to show the positive denial of justice that may, nay *must*, in certain cases, arise from the adoption of the opposite construction. By the 6th Rule* it is directed, that when by any rule, order or proceeding time is to be computed by days it shall be inclusive or exclusive of the holidays, under the Common Law Procedure Act, as is by that Act directed. Now that statute only specifies five cases in which the holidays are to be excluded: first, in section 43, where the time for appearance to a plaint is twelve clear days, exclusive of holidays; secondly, in the 191st section, which declares that writs shall not be tested or returnable on holidays; thirdly, in the 192nd section, which directs that rules shall not run in holidays; fourthly, in the 229th section, as to the return of a writ of replevin; and fifthly, in the 232nd section, which declares that they shall not be reckoned in any notices or other proceedings, except notices of trial and notices of inquiry. In no instance does the statute expressly direct that a computation is to be inclusive of the holidays, but it leaves it impliedly and necessarily to be inferred, that in every case, save those specified to the contrary, the computation is to be inclusive of holidays; and, therefore,

* 6th General Order.—"When by any rule, order, or proceeding, time is to be computed by days, it shall be inclusive or exclusive of the holidays under the Common Law Procedure Amendment Act, 1853, as is by that statute directed; and when by the month, it shall be considered a calendar month; and when by the year, twelve calendar months; and in all cases it shall be exclusive of the first, and inclusive of the last, day, unless the last be a holiday under the Common Law Procedure Amendment Act, when the following day shall be included." [This rule is to be construed in connexion with the 232nd Rule of the 16th and 17th Vic., c. 113. *Vide* note in Johnstone's General Orders, p. 4.]

Vide note in Ferguson's Common Law Procedure Act, 256. Sunday is excluded from computation in any notice or proceeding, and the other holidays are excluded from counting in all notices and proceedings, except notices of trial and inquiry. *Vide* 4th General Order.

it is submitted that in ascertaining the time for lodging the draft bill of exceptions there is no authority for excluding the holidays. Besides, it is plain, from the language of the 232nd section and the heading of it, that it was not intended thereby to legislate for anything but the regulation of business in the courts, and the offices of the courts, and that it was not intended to interfere with the progress of business out of the court, and between two opposite attorneys.

PENNEFATHER, B.†.—This application is, that the defendant should be at liberty to make up his bill of exceptions. It is a right which a party has by statute, but modified by subsequent statutes and rules of the judges, which have received the form of Legislative enactments. The question is, whether the party has, within the proper time, pursued the forms and rules laid down by the statute and the judge's orders; and the first part of it is, whether the service of the bill of exceptions being made on the 27th of December, a day pronounced a holiday by the Act of Parliament, is not to be considered altogether void, or at all events, whether the holidays should be at all reckoned as part of the time required by the Act. The 84th Rule requires that the party taking a bill of exceptions should, ten days before the next Term, when the trial has taken place, as in the present case, furnish a draft of the bill of exceptions to the opposite party, with a notice calling on him to return it in four days settled on his behalf. If that Rule be imperative, this bill of exceptions has not been served in time. Perhaps cases may occur in which it will be impracticable to comply with the Rule. If that be so, the court will not consider itself bound by this decision; but here the trial took place on the 9th of December. The defendant's attorney very properly laid the papers before his counsel on the 10th. Enough time was given him to prepare it, so as to comply with the Rule. There is nothing exceptional therefore in this case to exempt it from the general rule. Counsel for the defendant has most properly and manfully taken the blame on himself; he has informed us that he was unwell when the papers were sent to him, and that on his recovery he took a different view of the Rule, and did not consider the matter pressing. I do not think the mistake of counsel as to the interpretation of a rule of the court is a sufficient reason for our dispensing with it. If he had been so ill as not to have been able to attend to the business, and no other was to be found to do so, that would be such a fatality as the court would act on. It is said that the seven days' vacation after Christmas, given by the 232nd section of the Common Law Procedure Act, are intended only for the judges and the officers of the courts, but do not extend to the attorneys. I should be very slow to adopt such an opinion. These seven days are as much holidays as Christmas Day itself, and as much so for the practitioners in, as the officers of, the court. This bill of exceptions has not been served ten days before the first day of Term, and no sufficient excuse has been given for

† Pigot, C. B. was absent.

its non-service. The motion must therefore be refused, but as it is a new case, without costs.

RICHARDS, B., (reads the 232nd section.)—This section expressly points to proceedings in the courts and offices, and the office of the registrar of judgments. It does not say the days enumerated are to be holidays for all purposes. It specifies the particular purposes as to which they are to be observed as holidays; and I should consider it rather a violent conclusion to hold that these days are to be considered as if struck out of the calendar. What follows as to Sunday, excluding it from being reckoned in any proceeding whatsoever, rather strengthens the view I am disposed to take, viz., that the other days are to be considered as holidays only in the courts and offices, and as to proceedings carried on through them. But the 84th General Order is silent, (reads it.) The first question is, whether the bill of exceptions is a proceeding in the cause within the meaning of the 232nd section—and considering the rules of the judges as a graft upon the Act, that construction would lead to the absurdity suggested by the defendant's counsel. It may frequently occur that exceptions may be taken in a case tried on the last day of the sittings after Michaelmas Term; yet, the judges have framed a rule which, if the plaintiff construe to be the correct one in such case, excludes the plaintiff from his statutory right and common justice. I think, therefore, the serving the bill of exceptions not being done either through the court or offices enumerated, is not a proceeding within the 232nd section. But it is then said the 6th General Rule is so clear, that it puts an end to the question, (reads it.) It is answered that the terms there used do not refer to the general rules made by the judges, but to particular rules and orders of each court. The terms of the rule, no doubt, are very large; but I am disposed to hold that it should receive that construction, to avoid the absurdity of supposing that the judges would praise a rule which would otherwise be a denial of justice in cases of the most common occurrence. Under all the circumstances, I am strongly disposed to allow the defendant an opportunity of bringing his case before another tribunal, especially as on its former argument we expressed an opinion rather against him.

GREENE, B.—I concur with Baron Richards that it would be very desirable to allow this gentleman an opportunity of having the opinion of the court reviewed in the court above, and I would afford every facility in my power if I thought I could do so without violating the rules prescribed, but on its being argued before me I was of opinion that I ought not to receive the bill of exceptions. The 232nd section authorises the judges to make rules and orders, and that such shall be valid and observed in the offices, and they are to be maintained, and ought not to be lightly departed from unless some impracticability or fatality be shown to induce the court to relax or modify them. Whether you call them rules or orders, the 6th General Order extends to all rules to be made by the judges, and also to any rules or orders in the cause. We must therefore construe the 84th and 85th sections with reference to the Common Law Procedure Act. The

notice accompanying the bill of exceptions, in my mind comes within the meaning of the Act. If impracticability and a case of fatality be shown I think that the court has a relaxing power, and I would not, by abiding too closely by the rules, make—to use the words of Lord Plunket referring to the Chancery Rules—"the creatures of the court its masters," but in the present instance no fatality has been shown, and although one of the counsel in the cause had admitted that the mistake arose from his having taken an erroneous view of the rule, still that is not a reason we should admit for the relaxation of the rule. The party here lapsed his opportunity and lost by his own act—wholly unaccounted for—the privilege of arguing his bill of exceptions.

Rule accordingly.

NERWICH v. GREGORY.—Jan. 31.

17 & 18 Vic., c. 34—Subpoena ad testificandum—*Attendance of witnesses from England.*

It is a matter within the discretion of the court, and not as of course, for the Courts of Law to issue process under the provisions of the 17 & 18 Vic., cap. 34, to compel the attendance of witnesses out of their jurisdiction, and the party making the application for the subpoena ad testificandum must show in the affidavit facts sufficiently indicating a necessity for the attendance of the witnesses required.

Lawson applied, on behalf of the defendant, that the court should order that writs of *subpoena ad testificandum* should issue under the provisions of the 17 & 18 Vic., c. 34, to compel the attendance, as witnesses in the cause, of certain persons of distinction resident in England, whose testimony was of importance for the defence. The action was one for the recovery of the amount of several bills of exchange, and the genuineness of the hand-writing of certain parties to the bills was the important question in the case.

PENNEFATHER, B.—It is not a matter of course to issue this process, but it is for the discretion of the court, and it is expressly so stated in the 1st section of the Act—consequently it is incumbent on the party making the application distinctly to show that there is a necessity for the attendance of the witnesses, and that evidence of the facts they are summoned to depose to cannot be obtained *aliunde*. If the witnesses were to be brought over from England to prove the fact of hand-writing, which could, perhaps, be proved by witnesses in this country, the court would not grant the motion.

RICHARDS, B.—The necessity for the attendance of these persons is not stated sufficiently satisfactorily. You should give in the affidavit some history of the facts, to enable the court to exercise its judgment before making the order.

No rule on the motion.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

STEVELLY v. STEVELLY.—Jan. 18, 19.

Will—Construction—Substituted gift—Merger—Exoneration—Codicil.

A testator by his will bequeathed annuities to each of his daughters, severally with power of appointment to their children, and in case they should die without leaving issue then the annuity of the daughter so dying to go to his sons, to be equally divided between them: but in case of either of his sons dying before such event then his proportion in such annuity to go to such issue as he should leave: and if any of his sons should die without issue then to his other sons, except he or they should leave a widow or widows, and if so, to such widow or widows during her or their lives: and after to his sons or the issue of such sons as may have died. He then devised his freehold and leasehold property to his four sons A, B, C and D, in the following proportions: to A one-third, to B one-third, and the remaining one-third to be divided between C and D, after payment of the annuities, providing that in ten years after his death his "income" should be equally divided between his four sons, after payment of the annuities, with the following provision: "Having left to my eldest son D one-fourth of my income to take place in ten years after my death, it is my will that then he shall have his choice either to take the one-fourth of the income as mentioned above, or to take instead of one-fourth of the income the house and demesnes of X and Y, subject to the marriage settlement of the said D, and subject also to a sum of £500 and interest at 6 per cent. on said sum of £500;" and after a bequest of his furniture, &c., "I appoint my executors residuary legatees in trust first with the produce of such property to pay each of my daughters (naming them) £5 each, and such further sum as shall be necessary for their maintenance until the first payment of annuity shall be made to them." He then named his sons D and C, and his son-in-law executors. In the following year he added a codicil, naming his son C as executor in place of D, with the following clause: "And with the view of removing any doubts that may exist as to the continuance of annuities to my daughters (naming them) it is my will, and so intended by me, that the same respectively be only payable during their respective lives, and in the event of their dying leaving children, the share of such so dying to survive to their children, and subject to appointment as in my will named." Held, that the several annuities did not become extinct upon the death of each daughter respectively.

Held also, that the lands of X and Y, (D having elected to take them in lieu of his one-fourth of the testator's income,) were exonerated from the payment of the annuities.

Held also, that the residuary legatees did not take a beneficial estate in the residue.

THE testator in this case, George Stevelly, devised and bequeathed as follows: To his eldest daughter Anne an annuity of £50 during her natural life,

with a power of willing the same, in case she should be married and have a child or children, to such of the latter and in such proportions as she should appoint, said £50 a year to be payable half yearly by equal payments; and the will proceeded as follows: "and in case of her death without leaving a child or children, then it is my will that the said sum of £50 a year shall be equally divided between my sons, or if any of them shall have died before such event, then his proportion of said £50 a year to such issue as he may have left, (lawfully begotten) but if he or they shall not have left issue, then to my other sons, unless he or they shall have left a widow or widows, and then to the widow or widows during her or their lives, and after to my sons, or the issue of such son or sons as may have died." To his daughter Jane an annuity of £30 per annum, stating that she having married contrary to his advice, the testator wished that her husband should have no power over her fortune of £30 a year, and that therefore it should be payable to her own receipt, and that neither she nor her husband should have power of disposing of it, but that it should be for her maintenance, and after her decease for any child or children she should leave, "and if not, then to revert to my sons or their issue after her decease." To his daughter Charlotte £40 per annum, under the same restrictions and mode of devolution as Anne's fortune; with an express declaration by the testator that it was so bequeathed, and also that the fortune of Jane was left to his sons under the same restrictions. The will having stated that the testator's daughters Dorcas and Hester had been provided for by portions settled on his lands, proceeded—"I leave and bequeath the remainder of my property in freehold, chattel, and leasehold, to my four sons now living, in manner following, to be divided in regular half-yearly payments, but not until my three daughters Anne, Jane, and Charlotte, shall first have been paid their half-year's proportions; after that my will is, that my son the Rev. E. Stevelly, shall receive one-third, my son Professor J. Stevelly one-third, and my eldest son R. G. Stevelly and my youngest son Joseph Stevelly, shall receive the other third between them as tenants in common and not as joint tenants, in like manner of the income that shall remain each half-year after my daughters Anne, Jane, and Charlotte shall first have been paid their half-yearly payments." The will, after stating that the youngest and eldest sons were to receive but one-third between them on account of advances already made in their favour, proceeded to declare that it was the testator's will that in ten years after his death his "income" should then be equally divided between his four sons after payment of the annuities bequeathed to the daughters; and then after some bequests of moveables, and the grant of a leasing power to his executors, the will proceeded thus: "Having left my eldest son R. G. Stevelly one-fourth of my income, to take place in ten years after my death, it is my will that then he shall have his choice either to take the one-fourth of the income as mentioned above, or to take instead of one-fourth of the income the house and demesne of Clontynon Lodge, as well as Rochelle, as formerly let by me to J. Chormly, Esq., subject to the marriage settle-

ment of the said R. G. Stevelly, and subject also to a sum of £500 and interest of 6 per cent., on said sum of £500, which sum of £500 was taken up by me from my late brother Jonas Stevelly, Esq., in order to advance my said son R. G. Stevelly, by enabling him to join his brother-in-law J. Hodder, Esq., in partnership in the mercantile business. I therefore give my said son R. G. Stevelly his choice of Rochelle and Clontymon Lodge and demesne, subject to said incumbrances, and the head-rent of £13 10s. 6d., a year, or to take the one-fourth of the income as above in ten years after my death,"—and after bequeathing the furniture, &c., the will proceeded: "I appoint my executors residuary legatees in trust, first with the produce of such property to pay any just debts I may owe at my death, to give each of my daughters Anne, Jane, and Charlotte £5 each, and such further sums to my daughters Anne and Charlotte as shall be necessary for their maintenance until the first payment of annuity shall be made them." The testator then named R. G. Stevelly and E. Stevelly, his sons, and N. Parker his son-in-law, as executors. In the succeeding year he added the following codicil. "Having nominated my eldest son R. G. Stevelly one of the executors of my will, dated 11th April, 1836, and being now desirous to alter that appointment, I do hereby revoke the same, and in his place do nominate and appoint my son Professor J. Stevelly, who with my son the Rev. E. Stevelly, and son-in-law N. S. Parker, are to be, and are hereby appointed executors and trustees of my said will, for the uses and purposes therein stated; and with the view of removing any doubts that may exist as to the continuance of annuities to my daughters Anne, Jane, and Charlotte, it is my will and so intended by me that the same respectively be only payable during their respective lives, and in the event of their dying leaving children, the share of such so dying to survive to their children, and be subject to appointment, as in my will named." The testator died in the year 1837, leaving Robert G. his eldest son and heir-at-law, Edmond, John, and Joseph, and five daughters, Anne, Dorcas (married to N. S. Parker,) Jane (married to J. Welsted, residing out of the jurisdiction,) Charlotte, and Hester (married to W. Player,) and probate was taken out by J. Stevelly and N. S. Parker. Hester died in 1840, leaving her husband and three children surviving. Edmond died in 1841, leaving two sons. Anne died in 1841, intestate and unmarried. Charlotte also died without issue and unmarried, having appointed N. S. Parker her executor. Joseph died intestate, leaving a widow and three daughters. R. G. Stevelly, (the eldest son) elected to take the lands of Clontymon and Rochelle under the provisions of the will, and entered into possession. A cause petition having been filed by J. Stevelly for the purpose of declaring the rights of the parties,

F. Fitzgerald, Q. C. (with E. Molineux, Q. C.) for J. Stevelly.—Several questions arise upon the construction of the will and codicil in this case:—first, whether these annuities continued to subsist after the daughters to whom they were respectively granted had died; secondly, whether the lands of Clontymon and Rochelle are chargeable with the an-

nuities, supposing the latter to be still subsisting; thirdly, upon the construction of the residuary bequest. It is submitted that the daughters took no more than life annuities, whether we regard the will alone, or in conjunction with the codicil. The property out of which the annuities was payable belonged to the sons, and the codicil plainly declares that the testator's object was to remove any doubts that might exist as to the continuance of these annuities beyond the lifetime of the daughters respectively. Therefore, the annuities of Anne and Charlotte must be regarded as no longer subsisting. As to the liability of the lands of Clontymon and Rochelle, it is clear that when the annuities were created, these lands, as well as the rest of the testator's property, were subject to the charges; and, if the eldest son did not elect to take them, his interest derivable out of these lands would have been subject to the annuities; therefore, the testator had nothing in these lands to devise except what remained after payment of the annuities, and how could the mere act of election discharge them? There are neither express words nor necessary intendment to discharge the lands. They are given in substitution for one-fourth of testator's income, and that one-fourth was liable to these charges; therefore, according to the doctrine of this court, the liability should continue to affect the substituted gift. It is a well-established rule in the construction of wills, that where the thing bequeathed by a codicil (or, as in this case, by a subsequent clause in the will) is given in mere substitution for what is bequeathed by the will, the latter bequest must be taken with all the incidents of the former. *The Earl of Shaftesbury v. The Duke of Marlborough*. (7 Sim. 237); *Bristow v. Bristow*, (5 Beav. 289); and the words "instead of one-fourth of the income" show that it was so intended, the income being no more than a residue after payment of these charges. The trusts of the residuary clause are specified, and the residue, as far as those trusts do not extend, must go to the residuary legatees. It may be contended that the statute (11 Geo. 4, and 1 Wm. 4, c. 40,) requires an express gift to an executor, the mere appointment of a person as executor raising a presumption that he is not to take the residue beneficially: but this presumption may be rebutted, as, for instance, in the present case, by the gift of specific legacies to the next of kin.

Christian, Sergt. for R. G. Stevelly.—Even upon the construction of the will alone, these annuities will not merge in the inheritance upon the death of the daughters, being bequeathed as a provision to any widow or widows that might be left by any of the sons, for which no other provision is made out of the lands. Besides, the lands are divided into thirds, and the annuities into fourths, and, therefore, there can be no merger; therefore, the only question is as to the effect of the codicil, and it is clear from it that the testator did not intend that the duration of these annuities should be limited to the lives of the daughters alone, because he contemplates a further provision. [*Lord Chancellor*.—The testator revokes nothing in terms by the codicil.] The only remaining question, therefore, is as to the liability of Rochelle and Clonty-

mon to the annuities. It is not denied that these lands were liable for the first ten years; and it is admitted that *prima facie* in the case of substituted gifts, the liability continues; but the question is, in lieu of what was R. G. Stevelly to take these lands? not in lieu of one-fourth of the lands so charged, but of one-fourth of the clear income derived out of these lands. It has been argued by the other side that the testator had nothing to dispose of except the lands so charged; but, up to the last word of his will he had his entire income to dispose of. As to the residuary clause, it must be considered as a mere appointment of trustees, and, at any rate, J. Stevelly could not claim as residuary legatee, not being named at all in the will. [*Lord Chancellor.* The testator says, "I appoint my executors residuary legatees." We may, therefore, look to the codicil to see who are executors.] He cannot take in either case, for an executor, as such, cannot hold the testator's property for his own benefit, and except as executor, he could not claim a portion of the residuary estate at all.

Hays, Q. C. for other parties.—The annuities still subsist. [*Lord Chancellor.*—You need not argue that question.] The lands of Clontymon and Rochelle are chargeable, for they were so originally, and there is nothing expressly showing that the testator intended to exonerate them. The residuary bequest is clearly for the benefit of the next of kin, there being a direction that the executors are to maintain the testator's daughters until the payment of the annuities, and this maintenance could not have been intended to come out of the executors' own pockets.

J. S. Townsend for R. G. Stevelly.—Charges of this nature cannot merge in cases like the present. *Walpole v. M. Clintock*, (7 Ir. Eq. Rep. 353); *Grice v. Shaw*, (0 Hare, 76.) Under the will these annuities are quite distinct from the property in the lands. The codicil speaks for itself as to what doubts the testator sought to remove, viz. as to the rights of the daughters, not of the sons. A codicil cannot have the effect of disturbing an antecedent will, except there be an "absolute necessity" for it. 1 Jarman on Wills, 160. There must also be clear words to effect such alteration. *Stokes v. Heron*, (12 Cl. & Fin. 161); *Persse v. Daly*, (9 Ir. Eq. R. 508); *Fitzmaurice v. Sadlier*, (12 Ir. Eq. R. 544.) As to the residue, executors, as such, cannot, as formerly, derive a benefit from an undisposed of residue, but must be expressly named as the objects of the testator's bounty, otherwise they must act as trustees for the next of kin. 2 Wms. Exor. 1264. 11 Geo. 4, and 1 Wm. 4, c. 40.

Flood was heard in reply.

LORD CHANCELLOR.—In this case the first question I shall consider is, has the codicil any effect in making an alteration in regard of the will, as to the annuities given to the daughters; and if this be so, it will amount to a revocation of several limitations already made in the will. That it was the intention of the testator, by the will, that these annuities were to survive the daughters, is plain. I cannot yield to the argument that is used in support of a different construction. The only expression in the will that might be supposed to have

such a meaning is the expression "revert," which is made use of as to one of these annuities. Certainly, if that expression stood alone and unexplained by the context, it would have the meaning contended for; but it cannot have this effect in the present case, for it is explained by a subsequent part of his will, in which the testator declares that all these annuities are left to his sons under the same restrictions, which is tantamount to saying that they were all subject to the same limitations as those specified as to the first annuity. It must therefore be considered that under the will the testator did not intend that these annuities, in case his daughters should die without issue, should altogether cease. That being so, the next question is, as to the effect of the codicil as regards these charges. It does, no doubt, provide that as to the continuance of these annuities, they shall be payable to the daughters only during their respective lives, but it does not refer to any of the subsequent limitations as to these annuities contained in the will—it only speaks of the continuance of them as to the daughters; and it is to be observed that the language of the testator is "as to the continuance of annuities to my daughters." It would be a very strong construction to hold that this amounted to a revocation of the will, nothing being expressly stated to that effect. The word "revoke" is not used in this part of the codicil, and therefore it would be a forced and unnatural construction to give it this effect. This portion of the will therefore appears to me not to be open to doubt. The next question is more difficult. Having made these bequests, the testator next proceeds to introduce a provision that might have the effect of altering the bequest of the annuities, as follows:—"I leave and bequeath the remainder of my property in freehold, chattel, and leasehold, to my four sons, now living, in manner following, to be divided in regular half-yearly payments, but not until my three daughters, Anne, Jane, and Charlotte, shall first have been paid their half-yearly proportion." The effect of this is, to charge these annuities upon the estate, although he does not use the actual word "charge," and he proceeds—"after that my will is, that my son, the Rev. E. Stevelly, shall receive one-third; my son Professor J. Stevelly, one-third; and my eldest son R. G. Stevelly, and my youngest son J. Stevelly, shall receive the other third between them, as tenants in common, and not as joint tenants, in like manner of the income that shall remain each half-year after my daughters Anne, Jane, and Charlotte, shall first have been paid their half-yearly payments." He thus shows what it is that is to be divided between his sons; and he then provides, that after ten years from his death the share of each of the sons is to be one-fourth of this income, instead of the third being divided between the eldest and youngest. Then comes the following clause, as to which the chief difficulty arises:—"Having left to my eldest son, R. G. Stevelly, one-fourth of my income, to take place ten years after my death, it is my will that then he shall have his choice either to take the one-fourth of the income as mentioned above, or to take, instead of one-fourth of the income, the house and demesne of Clontymon

Lodge, as well as Rochelle, as formerly let by me to G. Chorley, subject to the marriage settlement of the said R. G. Stevelly, and also subject to the sum of £500." The question upon this clause is, whether the eldest son, in case of such election, was to take the lands still subject to the annuities created in the previous part of the will. He contends the contrary, and I am of the latter opinion, as I think that it was the intention of the testator that these lands should be exonerated from those annuities. The testator does not state what security had been given for this sum of £500 which had been taken up, but merely that it had been borrowed; however, it might plainly be inferred that it would have been chargeable against the entire property, but for this provision. The testator contrasts these two denominations, so selected from the rest of his property, with one-fourth of his *income*, for he says:—"I therefore give my son, R. G. Stevelly, his choice of Rochelle and Clontymon Lodge and demesne, subject to said incumbrance, and £13 10s. 6d. a-year, or to take the one-fourth of the *income* as above." We must therefore look back to see what the income is, and we find that his property is subject to these annuities and this other charge, and then we find the testator separating this portion of his property from the rest; and in describing the charges on it, and it is to be observed that he does not say that his son is to enjoy it after payment of the annuities, and I do not think that he intended that it should be so charged. His intentions are not very fully expressed, but I think they are clear enough; I therefore conceive, that from the manner in which he has dealt with these two properties, he intended that they should only be subject to the incumbrances which are expressly set forth in the terms of the will, and therefore that he means by the term "*income*" the rents of his other property, subject to the charges to which they are liable. These two properties will be therefore exonerated from the payment of these annuities. As to the residue, another question arises. After the testator has thus provided for his children, he then comes to dispose of his residuary estates in these words:—"I appoint my executors, residuary legatees, in trust, &c." He does not then name his executors, so as to shew that he had any preference for one member of his family more than another; but he subsequently nominates two of his sons and his son-in-law as executors. It is strange that he should exclude from the residuary clause one of his sons, if he had intended that it should pass a beneficial interest, and it would appear the more so from the codicil, by which he revokes the appointment of one of them, and substitutes another; therefore I can see nothing from which to conclude that he intended to give a beneficial bequest under the residuary clause to these individuals. Before the passing of the statute, the effect of naming a person executor, even if nothing more was said, was, to create him residuary legatee. The statute has altered the law in this respect, and provides that such an appointment shall not have that effect. Here, it is said, the testator does both what was requisite before and since the passing of the statute,

to give these individuals the residue; and the only solution I can give to this objection is, that the will does now what the law effected before the passing of the statute—that is to say, it makes these parties residuary legatees, they being also executors: and this of itself would be sufficient to give them a beneficial interest in the residue—the same effect as the naming of them executors would have had before the statute, provided that there were no express words to the contrary; but in this case I find the words "*in trust*," and I think that these expressions were sufficient to override the entire bequest, and therefore to shew in what capacity these residuary legatees were to take. I do certainly find in the residuary clause some small bequests to some of the next of kin, but still I am of opinion that the testator intended that the residue should go to his next of kin.

Decree accordingly.

COURT OF QUEEN'S BENCH.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

KEATING v. JOHNSON.—Jan. 30.

Practice—Irregularity—Costs.

Where a defence was irregular for want of an indorsement of particulars of payment, and after service of a notice of motion to set aside the same, a notice in reply offering to amend, with an undertaking "to pay all costs properly and necessarily incurred in and about the service of said notice," is not sufficient to exonerate the defendant from the further costs of the application, but he is bound to offer to pay all costs incurred, up to that time, by reason of his mistake.

Walter Bourke, Q. C. moved that so much of the defence filed by the defendant in this cause as stated that the defendant paid the sums of £20 10s. and £30 therein mentioned, should be set aside, on the ground that the full or any particulars of the payments of such sums of money respectively were not indorsed upon or given in the said defence, &c. as required by the Common Law Procedure Act, and also that so much of the defence as states that the defendant is indebted to the plaintiff in £10 18s. 11d. only, be set aside, as the same did not traverse any material matter of fact in the summons and plaint, and amounted only to the general issue, and was calculated to embarrass plaintiff. He relied on the 16 & 17 Vic. c. 113, ss. 41, 83. The defence stated that defendant paid the sum of £20 10s. in said summons and plaint stated, to the said W. Keating, on foot of said promissory note, bearing date the 27th of February, 1850; and as to said sum of £40 18s. 11d. in said summons and plaint also mentioned; that defendant paid on foot of said account £30, and was now indebted to said plaintiff in £10 18s. 10d. only.

Forbes Johnson contra.—After the service of the notice of this motion on the 20th, we served a notice as follows, viz. "In reply to your notice of the 20th I have to inform you that the defendant paid to William Keating (testator of plaintiff) the amount of said bill of exchange shortly after it became due, and that the said defendant paid the said sum of £30 to said William Keating at the Fair of Cas-

bledermot, which was held next before the death of the said William Keating, and I hereby undertake to have said plea and defence amended by indorsing upon the same the particulars of the said payments as aforesaid, in pursuance of the Common Law Procedure Act; and I further undertake to pay you all costs properly and necessarily incurred in and about the service of the said notice." As the plaintiff refused to act upon this, he ought not to succeed on the present motion.

LEFROY, C. J.—We will dispose of this case upon principle. A certain course of procedure has been prescribed by the Act, which has been violated by the defendant in two respects: first, there are no particulars of payment; and secondly, the plea is calculated to embarrass and mislead the plaintiff, for there are two persons to whom the alleged payment might have been made, and the plea does not specify which of them. Is the defendant, then, to repair that violation of the Act by serving a notice that he would set the matter right, and so deprive the other party of the expenses which he had incurred by the act of his opponent? Is an offer to set proceedings right to supersede the irregular act of that party, and to deprive the other party of the expenses of enforcing his objection, which he has incurred, and which he is entitled to? The defendant should, by his notice, have offered to amend, upon terms of paying the costs incurred up to that time, and he may do now that which he should then have done, paying these costs which necessarily include the costs of this motion.

Rule accordingly.

REG. v. GUARDIANS OF URLINGFORD UNION.
January 31.

Poor Law Commissioners—Pauper—Board of Guardians—1 & 2 Vic. c. 56—Costs.

It is the duty of the Poor Law Commissioners, in cases relating to the internal management of the affairs of the union house, to communicate in the first instance with the guardians of the union, and not to interfere directly with or convey their instructions to the officers of the establishment.

When the commissioners had, improvidently, directed the master of a union workhouse to alter the registry of the religion of a pauper infant, under the 1 & 2 Vic. c. 56, s. 43, and upon the refusal of the Board of Guardians to allow thereof, had obtained a conditional order for a writ of mandamus to the said Board, for the purpose of enforcing the foregoing instructions, and upon subsequently discovering their mistake, admitted the cause shown against the rule to be good. Held, the defendants were, under the circumstances, entitled to costs.

IN this case a conditional order had been obtained by *E. Pennefather*, on a previous day, for a writ of mandamus to issue to the defendants, commanding them to change the religion of a certain pauper infant, named John Fortunate, a supposed foundling, now chargeable to the said union, and resident in the workhouse, from the Roman Catholic to the Protestant column, in the proper book kept for

that purpose, pursuant to the 1 & 2 Vic. c. 56, s. 43. It subsequently appeared upon the affidavits filed on behalf of the defendants, as cause against this order being made absolute, that the child in question was not a foundling, but had been previously to his last admission for a short time in the house with his mother, who stated herself to be a Roman Catholic, and who afterwards left along with her child. The latter was subsequently readmitted, having been deserted by his parent. Under these circumstances the child was registered in the latter religion. In consequence of some doubt having been thrown upon the propriety of this mode of registry, the master of the workhouse communicated with the commissioners, who thereupon sent him a direction, not under seal, to alter the registry. The guardians refused to allow of this, and hence the application for the *mandamus*. It did not appear that the commissioners were aware of all the facts of the case until the coming in of the present affidavits. Under these circumstances,

E. Pennefather, on behalf of the commissioners, submitted that the rule ought to be discharged without costs. Had the commissioners been apprised by the board, in the first instance, of the real facts of the case, the order would not have been sought for, and that ought to have been communicated.

O'Hagan, Q. C., contra.—We are entitled to our costs. We came here to show cause not alone upon the ground referred to, but upon the general principle that the law was entrusted absolutely to the discretion of the guardians, without reference to the commissioners. The commissioners in the present case ought not to have directly communicated with the master of the house, but should have conveyed their instructions to the board. The board were not under the circumstances bound to state the facts to the commissioners, when the proceedings were quite irregular and at variance with the Act.

LEFROY, C. J.—The commissioners have here violated their duty. The guardians are the primary parties to make an order with regard to the mode in which the columns in question ought to be filled. The commissioners ought to have applied to the guardians on this subject, and not have passed them by, and directed the master to do the act. It is as plain as light that the commissioners have superseded the guardians, by directing the master to do an act, regarding which it was the commissioners' primary duty to communicate with the guardians. The defendants are entitled to their costs.

Rule accordingly.

COURT OF EXCHEQUER.

HILARY TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

BUTLER v. LORD MOUNTGARRETT.—Jan. 27.

Practice—Trial at Bar.

A trial at bar is very seldom granted, and only under special circumstances, inasmuch as it interferes with the general business of the court. The Attorney General has the right, ex officio, to ob-

tain a trial at bar, but the court rely on his exercising a sound discretion before applying. Where the points saved at the trial had been unanimously ruled in favour of the party who now sought for a trial at bar, Held to be a sufficient reason for the refusal of the court to grant the order, which always lies in their discretion.

Butt, Q. C., (with whom were *Napier, Q. C., Barron, and M. O'Donnell*), applied that the trial about to be had in this case might receive a trial by a special jury at the bar of the Court of Exchequer. The learned counsel relied on the affidavit of the attorney for the defendant, which stated "that the property sought to be recovered in this action is of the value of about £4,000 a-year, and that there are further estates, not included in the ejectment brought in this cause, now in defendant's possession, of the value of about £4,000 a-year more, the title to all which estates depends upon the question whether the present defendant is the heir-at-law of the late Earl of Kilkenny; and that the right and title of the defendant to the ancient peerage of Mountgarrett depends upon the question of his legitimacy." The affidavit further stated that "At the trial already had in the County of Kilkenny, three eminent advocates practising at the Scotch bar were produced as witnesses, and that at any other trial which may be had it will be necessary to produce similar testimony on the subject of the Scotch law of marriage; that, at the last trial, one special counsel was brought for the defendant, and two special counsel for the plaintiff, to the Assizes in Kilkenny; and that, in addition to the Scotch advocates, several witnesses (whose names were set forth in the affidavit) resident in England or Scotland, were examined, all of whom could more conveniently attend a trial in Dublin than in Kilkenny; and that it will be necessary to produce on defendant's behalf, at any future trial; all the witnesses examined in his behalf on the last trial." As to the witnesses produced, the affidavit referred to the certificate of counsel and the report of the learned judge (*Mr. Justice Ball*) who tried the case; "that the last trial occupied five days, and that points of law and evidence of great importance and difficulty arose; that on any future trial these and similar questions of difficulty and importance are likely to arise; that the question at issue depends upon the existence and validity of an alleged irregular Scotch marriage, as invalidating a marriage regularly and publicly solemnized, and involves matters of great importance and difficulty in point of law, not only as to the reception of evidence, but also as to the law of marriage in Scotland, and the application of that law to the facts of this case, and proceedings in the courts of justice in this country; and that this is a fit and proper case to receive a trial by a special jury at the bar of this honourable court." Counsel contended that the rule as to the granting of trials at bar was now settled by the Common Law Procedure Act. Formerly it was the rule never to grant a trial at bar in the same Term as it was applied for:—"If H would have a trial at bar in Easter Term, he ought to move for it in Hilary Term."—*Holt, C. J.* in *Turner v. Barnaby*, (2 Salk. 649.) The affida-

vit in this case fully sets out the value of the property at stake, and the importance of the legal questions to be discussed, so as to entitle the defendant, *ex debito justitiæ*, to have a trial at bar. The granting the application is for the discretion of the court. It is thus laid down in *Lord Sandwick's case*—"When there is value or difficulty we are bound of common right to grant trials at the bar—'*Inquisitiones de grossis et pluribus articulis, quæ magna indigeant examinatione, capiantur coram justiciariis de Bancis.*'"—(Stat. West. c. 30; per *Holt, C.J.*) To the above case the following note is added by the editor: "The word 'or' here should be 'and,' per *Cur. Com. B., Trin. 2 Geo. 3.*" An erroneous impression was prevalent that in this court trials at bar were seldom, if ever, granted, and only on the application of the Attorney General; but in the case of *Lessee Dumer v. Mahoney* a trial at bar was granted in the Exchequer in Easter Term, 1742.—(How. Pl. Excheq. 222.) [*Pennefather, B.*—I remember a trial at bar since I have sat here, but the courts are certainly slow to grant such applications.] *Mr. Howard*, in his book on the Plea-side of the Exchequer, p. 222, says—"In matters of great weight and difficulty the judges above, upon motion and information, will retain causes to be tried there, (*sc. Westminster*), though 'laid in the country'.....' and there the juries must come up for a trial at bar,' and the court, on counsel's motion, will grant the same; but an affidavit is to be produced of the value, and it must also appear that it is a case of difficulty, and will require great examination, or some other sufficient reason; but the court will not require the party to set forth what the point of law is." All these several reasons concur in requiring that the present application should be granted. The celebrated *Trimleston case*, in which the issue was *devisavit vel non*, was tried at the bar of the Queen's Bench. In the case of *O'Hara v. O'Hara* (not reported,) a trial at bar was granted, and the question at issue was the validity of an alleged Scotch marriage. In the Common Pleas actions of *quare impedit* are tried at the bar. It has been objected that we should have made this application in the first instance, and before the trial already had. But, on reference to the rule books, we have found that in the case of *The Lessee of the Corporation of the City of Dublin v. Thomas*, (tried in 1826,) the court set aside the verdict, and granted a new trial at the bar. In the case of *The Irish Society v. The Bishop of Derry*, the affidavit merely stated that difficult points of law would arise; and it was held to be sufficient, and that it was not necessary to specify the exact points. [*Greene, B.*—That was a case in which the difficulties arose on points of our own law.] Our case here is *a fortiori*, for the questions will arise on difficult points of Scotch law; and the observations of *Pennefather, B.*, in giving judgment on the new trial motion recently argued,—'that it was not surprising that the learned judge who tried the case should have fallen into error on a trial where so many complicated questions of law arose,'—confirm our opinion that, if trials at bar are to remain, there never was a case which more required such a tri-

bunal than the present. On the ground too of the saving of expense to both parties, and of greater expedition towards the final adjudication of the questions at issue, we would urge the court to grant our application; for, at a trial at bar, the court gives judgment immediately, and the questions will go at once to the Court of Error, by a bill of exceptions to your Lordships' ruling. The question of convenience lies between the taking of three special counsel down to Kilkenny, or the bringing of twelve special jurymen up thence. The having a trial at bar will not interfere with the general business of the court, for, by the 1 & 2 W. 4, cap. 31, s. 3, it is competent for the court to fix a day in vacation for the trial; and a trial at bar will occupy less time than if the case were tried at the assizes, and subsequently argued in the court above. [Counsel also cited *Jones v. Porter*, (1 Ir. T. R., 297.)]

The Attorney General, (with *D. Lynch, Q. C.*) contra.—The last statement of the learned counsel came upon me by surprise, for as all law points which arise in the case during the progress of a trial at bar must be argued as they arise, we must add to the number of days the trial lasted at Kilkenny an additional five days or more for law arguments, and thus we shall have the public time, and that of the full court, taken up for a fortnight, or three weeks perhaps, in trying a single case. It cannot be had in Term time, for that would interfere with the general business of the court, and with the other suitors, and to defer it to next Term would delay the plaintiff in the prosecution of his just rights. If a trial at bar be appointed after Term, it must interfere either with the usual Nisi Prius Sittings, or the judges must be withdrawn from the circuits, and thus occasion inconvenience to the public business of the country. The point of the greater convenience of Dublin, as being more accessible for the witnesses from England and Scotland than Kilkenny, is untenable, for the railway has brought the two places within a short drive of each other, and one place is as easily reached as the other. I do not say that this court cannot grant a trial at bar, but it is for the discretion of the court, and its prerogative is not lightly to be exercised. I was present at the debate of the two last cases in which similar applications were made in this court, and, on the first of those occasions Baron McLelland said, "We have uniformly refused to grant trials at bar;" and in the next case, that of the *Attorney-General v. Walsh*, (Hayes & Jones, 65), wherein, on an information in the Revenue Exchequer, the Attorney-General moved for a trial at bar, and insisted on it as a matter of right, which it was not competent for the court to refuse, Joy C.B. and Pennefather B. felt that they could not resist the motion, but granted it most reluctantly; because, if trials at bar be granted, it may become impossible to dispose of the general business of the court. This is a practice which ought not to be resorted to without a sound exercise of discretion on the part of the Crown officers. The case of *O'Hara v. O'Hara*, cited on the other side, is an express authority against this application. Some of your Lordships

may remember it. It was a case similar in some respects to this, and involved the question of an alleged marriage with a French woman in Scotland; but property to a much larger amount than in the present case was at stake. A trial at bar did, I admit, take place, but the ultimate decision of the case took place at Carrickfergus, whither the court, having discharged the order for a trial at bar, sent the case to be tried, and five special counsel were taken down, and that at a time when there were not such facilities for travelling as now exist. The trial of this case at the next Assizes at Kilkenny will not occupy so much time as on the last occasion, for the judge who tries the case must try it according to the decision of the court already pronounced on the most important legal questions likely to arise. I admit the court has a discretion, but this is not the case in which it should grant a trial at bar.

Lynch, Q.C., was about to follow on the same side, but the court called on the other side.

Napier, Q.C.—In the case of *O'Hara v. O'Hara* the court granted a trial at bar, and the reason that the trial was had at Carrickfergus was on account of the very great facilities afforded for the attendance of the Scotch advocates and witnesses examined in the case, by the proximity of, and intercourse between, that town and Scotland. The granting of the trial at bar will not in any way interfere with the general business of the court for the ordinary suitors, for a convenient day in the vacation can be appointed. To grant the application after a trial had is not unusual. *Lord Sherborne's case*, (Ridg. Par. Cas., 224,) is strictly in point; it was a question of legitimacy, and the fact in issue was the marriage of General Napeg with one Anne Fitzgerald, alleged by two witnesses, Mary Swaine, a trooper's wife, and one Bell, a trooper, who swore to being present at the ceremony, in the village of Mark-allendorf, in Germany. After a verdict found for the defendant at the first trial, the appellant applied to the Court of Exchequer for a trial at bar, and the 25th of April, 1780, was appointed. The second verdict was set aside on much the same grounds, among others, as the verdict in this case, viz., as being contrary to the weight of evidence, and also because the defendant's counsel had addressed themselves too much to the passions of the jury; and in November, 1782, the case was tried a third time at the bar of the Court of Exchequer; and a fourth trial was had at the bar of the Court of Common Pleas in Michaelmas Term, 1788, by direction of the Lord Chancellor; and, finally, a fifth trial, at the bar of the Common Pleas, was had in Michaelmas Term, 1790, by order of the House of Lords. Our case is stronger, as involving questions of foreign law. As to the case of *The Attorney General v. Walsh*, every one knows it is the right of the Crown to have a trial at bar, and all the court said was, that he, the Attorney General, should exercise in every case a sound discretion before he made the application; and the court made the observation because at that time there was not the power, since given, of ordering the trial to be had in the vacation. The *Anglesey case*, (17 State Trials,) was tried at the bar of the Court of Ex-

chequer in 1743. In the case of *Hume v. Burton*, (1 Ridg., 506,) the issue being sanity or insanity, a new trial was ordered at the bar of the Court of King's Bench. In that case I find the following important observations: "The value appears by the affidavit, the difficulty by the certificate; so that, by the rules of the court, the trial should be at bar, but the plaintiff is entitled, *ex debito justitiæ*, at common law. All trials were at Westminster or Dublin until the Statute of Westminster 2nd, cap. 30, (in force in Ireland by 10 Henry 7); and the true meaning of the case in Sayer is, that it shall be discretionary in the court to determine whether a case is of such difficulty as to direct it to be had at the bar; but if it be of difficulty, or appear to be so by such a certificate as the rules of this court require, (which is the present case,) the plaintiff is, *ex debito justitiæ*, ever entitled to such a trial." We have such a certificate. Your Lordships are fully aware, from the recent argument, of the difficulties of the many questions of law, and of the nature of every point likely to arise, in consequence of the patience and attention with which the new-trial motion was heard; so that no delay will arise from a trial at bar. But at Kilkenny much delay and great inconvenience on the circuit will be occasioned by the non-acquaintance with the case of the going judge of assize, who will have to be instructed *ab initio* in the many complications and difficulties of the case. On the broad ground of doing justice to all parties, this case ought to be tried at bar.

PENNEFATHER, B.—This is a very unusual application, but it is particularly so as being made by the defendant, and still more so after that the points of law which arose have been ruled in his favour, on argument, by this court. It is not for the court to say whether the points of law discussed presented extreme difficulty or not, but the court ruled them in favour of the defendant, without feeling any hesitation as to the correctness of that ruling. That is one serious difficulty in this motion, it being extraordinary that the defendant should apply for the order under such circumstances. It is always very objectionable to grant such a motion, unless very special reasons are offered. It is a serious interference with the business of the court and with the other suitors, and therefore the court has abstained for many years from exercising the discretion, which it undoubtedly possesses, of granting a trial at bar. The learned judge who will try this case must follow the ruling of this court on the points which have been argued, and which do not possess any very great difficulties. The observations in the *Attorney-General v. Walsh*, as to the exercise of a sound discretion by that functionary, are very valuable. The Attorney-General has the right in every case to call for a trial at bar. In the case of *O'Hara v. O'Hara*, which has been referred to, the court discharged the order, and sent the case down to Carrickfergus, after having granted a trial at bar. This is not a case for changing the venue. The public time must be economized. The case of *Lord Sherborne* affords, to my mind, strong reasons why it should not be followed, for the trials at bar there giving so little satisfaction,

and no fewer than four of them proving unsatisfactory and abortive, clearly shows that neither time nor trouble would be saved by granting the present motion. We think that no sufficient reasons have been suggested to us for exercising the discretion of the court. It is not convenient to order the trial to take place out of Term, for it would interfere with the *Nisi Prius* sittings, and with the general business of the court.

RICHARDS B.—I agree with all the observations made by Baron Pennefather. There were certainly very important questions in the case, and they were most ably argued before us during the present Term. The court has pronounced its opinion upon them, and we have ruled them, whether rightly or wrongly, subject to review; and the opportunity will be afforded, in the event of a new trial, of having our decision reviewed by a Court of Error, and, if necessary, by the House of Lords. However, on the new trial there does not appear to be any probability of any questions of very great difficulty arising.

Lynch, Q. C., applied for the costs of the motion.

PENNEFATHER B.—There is no reason why an unsuccessful motion should not be refused with costs.

Rule accordingly.

NERWICH v. GREGORY.—Jan. 29.

Inspection of documents.

The court will grant an application for the inspection of documents—e. g. bills of exchange, but timely notice must be given to the party in custody of them, to enable him to permit the inspection at a convenient time.

F. M'Donagh, Q. C., for defendant, moved for liberty to inspect certain bills of exchange—the subject matter of the present action—and which were in the possession of the plaintiff's attorney. Actions had been instituted to recover the amount of several bills of exchange, which the defendant alleged to be forgeries, and it was necessary to have the indorsements examined by the defendant and persons acquainted with his handwriting. A similar motion had been granted *in consimili casu*, in the Queen's Bench; and a recent case in England has decided that a party is entitled—in a case in which a charge of forgery is involved—to have the bills impounded and inspected. The plaintiff's attorney, having the custody of the documents, should have such previous intimation as will enable him to be prepared to allow the defendant and his witnesses to inspect them.

Murphy contra.—The Court of Queen's Bench, in making the order alluded to, required the defendant to give twenty-four hours' notice to the party having the documents in his possession, to enable him to have them ready for examination.

PER CURIAM.—Let the defendant and his witnesses have liberty to inspect the documents, as required, on giving twenty-four hours' notice of such intention.

Rule accordingly.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq., Barrister-at-Law.]

BRESLIN v. WALDRON.—Feb. 5 & 6.

*Will—Construction—Bequest—"Servant"—
Yearly hiring—Gardener.*

A testator made the following bequest in his will: "I give and bequeath unto each and every of my servants, male and female, who shall respectively have been living in my service for the space of six calendar months immediately previous to my decease, the amount of one year's standing wages, over and above any yearly salary or wages I may owe them respectively at my decease." Held, not to include a person who had lived in the testator's service as gardener, at the weekly wages of 12s. 6d., (although his service had been exclusively given to the testator, in a cottage belonging to whom he resided, and by whom he was allowed yearly a certain quantity of coals,) upon the ground that the hiring was not a yearly one.

THE petition in this case was filed to raise the amount of a legacy (and the interest thereon) alleged to have been bequeathed to the petitioner by the testator. The latter, who was possessed of considerable real and personal property at the time of his death, made his will upon the 15th of September, 1848, and it contained the following provision:—"I give and bequeath unto each and every of my servants (male and female) who shall respectively have been living in my service for the space of six calendar months immediately previous to my decease, the amount of one year's standing wages over and above any yearly salary or wages I may owe them respectively at my decease." This bequest was immediately preceded by a similar gift to "Charles Duffy," by name, who had been an outdoor servant, residing in a house upon the premises. The will also contained a provision, that all the pecuniary legacies contained in it, amounting to £52, should be payable within six months after the decease of the testator, and should bear interest at the rate of four per cent. The petitioner had been a gardener in the service of the testator for a space of nearly eleven years prior to his decease, and received remuneration equivalent to the sum of £52 per annum, by a weekly allowance of 12s. 6d. in money, and a house rent free, with an allowance of milk and coal yearly, amounting altogether to the above sum. During the time of his service, the petitioner had given his time and labour exclusively to the testator. This petition was filed under the fifteenth section of the Chancery Regulation Act, but the Chancellor directed the main question in the case to be argued before him previous to referring it to the Master.

B. Coxe, in support of the petition.—The question in this case is, whether the petitioner comes under the description of a servant in the testator's will. The distinction in such cases is between a person who is obliged to spend his entire time in his master's service, and one who does not; but the fact of residence in the master's house is not requisite. In *Townshend v. Wyndham*, (2 Vern. 546), the bequest was—"I give and bequeath unto such

of my servants as shall be living with me at the time of my death, one year's wages;" and the Lord Keeper, in delivering judgment, said:—"Stewards of courts, and such who are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will; but I will not narrow it to such servants only that lived in the testator's house, or had diet from him." This is still the law upon the subject, and the word "servant" does not of necessity imply a menial.—*Ex parte Grelhier*, (Montag. Ca. in B., 264.) The employment must be an annual one, and such it was in the present case, where although the wages was payable weekly, yet the service, and therefore the hiring, was yearly. *Booth v. Dean*, (1 Myl. & Keen, 560.) In *Chilcot v. Bromley*, (12 Ves. 114,) a bequest to "my other servants who shall be living with me at the time of my decease," was held not to include a coachman who had been provided for the testator by a jobmaster, who also supplied him with a carriage and horses by the year; but that is clearly distinguishable from the present case. *Ogle v. Morgan*, (1 De Gex. M. & G., 359,) is also a negative authority, and may be considered, in some respects, as similar to the present case, but it is distinguishable. In that case the testator gave "to each person as a servant in my domestic establishment at the time of my decease, a year's wages beyond what shall be due to him or her for wages;" and it was held that a head gardener, who lived in one of the testator's cottages, and did not diet in the house of the testator, did not come within the words of the bequest; but the words "in my domestic establishment," clearly distinguish that case from the present. A farm bailiff, and also a head gardener, has been held to come within the word "servant"—*Bulling v. Ellice*, (9 Jur., 936;) *Nowlan v. Ablett*, (2 Cr. M. & R., 54.) The judgment of the Lord Chancellor in *Ogle v. Morgan* shows that the decision rested upon the word "domestic" used in the will, and therefore that case may be regarded as a positive authority in favour of the present application. In *Blackwell v. Pennant*, (9 Hare, 551,) the bequest was—"I give to each of the servants living with me at the time of my decease, and who shall then have lived in my service for three years, one year's wages," and it was held not to exclude servants of the testator living in a different house from which the testator lived, but only servants not hired for the year. The latest case upon this subject is *Vaughan v. Booth*, (16 Jur. 808,) and the bequest there was to the testator's domestic servants who should be with him or in his service at the time of his decease, and this case was also decided upon the meaning of the word "domestic," a gardener residing in a cottage adjacent being held disentitled to the bequest. Sir J. Romilly, in giving judgment, said that he would not distinguish that case from *Ogle v. Morgan*, both depending upon the word "domestic." It may therefore be concluded, that in the absence of that word those cases would have been decided differently, and that word not occurring in the present case, a similar result should follow.

E. Lawless contra.—The bequest to Duffy by name, he being a person in the service of the testator, but not living in the testator's house, shows that the testator intended the bequest relied upon by the petitioner to apply to the servants only who resided in the dwelling-house. But the point upon which this case must turn is the weekly hiring, the bequest being to such servants of the testator as were paid "a yearly salary or wages." The petitioner does not state that he was paid such a salary, but only that he had certain benefits that were equivalent to £52 a year; but the hiring was only a weekly one, and a gardener is always in such cases allowed to occupy a dwelling-house on the premises. *Dean v. Booth* clearly decides this point. In *Ogle v. Morgan* the bequest certainly did contain the word "domestic," but the decision was also founded upon other grounds. In *Blackwell v. Pennant* the words "living with me" were held not to exclude servants of the testator living in a different house from that in which the testator lived, and so far that case is like the present; but it was held to exclude servants not hired by the year, and therefore that a gardener employed at weekly wages was not entitled to the benefit of the bequest. The Vice-Chancellor, in delivering judgment in that case, says:—"The nature of the gift explains the persons for whom it was intended. To impute to the testator, that he intended by a year's wages the aggregate of the wages of fifty-two weeks would, I think, be a most unreasonable and strained construction of the words which he has used." A similar attempt is made in the present case. If the words in this devise are held to include the gardener, they must be also held to include the testator's ploughman and all his labourers.

B. Cox in reply.—It is not merely from the aggregate of fifty-two weeks' wages that the petitioner insists upon a yearly hiring, but from the fact that he had a cottage and a supply of coal yearly from the testator, and that the service of the petitioner was given to the testator yearly. Besides the long service of the petitioner should be taken into consideration, as he lived with the testator for eleven years; whereas six months in his service before his decease, would have been sufficient to entitle him to the bequest.

LORD CHANCELLOR.—There are some nice distinctions in the authorities cited, and I shall, therefore, reserve delivering judgment until to-morrow.

Feb. 6.—**LORD CHANCELLOR.**—It is with considerable reluctance that I have been induced to arrive at the conclusion that the petitioner is not entitled to relief under the terms of the bequest contained in the will of the testator. The bequest was made "unto each and every of my servants, male and female, who shall respectively have been living in my service for the space of six calendar months immediately previous to my decease, the amount of one year's standing wages, over and above any yearly salary or wages I may owe them respectively at my decease," &c. I conceive that under the terms of that bequest it is an essential element, in order to make a servant of the testator entitled under the will, that there must have been a yearly hiring and

yearly wages. The fact of the wages being paid weekly would be of no consequence, provided the hiring was a yearly one. In the case before Lord Truro, which has been cited on behalf of the petitioner, it appears that the hiring was a yearly one; and, although that decision has been ingeniously put by Mr. Coxe as grounded upon the word "domestic" contained in the bequest, yet the decision was chiefly founded on the fact that the hiring was yearly, although the payment was weekly. In the decision in *Booth v. Dean* it was held to be essential that the hiring should be a yearly one, and in *Blackwell v. Pennant* the decision of the court was founded upon the same distinction, and recognized the same principle. The words in that case were "servants living with me," and the testator devised to them "one year's wages," and the Vice Chancellor considered the words "living with me," as synonymous with "living in my service." In the present case the words "living in my service" are made use of, and, therefore, it is not necessary to rely upon that portion of the decision; but that case also depended upon the question of a yearly hiring, and the Vice Chancellor, in giving judgment upon that portion of the case, says, "Where a testator gives a year's wages, he must, I think, be understood to mean that he gives to those whom he has hired at yearly wages. The nature of the gift explains the persons for whom it was intended." Now, I do not think that it is possible to take the present case out of this class of authorities, and the words used by the testator in this case are stronger than those in any of the cases cited. The words I allude to are, "one year's standing wages over and above any yearly salary or wages I may owe them respectively." These words may not, perhaps, be very clear; but the meaning of the testator evidently was, that the benefit of this bequest should only extend to the servants of the testator hired by the year. The petitioner does not swear that he was hired by the year, but he seeks to make it out by his statement that he was allowed by the testator to occupy a cottage, and that he had an allowance of coals by the year. Under these circumstances I do not think that I can give the relief that has been sought; but I am glad that I did not send this matter before the Master until I had directed the question of law to be argued in this court. I shall, therefore, dismiss this petition, but it must be without costs.

Petition dismissed.

COURT OF QUEEN'S BENCH.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]
HILARY TERM, 1855.

CUSTIS v. SANDFORD.—Jan. 19, 20.

Slander—Pleading—Privileged Communication.

In an action for oral slander, where the words alleged to have been spoken concerning the plaintiff in his profession of surgeon, amounted to a positive charge of drunken, disorderly conduct at D during a former period of his professional life, the defendant pleaded, in substance, that he was chairman of a board of guardians of which the

defendant was medical officer, and took part officially in a certain conversation relative to the plaintiff's fitness for his office, that in the course of such conversation former charges against the plaintiff of intemperance were discussed, and that the defendant then stated that he had been informed that the plaintiff had been previously addicted to or charged with intemperate habits at D, which statement the plaintiff believed it to be his duty, as chairman of the board of guardians, to make, and which he believed to be true in substance and in fact, and was the same as the slander complained of in the summons and plaint. Held, to be a bad plea, because it should have shown the speaking of the words to have been upon a justifiable occasion.

Semble, that a plea that the words were spoken without malice, and in the exercise of defendant's office of chairman of the board of guardians, and, being so spoken, that was a privileged communication, is bad for not showing the lawfulness of the occasion itself.

THIS was an action of oral slander. The summons and plaint alleged that the plaintiff was a surveyor and licentiate of the Royal College of Surgeons in Ireland, and had practised the profession of surgeon as well in Dublin as in the neighbourhood of Castlereagh and Loughglyn, in the County of Roscommon, and, while in the last-mentioned places, had been appointed medical attendant of two districts by the Guardians of the Castlereagh Union, and still continues to be such, and, while he was so practising and acting, the defendant was the chairman of the said board, and, at a meeting thereof, on the 24th of July, 1853, the defendant being the chairman of said board, and upon plaintiff's application for payment of a portion of his salary, in the presence and hearing of divers guardians, maliciously spoke of and concerning the habits and conduct of the plaintiff while practising as a surgeon in the City of Dublin the following words, viz. "He lost his practice in Dublin, about £800 per annum, by his drunkenness and ungentlemanly conduct." The writ stated these words, with appropriate innuendoes, and alleged special damage.

The defendant pleaded, secondly, that on the occasion in question the defendant was present, and attended in his official capacity as chairman of said board, and that a conversation arose amongst the guardians then present concerning the plaintiff as a medical attendant, and his fitness for and conduct in said office; that defendant, as chairman of said board, and in the discharge of his functions as such took part in such conversation; that in the course thereof a charge of intemperance, which had theretofore been brought against the plaintiff before the Poor Law Commissioners, and a similar charge which was then depending against the plaintiff, were mentioned, and formed part of the subject-matter of said discussion and conversation; that the alleged intemperate habits of the plaintiff also formed part thereof; that defendant, amongst other things, said that he had been informed that the plaintiff had previously been addicted to, and had been charged with intemperate habits in Dublin, and had thereby lost his practice there, which statement the defend-

ant then and there believed it to be his duty, as the chairman of the said board, to make, and which statement he also then and there believed to be true in substance and fact, and which conversation and statement are the slander complained of in the said summons and plaint. Thirdly, that the words spoken of the plaintiff by the defendant on this occasion in the said summons and plaint mentioned, were spoken by the defendant without malice, in the exercise of his office and duty as chairman of the Board of Guardians of Castlereagh Union, and being so spoken were a privileged communication.

The plaintiff demurred to the second plea, on the ground that it did not confess and avoid, while it admitted the speaking and publishing of the slanderous words complained of; and that it did not justify or excuse the words, either in the sense imputed or their natural signification; that it neither took issue on any specific matter of fact alleged in the summons and plaint, nor did it rely on matter of avoidance, excuse, or justification. The plaintiff also demurred to the third defence, because it did not allege that the plaintiff spoke the words in question honestly and *bona fide*, believing them to be true; and that it did not specify facts showing the lawfulness of the occasion for the speaking of such words; and because it did not expressly or unequivocally apply itself to the words in the summons and plaint mentioned, but referred to the occasion mentioned in the summons and plaint, but not to the slanderous words therein mentioned.

Harkan (with whom was *Macdonagh, Q. C.*) in support of the demurrer.—The second plea is bad, because it does not justify the words which the summons and plaint alleges to have been published. A plea of justification ought to justify the words in the very sense imputed. Where the defendant was charged with having spoken these words of the plaintiff, "She is a thief to you and to me, and hath stolen twenty pounds from me and forty pounds from you," and the justification was that the plaintiff was a thief, and stole two hens from her such a day and year feloniously; a demurrer was allowed, on the ground that this was no justification of the words spoken.—*Hilsden v. Mercer*, (Cro. Jac. 677.) Again, in an action for the words, "Thou hast played the thief with me, and hast stolen my cloth and half a yard of velvet," the defendant pleaded that the plaintiff was his tailor, and that he delivered to him a yard and a half of velvet to make him a pair of hose, and he made them too short, *ratione cujus* he spoke these words, "Thou hast stolen part of the velvet which I delivered you; *absque hoc* that he spoke any words *aliter vel alio modo*; the plaintiff demurred, and the court held that the plea was no answer to the words alleged. *Johns v. Gittings*, (Cro. Eliz. 239); *Wolverly Strachey's case*, (Styles, 118); *Edsall v. Russell*, (4 M. & G. 1090.) In the case of *O'Brien v. Bryant*, (16 M. & W. 168,) the declaration alleged the libel to have been that the plaintiff "bolted." The plea of justification alleged that the plaintiff "quitted" the town and neighbourhood, leaving divers of the tradesmen, to whom he owed money. That was held bad, inasmuch as such quitting might be innocent, and without any intention to defraud. It

is no justification to allege that the defendant heard from another the alleged slander of the plaintiff, and that he named his informant at the time, without showing that he believed it to be true, or that it was on a justifiable occasion. *M'Pherson v. Daniels*, (10 B. & C. 263.) With respect to the third plea, a plea of privileged communication should show the occasion, in respect whereof the privilege is claimed. Privilege is a question to be left to the jury to determine from the circumstances, including the style and manner of the language used, whether the defendant acted *bona fide*, or was influenced by malicious motives. *Toogood v. Spyring*, (1 Cr. M. & R. 181); *Somerville v. Hawkins*, (10 C. B. 583.)

J. E. Walsh, and *Fitzgibbon, Q. C.*, contra.—There could have been no plea of privileged communication before the Common Law Procedure Act. Such a plea previously would have been bad, as it would have amounted to the general issue. The pleas referred to are pleas justification of the truth of the words alleged in the declaration. Under the recent Act it is sufficient simply to state that the words spoken were a privileged communication. What this plea in fact alleges is this:—"The words which I said with reference to you have been misreported; I used other words, but the occasion on which I spoke them was sufficient to justify the use of either words which you allege that I spoke, also those which I did speak in point of fact." If the privileged occasion be such that it will suffice to justify either set of words, it is a good plea. [*Lefroy, C. J.*—Not unless you admit that you spoke the words in the plaint mentioned; it would otherwise mislead the party. *Moore, J.*—Would this have been a good plea if Mr. White-side's Act had not been passed?] It would have been bad upon a special demurrer, for not confessing and avoiding. [*Perrin J.*—Must you not under the new Act admit the speaking of the words, for the purpose of justifying them?] The *quæ est eadem* at the conclusion of this plea is a sufficient traverse. (2 Wms. Saund. 5 f, note z.) [*Lefroy, C. J.*—This should rather have concluded with an *absque hoc*.] By the sixty-eighth section of the Act, every matter in the plaint which is not traversed is to be deemed to be admitted for the purpose of the defence. [*Crompton J.*—The Legislature thereby evidently intended that the rule relative to confessing and avoiding should be retained.] In 4 Co. R. 14 a. it is said:—"If, where a man brings an action on the case for calling the plaintiff 'murderer,' the defendant will say that he was talking with the plaintiff concerning unlawful hunting, and the plaintiff confessed that he killed several hares with certain engines, to which the defendant answered and said, 'thou art a murderer' (*inuendo*), the killing of the hares, this is no justification, for he does not justify the sense of the words which the declaration imports, and therefore he ought to plead not guilty; but as to that, it was answered by the defendant's counsel, and resolved by the whole court, that the justification was good; for in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them." When the words are of such a nature as require

an express admission thereof in the plea, the latter should contain such. The decision in *M'Pherson v. Daniels* rested upon the resolution in *Lord Northampton's case* that if a person publish generally, without a certain author, that another was a traitor or thief, he cannot thereby justify,—12 Co. 134, because the party who repeats it only gives greater weight to the slander, and as great an injury may result from the repetition as from the first publication. In *Tidman v. Ainslie*, (10 Exch. 63,) this doctrine was carried further, and it was held that even the disclosing of the name of the previous publisher at the time of the publication by the defendant, accompanied by an allegation that he believed in the truth of the statement contained in the libel, was no defence. There is, therefore, no difference in legal effect between the statement of the words as alleged in the summons and plaint and that contained in the plea, because in either case they would be equally actionable, and to be construed in the same sense. We were placed in this difficulty: if we by our plea denied the speaking of the words, the variance would be so trifling that the judge at *Nisi Prius* would amend, and so deprive us of our defence. On the other hand, had we expressly admitted the words, as alleged, we could not have verified the defence by affidavit, and so would have been precluded from the advantages of pleading double. The same *inuendo* will apply equally to both set of words—namely, drunkenness; now the vice, which is alleged to exist in our mode of pleading is this, that we do not confess the words, but we confess the uttering of the slanders. The occasion was such as would *prima facie* justify the use of the language, if uttered in a *bona fide* belief of its truth. Silence might be construed into acquiescence. *Tuson v. Evans*, (12 Ad. & El. 736); *Toogood v. Spyring*. With regard to the third plea, it is sufficient to state that the words themselves were privileged, without setting forth the occasion; that would lead to great prolixity of pleading. [*Moore, J.*—Was there anything in the old law to prevent a special plea of privileged communication? It strikes me that under the old law, although such a defence might have been given in evidence under the general issue, it did not follow that it would be bad pleading. If this plea were good under the old law, or bad only on special demurrer, then of course you sustain your argument.] [They also cited *Harris v. Thompson*, (13 C. B. 333); *Coxhead v. Richards*, (2 C. B., 569); 1 Starkie on Slander, 329; *Lewis v. Walter* (4 B. & A. 605).]

Macdonagh, Q. C. in reply.—With regard to the last point, it is quite clear that the old law did admit of a special plea of privileged communication. In *Smith v. Thompson*, (2 B. N. C. 374,) there is a precedent of such a plea, which fully sets forth the occasion upon which the words were spoken. It has recently been decided in the Court of Exchequer here by Baron Pennefather, that in such a plea as the present such a state of facts should be averred as would afford a presumption of privilege. With regard to the other point, it is quite clear that the plea offers no justification of the words alleged to have been spoken. The defendant ought

to have denied the speaking of them, or else, admitting that, he should have justified them *prima facie*. [Lefroy, C. J.—The only point of the argument which has made any weight with me is that, in case the fact be as alleged, it might deprive the party of his defence, unless he were to be allowed to say, “I spoke certain words in the same sense as in the declaration, and they were justified by the occasion.” If he were to be deprived of this defence it would be hard, as the law now stands, though before the recent Act, the plea might have been the subject-matter of special demurrer.] If the words were not the same, the defendant ought to have denied the speaking of the words; but the court, in case they permitted an amendment, would provide against the defendant being taken by surprise. [Crampton, J. It appears to me that if the words in the plea and those alleged in the plea be not the same, the plea is no answer; on the other hand, if they be the same, the defendant is placed under no difficulty in putting in his plea the same words as in the plea.] The words alleged in the plea differ substantially from those in the plea, for the former are a categorical assertion of the charge, whereas the latter are merely a repetition of hearsay. How can the *in-endo* be severed from the words themselves?

LEFROY, C. J.—What the defendant has stated here is this, “I did not say so and so, but I said so and so, and I am justified in so doing.” Now if a man were to be shut out of the benefit of that defence, it would be a hardship; but he is not so shut out, for if the words which the plaintiff has alleged to have been spoken were not proved to have been used, or substantially used, the plaintiff would be liable to be nonsuited, and the defendant may rest his defence upon the fact of the plaintiff having failed to prove that the words were such, or substantially such, as alleged. This is the short answer which it occurs to my mind may be offered to the argument on the part of the defendant. It appears to me that the deviation in the pleas from the allegation in the summons and plea is not sanctioned by the principle whereby the law allows a party to make his defence according to the matter of fact. I may add that, according to the rule in *Lord Northampton's case*, it cannot be questioned that a party is not justified in reporting what he has heard, without naming anybody. The demurrer must, therefore, be allowed.

CRAMPTON, J.—This plea offers no answer whatever to the plaintiff's action. If the Common Law Procedure Act had not been passed, and the old common law still governed, it would, of course, be impossible to maintain this plea. According to the rules of pleading the plaintiff, who complains of the use of particular words, should prove these words to have been so used, and it is no answer to that complaint that on any occasion words were used not substantially the same, and that such were justified by the occasion. The questions which should be raised by the pleading ought to be—first, did the defendant speak the words? and, if so, did he use them upon a justifiable occasion? The defendant has, however, shifted his ground, for he says, “I did not speak those words which you impute, but others which are jus-

tifiable.” Now Mr. Whiteside's Act has not changed the rules of pleading applicable to such cases as the present; that one in particular, that when the defendant does not traverse the statement of the words imputed, he is called upon to address his defence to the statement of the plaintiff's cause of action. It has been forcibly argued that if the record went to trial upon this plea, and that the plaintiff proved the words in question, he would be entitled to a verdict on the first issue, but then, in case the defendant proved that he spoke, *inter alia*, the words which he has alleged, and on a lawful occasion, he would be entitled to a direction from the judge to the jury to find a verdict for him on that issue, and so the plaintiff would have a verdict against himself. However, that amounts to no justification of the words alleged to have been spoken by the defendant.

PERRIN, J.—Without saying what in other respects the Common Law Procedure Act has done or has not done, it has certainly enforced a rule of the common law as to the necessity of taking issue on some material matter of fact. This plea is bad, because it seeks to excuse the words, without having admitted them to have been spoken, and on the same record an issue is joined on the question of whether the words were spoken at all.

MOORE, J. concurred.

Demurrer to both pleas allowed.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

HILARY TERM, 1855.

NEILAND v. SMITH.—Jan. 13.

Elegit—Inquisition—3 & 4 Vic. c. 105, s. 19.

Where a judgment had been recovered prior to the passing of the 3 & 4 Vic. c. 105, and subsequently an elegit executed under section 19 of that Act, extending all the lands of the debtor, and where it appeared that prior to the passing of that Act, but subsequent to the rendition of judgment, the judgment debtor had made leases of two portions of the lands that were subject to the judgment debt, it was held that the elegit creditor who had brought his ejectment to recover all the lands, was only entitled to recover a moiety set out by metes and bounds of the leased lands, but the whole of the lands in the hands of the tenant from year to year. The sheriff is bound to execute the writ of elegit as it comes to him, and the benefit of the proviso in the latter part of the 19th section of 3 & 4 Vic. c. 105, only enures upon any subsequent proceeding by the judgment creditor.

*Lessee O'Brien v. Bernard, (6 Ir. L. R. 16,) considered.**

THIS was an action of ejectment on the title, brought by an elegit creditor for the recovery of the lands of Currane, situate in the County of Galway, and was tried before Baron Greene at the last Summer Assizes for the Co. Galway, when a verdict was found for the plaintiff pursuant to the direction of the learned judge, leave being reserved to the defendant

* Torrens and Jackson, J. J., absent.

to turn same into a verdict for the defendant, if the court above should be of opinion that he was so entitled. The plaintiff, in his summons and plaint, alleged that his title to the premises accrued on the 20th April, 1854, and he claimed a sum of £20 for mesne rates. The defendant took defence for that part of the lands in his possession. It appeared that in the year 1837, a person named John Merrifield was seized of the lands mentioned in the plaint, and that one Thomas Burke had obtained a judgment against Merrifield in Hilary Term, 1837. That in 1839, Merrifield made leases for 31 years to Michael Tannion, and to Andrew and John Jennings, of a portion of these lands, the lessee's interest in which the defendant had purchased in the year 1847, and had in that year gone into possession of those portions, as well as of other portions of said lands not held under lease, and had so continued in possession to the present day. That in Hilary Term, 1854, the judgment against Merrifield had been revived, and that on the 13th of April, 1854, the plaintiff had sued forth an *elegit* directed to the sheriff of the County of Galway, directing him to deliver to the plaintiff all such lands, tenements, &c., as the said John Merrifield or any person in trust for him was seized or possessed of at the time of the rendition of the judgment, or at any time afterwards, or over which the said John Merrifield on said day or afterwards had any disposing power which he might exercise for his own benefit, to hold until the said judgment debt should have been levied. The sheriff had held an inquisition and made a return thereon finding all the said lands and tenements. It further appeared that the following notice, bearing date the 22nd of April, 1854, had been served on the defendant by the plaintiff: "Inasmuch as Thomas Burke of Claven Bridge, in the County of Galway, did in or as of Hilary Term, 1837, obtain a judgment in her Majesty's Court of Common Pleas in Ireland, against the defendant John Merrifield of Kilcolgan in the County of Galway, gentleman, for the penal sum of £184 sterling, debt, besides £2 2s. 8d. costs, which judgment the said Thomas Burke duly assigned to me, pursuant to the statute in such case made and provided, and I have lately recovered judgment on *scire facias* to revive said judgment against the said John Merrifield, on which said judgment I have lately caused a writ of *elegit*, directed to the sheriff of the County of Galway, to be sued forth of said court, marked for the sum of £152 2s. 3d., and thereon have obtained a finding according to law, and an inquisition duly had of all that and those the lands of Currane, in the parish of Kilconickuly and County of Galway, to which you are tenants respectively. Now, I hereby require you to pay over to me your several and respective rents by you severally and respectively heretofore paid and payable out of said lands, which will fall due on the gale day next after the day of the service and receipt of this notice, (being the 1st day of May next,) as also the several gale days which shall accrue due subsequent thereto, until the said sum together with all interest and costs which shall be due thereon, shall be fully paid off and satisfied; and I hereby caution you and each of you not to pay your said rents or any part thereof, or any of

the subsequent gales thereof to any person whomsoever, other than to me or my agent lawfully authorised to receive same, and in case you shall do so, or neglect or refuse to pay said rent and the accruing gales as same shall become due to me, I will hold you responsible and proceed against you and each and every of you for recovery thereof by due course of law. Signed. Michael Neiland." It further appeared that in the month of February, 1840, a receiver had been obtained over the lands at the suit of Burke, the judgment creditor, and that the defendant had paid his rent for all the lands up to May, 1854, to Merrifield. A conditional order for a non-suit having been obtained,

P. Blake, Q. C. (with whom was *R. B. McCausland*) now showed cause.—The question here turns on the 19th section of 3 & 4 Vic. c. 105, and the true meaning of that section is that the Legislature gave a judgment creditor a right to reap the benefit of that Act as against all lands of the debtor, but did not interfere with the rights of creditors prior to that Act; or in other words, when the judgment creditor came to execute his judgment, he was to halt if he found other creditors claiming before him. We were not bound to ascertain the amount of our rights, or whether there were any other parties having rights prior to ours. The *elegit* is not a nullity. There is no evidence to show that Burke, the judgment creditor, constituted the defendant his tenant; nor has it ever been held that the *elegit* creditor fills the position of a landlord. [They cited *O'Brien v. Bernard*, (6 Ir. L. R. 16.)]

Robinson, Q. C., (with him *C. Kelly*), in support of the conditional order.—The notice of 22nd April constituted a tenancy between the plaintiff and defendant, as by it the defendant was directed to pay his rent to the plaintiff, and to no one else. The proviso at the end of the 19th section of 3 & 4 Vic. c. 105, is directly with us, by it the plaintiff was only entitled to the same rights as he had before the passing of the Act, viz.—a moiety, and this was the opinion of Burton, J. in delivering judgment in *O'Brien v. Bernard*, (6 Ir. L. R. 16.) [*Ball, J.*—Do you insist that the inquisition is void?] So far as the lands demised by the leases are concerned, we do. [*Monahan, C. J.*—This inquisition is clearly bad under the law as it stood before 3 & 4 Vic. c. 105, as under that Act the sheriff could only put the *elegit* creditor in possession of a moiety by metes and bounds.] The case of *O'Brien v. Bernard* is distinguishable; there the mortgagee was not in possession, and the *elegit* creditor went into possession of the entire by permission of the mortgagee, or at least without his opposition, and the mortgagee subsequently brought his ejectment for the entire, and the judgment of the court was that the mortgagee was not entitled to recover any portion of the lands. The rest of the judgment is extra-judicial. Here we were in possession, and the *elegit* being for the entire is altogether void.

McCausland in reply.—The *elegit* is not a nullity, and *Perrin, J.* in delivering judgment in *O'Brien v. Bernard* uses the following language: "As to the objection that this proceeding is void as against the mortgagee under the 3 & 4 Vic. c. 105, s. 19, in my opinion the *elegit* is not a nullity,

but had effect to the same extent an elegit would have had before that Act had come into operation, that is, to vest one moiety of the premises in the elegit creditor, and the other moiety in the mortgagee, and no more; that is, not an undivided moiety, but by metes and bounds."

Jan. 19.—MONAHAN C. J. this day delivered the judgment of the court.—In this case the elegit creditor has brought his ejectment, founded on the elegit, and seeks to recover the whole of the premises of his debtor. The defendant is tenant of two denominations or portions, held under leases made subsequent to the rendition of the judgment, but prior to the passing of the Act of 3 & 4 Vict. c. 105, and it is contended on his part, that he is a purchaser under the latter clause of the 19th section of that Act. It is conceded that the plaintiff is entitled to judgment for that portion of the lands which the defendant holds from year to year, but the defendant contends that the elegit is invalid to give title to the lands he holds by lease. If according to the true construction of the Act, the proceedings under the inquisition are void, then the ejectment founded on the elegit cannot prevail. The question entirely depends on the true construction of the Act of Parliament. The preamble of the 19th section of that Act recites that "Whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law," and that section then proceeds to empower "the sheriff or other officer to whom any writ of elegit shall be directed upon any judgment which at the time appointed for the commencement of this Act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts of Dublin, to deliver execution to the party suing of *all* such lands, tenements and hereditaments, as the person against whom execution is issued, or any person in trust for him shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards;" and the conclusion of that section contains the following proviso: "Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this Act had not passed." The question in this case comes to this—whether the relief here enacted for the benefit of purchasers is to enure to the defendant on the execution of the elegit by the sheriff or afterwards, upon any subsequent proceeding by the creditor, as a defence to an ejectment. The same question as the present substantially came before the Court of Queen's Bench in the case of *O'Brien v. Bernard*, which has been referred to in the argument by counsel at both sides. In that case the facts were to a certain extent the reverse of the present, and the question was, whether the elegit and the inquisition on it constituted a good defence as against the mortgagee, and whether

more than a moiety of the lands having been delivered, the proceedings were not void; but there the court held, that the proceedings were right and the defence to the demise, in the name of the mortgagor, was good; and the only question that was there discussed was, whether the elegit afforded a good defence to the demise laid in the name of the mortgagee; and Mr. Justice Burton, in delivering judgment, says:—"It is indeed observable, that by the 19th sec. of the Irish statute, as well as by the 20th sec. of the English statute, there is a provision for the judges of the superior courts settling the forms of writs, for the purposes of carrying the intentions of the Legislature in favour of judgment creditors into effect, and this, although it has been done in England, has not, that I am aware of, been done in Ireland. But it has not been argued that the creation of such a form by such authority is essential to the validity of the writ, provided it is properly framed pursuant to the intention of the statute, and so it appears to have been held in the case of *Erdy v. Martin*, (8 Dowl. 342.) We have then only to see whether the writ is a nullity as to purchasers, mortgagees, or creditors, who shall become such before the time appointed for the commencement of this Act. I am not at present aware of any decision upon the operation of this clause nor of any annotation upon it; but it appears to me that it cannot be properly considered as making the writ of elegit, made and executed under the provisions of the 19th section of 3 & 4 Vic. c. 105, a nullity as to persons so described in the Act. The words are, that as against purchasers, mortgagees, or creditors, such a writ of elegit (that is, a writ of elegit to be executed upon all the lands,) shall have no greater or other effect than a writ of elegit would have had if the Act had not passed. The Act does not provide that the writ of elegit against all the lands shall be void as to persons of such a description: nor could it intend that it should be so; for it clearly intended that they should be within the operations of the writ of elegit to some extent, and that extent is specified by a reference to the elegit, as it operated previous to the statute in question; that is the effect which is to be produced in favour of the class of persons to which the proviso relates, and the only question then is, how that effect is to be obtained." He seemed to be of opinion that proceedings in a Court of Equity were the proper mode of obtaining that effect. We do not think that a true construction of the statute. We think the Act must have operation in a Court of Law, and the question is, how is it to have that operation? Judge Crampton, in his judgment, seems to have been of opinion that the proceedings were right, because the mortgagee was not in possession at the time of the execution of the writ. I cannot agree in that view. I think the sheriff cannot inquire whether he is to give all or only a moiety of the lands, but ought to execute the writ when it comes to him. Mr. Justice Perrin appears to us to have taken the proper view of the case; he thought that the elegit was not a nullity, but that, although the elegit and inquisition gave the whole lands, still all the elegit creditor was entitled to was a moiety by metes and bounds, and no more, and

we intend to act upon that opinion. This, however, is a stronger case. It is conceded that, as against the tenant, only a moiety can be taken; therefore we think the true effect of the *elegit* and inquisition is to give title to a divided moiety set out by metes and bounds; and, as to the other moiety, it leaves matters as before. It was also argued by Mr. Kelly that no demand having been made on the lands held by the mortgager, the plaintiff was not entitled to recover as against him, but, that point not having been made at the trial, it is not now necessary to consider it. We think the plaintiff was entitled, on the day mentioned, to *all* the lands held by the tenant from year to year, and a moiety of those held by lease, set out by metes and bounds; and we are of opinion that the *elegit* was right, and the inquisition right, and that the sheriff should give possession of *all* the lands, and that, when the *elegit* creditor seeks to enforce his rights by an ejectment, then, and then only, the proviso in favour of purchasers, &c. comes into operation. We shall, therefore, direct that the verdict be altered from what it is to a verdict for all the lands held from year to year, and a moiety, set out by metes and bounds, of those held by lease.

Judgment accordingly.

DARCY v. WYNNE.—Jan. 30.

Practice—Substitution of service—Taking summons and plaint off the file.

The court will allow the summons and plaint to be taken off the file, in order to indorse upon it the substitution of service directed by the court.

Roper applied for liberty to substitute service of the summons and plaint in this case upon the defendant, who lived in England, by serving a solicitor who had appeared and filed an affidavit for him in a suit then pending in the Court of Chancery, in which he was a respondent. The writ of summons and plaint had been filed by mistake, and he also asked for liberty to take it off the file in order to indorse the substitution thereon.

PER CURIAM.—Let the summons and plaint be taken off the file, and indorsed; and let service of the writ be substituted upon this solicitor, and let a copy be sent through the post-office to the defendant, to his residence in England.

Motion granted.

FIGGIS v. HICKEY.—Jan. 31.

Practice—Ejectment—Immaterial defence.

A defence that the defendant or any other person does not hold under the plaintiff is a good defence.

Pallas applied to set aside the defence as informal, and as not setting out the substantial grounds of defence, and as raising an immaterial issue; also as amounting to the general issue, and being calculated to prejudice and embarrass the fair trial of the action. The plaint was an ejectment for non-payment of rent under a lease, and the defence was in the following terms: "Says that the said defen-

dants, or any of them, or any other persons, did not hold the said dwelling-house, messuage or tenement, or any of them, or any part thereof, as tenant to the plaintiffs, or any one or more of them, in manner and form," &c. It was immaterial whether any other person held under the plaintiff. [He cited *Murphy v. Tuohy*, (3 L. C. L. Rep. 226.)]

Murphy contra.—The defence raises a good issue—the question simply being, whether the landlord is entitled to recover possession.

MONAHAN, C. J.—Here the defendant says that neither he, nor any other of the defendants, nor anybody else, is tenant to the plaintiff, and a good issue is raised. *Murphy v. Tuohy* does not apply.

Motion refused with costs.

COURT OF EXCHEQUER.

HILARY TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

RIDDICK v. KAVANAGH.—January 31.

Practice—Award—Entering up of judgment.

A consent to enter up judgment on an award of an arbitrator should not only provide that the award should be entered as the verdict of the jury, but must also provide specifically that final judgment should be entered up.

Purcell applied for liberty to enter up a judgment for the defendant on the award of Henry Martley, Esq., Q. C., the arbitrator to whom the cause had been referred. There had been a consent, which had been made a rule of *Nisi Prius*, providing that the award should be entered as the verdict of a jury, but the consent omitted to provide for the entering up of final judgment. A technical objection had been made in the office that the award could not be entered as a verdict, no jury having been sworn, and the officer refused to enter the judgment on the roll, there being no consent for that purpose. The application here was for liberty to enter the judgment without entering a verdict, and counsel contended that the consent virtually amounted to a consent for judgment. A similar order had been obtained in the Court of Queen's Bench in *Gray v. Carr*, and in *Mason v. Fagan*, (Roll. 6. 1853,) judgment was entered without the intervention of a verdict.

GREENE, B.—The difficulty arises from the consent not extending to the entering up of judgment on the award, and for which the parties should have provided. I cannot direct the officers to enter up judgment. Serve a notice to obtain from the opposite party a consent to enter up judgment, and take no steps until you ascertain whether any objection will be raised by him to your doing so.

No rule on the motion.

ROLLS COURT.

Reported by RICH'D. W. GAMBLE, Esq. Barrister-at Law.]

KELLY v. KELLY.—Jan. 30.

Receiver—Proceedings against Tenants—Costs.

Where the report of the Master in a cause had found that it would be for the benefit of the estate to take proceedings against certain tenants, and the receiver had proceeded by attachment, on which a return of non est inventus was made by the sheriff. The receiver is entitled to his costs of such proceedings.

THE Master, by his report, found that it would be for the benefit of the parties to the cause that proceedings by attachment should be taken against several tenants on the estate. In pursuance of this report a writ of attachment was issued against the tenants named, and it was lodged with the sheriff. The sheriff filed a return that the tenants were not to be found in his bailiwick. The lands were subsequently sold in the Incumbered Estates Court. The Taxing Master refused to tax these costs for the receiver without an order from the court.

W. Drury now moved, pursuant to notice, that the Taxing Master, in taxing the costs of the receiver in the cause, may tax and ascertain the costs of the proceedings by attachment taken against the tenants pursuant to the report of Master Henn, and that he should include the amount thereof in his certificate of the general costs of the receiver in the cause, and for the costs of the motion.

MASTER OF THE ROLLS.—You are entitled to have the order you seek by the motion.

SAVAGE v. O'CONNOR.—Feb. 17.

Injunction—Cultivation of flax—Husbandlike manner of tillage—Tenant to the court—Receiver.

A tenant holding under the court, by lease, with the usual covenant to cultivate in a husbandlike manner and not to commit waste, on a motion by the receiver a conditional order had been granted for an injunction to restrain him from sowing a large quantity of flax, and from breaking up grass land. On the motion to show cause, there being contradictory affidavits as to advantage or disadvantage of the mode of tillage, the motion was directed to stand over, with liberty to the receiver to bring an action at law on the covenant, serving notice on the parties interested in the estate, the tenant in the mean time to have liberty to go on with his tillage at his own peril.

A covenant to farm in a husbandlike manner means according to good husbandry in that part of the country, and though the court has a right to interfere by injunction it will not do so in a doubtful case.

A conditional order had been granted in this case by his Honor the Master of the Rolls, to the effect following: "That an injunction do issue in this cause to restrain George Fullar, the tenant to the said lands of Fort Robert, in the County of Cork, over which A. N. Meade is appointed receiver in this cause, his servants and guests, labourers and workmen, from sowing flax this year in that part of the lands of Fort Robert, containing 33 acres

or thereabouts, which he has been preparing for that purpose, or any other part of the lands of Fort Robert which has not been properly prepared and manured therefor. And also to restrain the said parties from breaking up any more of the said lands of Fort Robert now in grass, until he shall have manured and duly laid down those parts thereof which he has already broken up, unless in one week after the service of this order on said George Fullar good cause shall be shown to the contrary. And it is further ordered, that the said parties do stop in the meantime. And it is further ordered, that in case cause shall be shown, that same shall be shown during the present sittings." It appeared from the affidavit of A. N. Meade, that he had been appointed receiver over the lands, and that the tenant, Geo. Fullar, held under a lease from the court containing the usual covenants on his part to manage and cultivate the lands in a proper and husband-like manner, and not to commit during the said term, or suffer any wilful or voluntary waste to be committed on the said demised premises, and to preserve all improvements thereon. That the lands contained about 191 acres, and George Fullar had sown about 20 acres of flax last year, and was not preparing to manure it this year, and that he was preparing to sow 33 acres of flax this year. The affidavit stated several other particulars of ill-treatment of the lands—such as removing the manure, &c.; and that the lands were in an exhausted state, and unfit to grow flax, and that, if persevered in, the lands would be much injured. The affidavit of the tenant denied that the lands had been ill-treated by him, or that he had at any time committed, or suffered to be committed, any wilful or voluntary waste of same, and that a great portion of the lands which he was about to sow with flax had been covered with furze and moss, and unfit for pasture, and then stated a great many particulars of how he had improved and manured the land, and denied the selling of straw or manure, but that he was in the habit of buying large quantities of hay, and consuming it on the lands.

Hughes, Q. C. now moved to show cause against the conditional order being made absolute.—No part of the grass land, which it was complained had been broken up, was ancient meadow, and the court never interfered when it was not; nor had an injunction ever been granted to prevent the sowing of flax. The court will not interfere with the course of cultivation unless for the purpose of preventing manifest waste, or preventing sowing a crop which was done expressly to commit waste. Another rule adopted by the court is, that they never will interfere by injunction when there is a difference of opinion as to the advantage or disadvantage of a certain course of cultivation, such as here.

Orpen contra.

MASTER OF THE ROLLS.—I am not clear that any injury has been done to the lands by the mode of cultivation adopted by the tenant here. The tenant is bound to cultivate in a husbandlike manner, but then what this is, must be regulated by the custom of the county. This is very clearly laid down by Lord Ellenborough in the case of *Leyh v. Hewett*, (4 East,

159,) he says, "The words here are, that the defendant promised to 'use and occupy the premises in a good and husbandlike manner, according to the custom of the county where the premises lie.' By which I understand the parties to have meant no more than this, that the tenant should conform to the prevalent usage of the county where the lands lie. From the subject matter of the contract it is evident that the word custom, as here used, cannot mean a custom in the strict legal signification of the word, for that must be taken with reference to some limit or space which is essential to every custom properly so called. But no particular place is here assigned to it, nor is it capable of being so applied. What shall be considered in farming as a *good and husbandlike manner*, must vary exceedingly according to soil, climate, and situation; and therefore, the custom of the county with reference to good husbandry, must be applied to the approved habits of husbandry in the neighbourhood, under circumstances of the like nature. That is the fair and natural meaning of the words of the contract as laid; and, perhaps, a contract to occupy an estate in a good and husbandlike manner simply, would have imposed the same duty on the tenant, because the same sort of evidence, drawn from the improved practice of that part of the county, would have been brought forward to show what was good husbandry." If, therefore, the course of tillage complained of here, is contrary to good husbandry in that part of the county, there is no doubt that an action at law on the covenant would lie. *Onslow v. —*, (16 Ves. 173.) It is plain that the court has jurisdiction to grant an injunction to restrain a tenant from an injurious course of husbandry, but then it should not be exercised in a doubtful case; and here, it is not clear to me that injury has been done. Then as to the course I should adopt, it would not be fair to the tenant to let this motion stand over generally, in order to give the receiver an opportunity to bring an action at law; therefore, while permitting the receiver to bring his action at law, I will in the meantime allow the tenant to proceed with his sowing, but he will do so at his own peril. The several parties interested in the estate must also have notice of the intended action, for they might not like the risk and expense of an action to be incurred.

MASTER BROOKE'S OFFICE.

DYER v. BESSONETT.—Feb. 14.*

Will—Codicil—Legacy—Specific devise—Application of sale monies of real estate in aid of deficient residuary estate.

A testatrix devised her estates of M and C to A upon trust to sell, and out of the produce to pay a certain legacy, and pay the residue to B. She also specifically devised other real estates, and "appointed C her residuary legatee and devisee. The bill contained this clause: "And in case such residue should prove insufficient for the purpose aforesaid, then and in such case it is ordered and directed that the said deficiency should be paid out of the said lands of M and C." The testatrix by

her will specifically devised other lands with legacies charged thereon, some exclusively, others generally. By a codicil the testatrix bequeathed to D a legacy of £2000 charged as well on her real as personal estate. Held, that the real estate specifically devised was not subject to the latter; and that the sale monies of the M and C estates were only bound to make good any deficiency of the residue to answer the debts and legacies bequeathed by the will itself, but were not charged with the legacy of £2000 created by the codicil.

In this case a petition was filed in the year 1852 in the Court of Chancery by the petitioner, claiming as legatee under a codicil to the will of Mrs. Angel Hamilton, praying an account of the real and chattel property of the testatrix. By this petition the petitioner insisted that the legacy was a charge on all the real and chattel property of the testatrix in priority to all the other devises and legacies contained in the will. It appeared that the testatrix on the 13th of September, 1845, made her will duly attested, and thereby bequeathed to James Bessonett, Esq., certain lands situate in the City of Dublin and County of Fermanagh, subject to the payment of certain legacies, which she thereby charged thereon, and expressly exonerated the personal estate from payment of the same. The testatrix devised other lands, specifying them by name, to Miss Hamilton Rowan, subject to the payment of certain other legacies which she thereby charged on said lands, and in like manner exonerated her personal estate from the payment of such legacies. She then devised her property at Rathfarnham (being a freehold estate,) to Mr. Francis Bessonett, subject to the payment of certain other legacies, which she declared should be charged and chargeable on the same, but she did not in that case exonerate the personal estate from the payment of such legacies. She then devised her estates of Mickmanstown and Coalford to Michael Searight upon trust to sell, and out of the produce thereof to pay the sum of £100 to Louisa Sampson, and the residue thereof to Mr. Thomas Rawlins. She then devised certain other lands and tenements to George French, Esq., subject to the payment of £100 to Mr. H. Gething, and she gave, devised, and bequeathed all the rest, residue, and remainder of her property, both freehold and personal, which should remain after payment of her just debts, funeral expenses, charges, administration, and legacies as aforesaid to the said James Bessonett, whom she appointed her sole residuary legatee. The will contained the following clause, "and in case such residue should prove insufficient for the purpose aforesaid, then and in such case it is ordered and directed that such deficiency should be paid out of the produce of the sale of the said lands of Mickmanstown and Coalford." She appointed the said James Bessonett and George French executors of her will. On the 1st of January, 1845, the testatrix, shortly before her death being at Exeter in England, then made a codicil to her will, and thereby, after alluding to her will, which was deposited by her with James Bessonett, of Leeson-street, Dublin, she gave and bequeathed to Miss Letitia Williams Dyer (the petitioner) the sum of £2000, and charged the said legacy on her

* *Ex relatione* W. H. Griffiths, Esq.

real as well as personal estate, and she then ratified and confirmed her said will in all other respects. The petitioner by her petition named James Bessonett, Miss Hamilton Rowan, and the other devisees and some of the legatees whose legacies were charged on the lands specifically devised, respondents. This petition was referred to Master Brooke under the 15th section of the Chancery Regulation Act, (Ireland.) George French, Esq., one of the respondents, filed an affidavit in answer, putting in issue the charges in the petition. When the petition was first opened by counsel for petitioner, the Master directed the lands of Mickmanstown and Coalford to be sold, and he also directed the solicitor for petitioner to prepare the draft order or decree, which the latter did, thereby giving a priority to the legacy to the petitioner over all the specific devisees and legatees, and the argument took place on a summons to settle that draft order. The respondents contended that the petitioner was not entitled to have her legacy charged upon the lands specifically devised to them.

The following counsel appeared on behalf of the respective parties, respondents:—

Tandy, for George French;

Waller, for James Bessonett;

W. H. Griffith, for Miss Hamilton Rowan, and *Henderson*, for Mrs. Sampson, a legatee under the will, whose legacy was charged on the Mickmanstown property.

Mr. French alone had filed an answering affidavit, and the argument was opened by counsel on his behalf. Counsel for the other respondents also argued in the same interest. It was contended for the respondents, that the rule as between specific devisees or legatees and general legatees was, that the pecuniary legatee cannot resort to the property specifically disposed of, unless a contrary intention be expressed; but if he express an intention to prefer the pecuniary legatee, the court must give effect to it, and here no such intention was expressed; that the effect of the words charging the real and personal property of the testatrix was, that thereby the legacy was made payable out of the residuary real or personal estate not specifically disposed of. *Spong v. Spong*, (3 Bligh, n. s. 84.) In that case there were some specific devises and specific legacies; then came a legacy, *not specific*, of £4000 to trustees, upon certain trusts, for the family of the testator, and several other legacies, and the testator by his will "*expressly charged and made liable his real and personal estate to and with the payments of the aforesaid several legacies.*" The Court of Exchequer in England decreed that so much of the legacy as should not be discharged by the personal estate of testator, should be a charge on the whole of his real estates, whether specifically devised or otherwise, and also upon his personal estate specifically bequeathed; but the House of Lords, on appeal, reversed that judgment, holding that the specific devisees were not to contribute to the payment of a general legacy. This case has been since held a binding authority, and recognised and acted upon in several subsequent cases; it is cited and relied on by Lord Cottenham, with approbation, in the

case of *Creed v. Creed*, (11 Clk. and Fin., 507.) The case of *Conran v. Conran*, lately decided in the Irish Court of Chancery (not yet reported) is to the same effect. The reasons for the decision in *Spong v. Spong* are much stronger now than at the time that case was decided, for now and at the date of the will in this case all the real and personal property which the testatrix might have at the time of her death, not specifically disposed of, would be liable to make good the legacy; whereas at the time of *Spong v. Spong*, no real property acquired by the testator after the date of the will could be affected by any of the provisions of it, so that now this principle of the well established rule, that a specific legacy should not abate in favour of a general legacy, applies also to cases between specific and general devisees; that in another point this case was stronger than *Spong v. Spong*, for there the legacies and charge on the real and personal estate were contained in the same instrument, and the testator had all the provisions of the will before him at the same moment; but in this case the codicil was made three years after the will, when the testatrix was at the point of death, and when she was in England and the will in Ireland, and the attention of the testatrix not drawn to the contents of the will.

Frederick Walsh, for the petitioner, argued that the intention of the testatrix was the true rule of construction, and that her intention, as expressed in the codicil, was to make the legacy of £2000 a charge on all her property in the first instance, and was so far a revocation of her will. By her codicil she refers particularly to her will; she mentions the date thereof; she mentions the executors appointed thereby, and appears to have been perfectly cognizant of its contents—most probably she had with her a copy thereof. She had in fact by that will disposed specifically of all her property, and she knew this, and the court is entitled to know all that the testatrix knew at the time of making her will or codicil respecting the state of her property. She by this codicil confirmed her will, except so far as regarded the provision for the said legacy of £2000—that is, she revoked the will so far as was necessary to provide for that legacy, which she expressly charged on her real and personal estate. Her intention, therefore, must have been to charge that property with the payment of that legacy. He then argued, that at all events the lands of Mickmanstown and Coalford were liable to make good the legacy, as one of the trusts of the produce of that property, was to make good any deficiency in her personal estate, for payment of her legacies.

Henderson, on behalf of the trustee of the lands of Mickmanstown and Coalford, and also for Mrs. Sampson, the legatee whose legacy was specifically charged thereon, argued, that the produce of the lands of Mickmanstown and Coalford were not liable to make good the legacy to the petitioner. The terms of the will, declaring the trusts of those lands, were (after certain other provisions,) "in case the residue should prove insufficient for payment of her debts and legacies aforesaid;" then the produce of the said lands

should be applied to make up the deficiency, but it was not to make up the deficiency which might arise in the payment of any legacy *thereafter* to be given. He cited the following cases:—*Masters v. Masters*, (1 P. Wms. 421); *Bonner v. Bonner*, (13 Ves. 381); *Hall v. Severn*, (9 Sim. 515); *Early v. Benbow*, (2 Coll. C. C. 304).

Feb. 14.—MASTER BROOKE this day delivered his judgment, and thereby declared that the petitioner's legacy of £2000 was not a charge upon any of the property *specifically* devised or bequeathed; that the proceeds of the lands of Mickmanstown and Coalford were applicable, first, in discharge of so much of the debts, funeral expenses, and charges of administration, including the petitioner's *general* costs of this suit, as the personal estate not specifically bequeathed were insufficient to pay; secondly, to pay Mr. Sampson's legacy of £100 specifically charged thereon; thirdly, to supply every deficiency of Mr. Francis Bessonett's estate to pay the legacies charged on it; and lastly, the residue to go to Mr. Rawlins, the residuary devisee of that fund; and that the proceeds of those estates were not applicable to make up the legacy to the petitioner. He also held that legacies charged on the lands specifically devised to Mr. James Bessonett, Miss Hamilton Rowan, and Mr. George French, were specific legacies, and he dismissed the petition with costs, as against those specific devisees.

COURT OF QUEEN'S BENCH.

HILARY TERM, 1855.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

IN RE BERRY.—January 31.

Insolvent—Warrant of commitment—Remand—
3 & 4 Vic. c. 107.

Where the warrant of commitment for the remand of an insolvent debtor, under the 3 & 4 Vic. cap. 107, under the hand of the Assistant Barrister for the county where the hearing had taken place, merely specified the period of the remand and the name of the detaining creditor, but omitted to state the grounds of the remand or the offence by which the insolvent had disenthralled himself to the immediate benefit of the Act. Held, upon a return to a writ of habeas corpus, to be insufficient, and that the prisoner was entitled to be discharged from custody accordingly.

Hartigan on a previous day had obtained a conditional order for a writ of *habeas corpus* to be directed to the Governor of the Gaol of the County of Limerick, and other parties concerned, commanding them to bring up the body of Ambrose Lynch Berry, a prisoner then in custody under a warrant of remand, under the hand of the Assistant Barrister, upon the hearing of the matter of his insolvent petition. It appeared by the affidavit of the insolvent that he had been in custody at the suit of one Dowling, had petitioned the Insolvent Court, and was set at large until the hearing at bail; that on the 25th of October, last, his petition came on for hearing at Limerick Quarter Sessions, and his discharge was opposed by Dowling, whereupon an order in writing was made for his remand, as follows:—

"Pursuant to the Act for the Relief of Insolvent Debtors in Ireland, and an Act of the 14th & 15th Vic. c. 27. At a Court of Quarter Sessions, before the Assistant Barrister for the County of Limerick, holden at Limerick, in the County of Limerick, on the 25th day of October, 1854, upon adjudication made in the matters of the several persons hereinafter named prisoners in the Gaol of Limerick, in said county, it is ordered that the said persons be severally remanded to your custody, and be therein kept, as to the several detainers written opposite to their respective names, for the several periods of time in that behalf respectively mentioned, and that at the expiration of such several and respective periods they be severally discharged from your custody, as to the said detainers, and for so keeping them in your custody, as to the said detainers respectively, and for so discharging them therefrom, as aforesaid, this shall be your sufficient warrant; and it is further ordered that the said prisoners be severally discharged from your custody forthwith, as to the other detainers hereinafter mentioned, and written opposite the respective names of such prisoners; (Ambrose Lynch Berry, remanded at the suit of Edward Dowling for twelve months, from 9th August, discharged forthwith as to the detainers of;) and for so discharging them from custody forthwith, as to the said last-mentioned detainers respectively, this shall be your sufficient warrant. (Signed) R. Tighe, Assistant Barrister. To the Governor of the said Gaol of the County of Limerick." The above conditional order having been subsequently made absolute, the prisoner was this day brought up on the return to the above writ.

Hartigan now moved that the prisoner should be discharged from custody.—The committal is insufficient, as it does not disclose the existence of any jurisdiction in the court below to make the order. [*Lefroy, C. J.*—Have you any authority to show that we are to presume that the judge of the Insolvent Court acted without authority?] Paley on Convictions, 288. [*Lefroy, C. J.*—Have you got any case to show that where a judge of record had committed generally, we are bound to presume that he has acted without authority? *Moore, J.*—I think that it has been held, that in the case of a committal by a judge of an inferior court, it is not enough to commit generally, but it must state the alleged contempt. No offence has been specified here. *Lefroy, C. J.*—The Assistant Barrister should be apprised that it is not sufficient merely to state the period of the remand, for the Act gives power to remand for *different* periods, according to the particular offence.] It would appear that this was the old form of committal on the offence.

PER CURIAM.—The committal must be quashed, and the prisoner discharged from custody.

— v. — Jan. 31.

Security for Costs—Practice—Affidavit of merits. It is not answer to an application for security for costs, that the defendant's affidavit of merits upon which the motion was grounded, admits that the amount claimed in an action is due, but alleges that it was tendered before action brought, inasmuch as

such tender, if proved under a plea thereof, will be a valid and meritorious defence.

Walker moved that the plaintiff, who resided out of the jurisdiction, should give security for costs. The affidavit alleges that defendant has a just defence to the action on the ground, that before the writ was issued he tendered the amount which was due.

Ormsby contra.—The affidavit admits the validity of the plaintiff's demand, and does not warrant this application.

LEFROY, C. J.—The defendant is entitled to security for costs, for although he confessedly owes the plaintiff something, he tendered it, and may by his defence insist upon that tender. We cannot try this question upon affidavits.

Motion granted.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

HILARY TERM, 1855.

DICKSON v. CAPES, STEWART, AND TYRRELL.
Nov. 24, 25, and Jan. 15, 16.

New trial—Judicial mistake—3 & 4 Vic. cap. 107.

An action of trespass will not lie against a principal, or his attorney, who act upon the order of a court of competent jurisdiction, and who are guilty of no irregularity, even though such order be wholly illegal.

THE following were the facts:—The plaintiff had been defendant in an action at the suit of Capes and Stewart, who were two of the defendants in the present action, and had been arrested under an execution which issued on the judgment obtained by them in that cause, and lodged in the Marshalsea; he continued there for 21 days, and not having satisfied the judgment, and having refused to file his schedule as an insolvent, Capes and Stewart applied to the Insolvent Court under the provisions of the 19th section of 3 & 4 Vic., cap. 107, for an order to vest the estate and effects of the prisoner in the provisional assignee. On the 8th of December an order of the Insolvent Court was made directing Dickson to file his schedule; and, not having done so, on the 24th December, 1852, by a further order of that court, the prisoner, Dickson, was, on the motion of Mr. M'Nally, acting in that court for Capes & Stewart, ordered to be committed to the Richmond Bridewell for contempt, and he, on this occasion, showed cause against his committal to that prison, which, however, was disallowed. The warrant for his committal having been made out, Mr. M'Nally informed the officer of the court that it was ready—lodged it with him—and directed him to act on it. Dickson was accordingly confined in the Richmond Bridewell from the 7th of February until the 9th of May, 1853, when he was discharged by the Court of Queen's Bench on a return to a writ of *habeas corpus*, that court deciding that the warrant of the Insolvent Court was bad, and that the Richmond Bridewell was not the proper prison for his being committed to. He then brought an action of trespass

for assault and false imprisonment against Messrs. Capes and Stewart, and also against Mr. Tyrrell, their attorney in that action. Tyrrell pleaded separately from Capes and Stewart, but the plea in both instances was the same, viz., a traverse of the assault and imprisonment. On the trial, during the after sittings of Michaelmas Term, the jury, on the above facts being proved, but no malice shown, found a verdict for Dickson, with £200 damages. Subsequently the defendants obtained a conditional order to set aside the verdict, and for a nonsuit, on several points reserved, and for a new trial on the ground of excessive damages.

J. D. Fitzgerald, Q. C., (with whom were *J. T. Ball, Q. C.*, and *Mackey*), now showed cause.—The order of committal to the Richmond Bridewell is confessedly illegal, and the parties who procured it to be acted on are guilty of false imprisonment. The judicial acts of the Insolvent Court ceased with the making out of the warrant, and the illegal acts of the defendants commenced when they procured that warrant to be acted on by paying the fees, and putting the officer of justice in motion. The position of all the defendants is the same when Tyrrell is proved as acting for the principals through M'Nally. The case of *Green v. Elgie*, (5 Q. B. 99,) is identical with the present case, and Tyrrell here is in exactly the same position as Toulmin was there; and though the form of action here is "trespass," and in that "case," yet there is no difference when it is shown that the attorney is active in procuring the arrest. In trespass all are principals, and, in cases of this description, there is no real distinction between the attorney and the client, for, in the language of the common law, the client appears in court, and puts the attorney in his place. [*Torrens, J.*—There is this difference—that the attorney has no benefit flowing from success, while the client has.] This is not a case of malicious prosecution, where that would apply. The defendant, Stewart, acting with M'Nally, procured the order to be acted on, and it is as illegal as though it had ordered him to be transported for seven years, and the suing out and acting upon such order renders them liable. The answer made in all the cases similar to the present is, It is your misfortune to have done this. [They cited *Green v. Elgie*, (5 Q. B. 99); *Kinning v. Buchanan*, (8 Com. B. 271); *Sedley v. Sutherland*, (3 Esp. 202); *Barker v. Braham*, (3 Wils. 376); *Codrington v. Lloyd*, (8 Ad. & Ell. 449); *Bates v. Pilling*, (6 Barn. & Cres. 38); *Ex parte Kinning*, (4 Com. B. 507); *Bryant v. Clutton*, (1 Mee. & W. 408); *West v. Smallwood*, (3 Mee. & W. 419); *The Marshalsea case*, (10 Coke. R. 76, A.); *Houlden v. Smith*, (14 Q. B. 841); *Coomer v. Latham*, (16 Mee. & W. 713).]

Hamilton Smythe, Q. C., and *C. Kelly*, for Tyrrell.

M'Donnagh, Q. C., and *Napier, Q. C.*, for Capes and Stewart.—The verdict is illegal, and the damages excessive. *Price v. Severn*, (7 Bing. 316); *Jones v. Sparrow*, (5 T. R. 257.) By the 3 & 4 Vic. c. 107, s. 19, where any party having property remains in custody for 21 days without satisfying the debt, the creditor is empowered to petition the Insolvent

Court that the debtor be ordered to file a schedule; that course was taken here, and the error, if error there be, is, that the Insolvent Court proceeded *inverso ordine*, and committed the plaintiff to the wronggaol, and the plaintiff has obtained this benefit by mistake, that if he had not been transferred to the Richmond Bridewell he would have remained to this day in the Marshalsea, or would have paid the debt. No appeal was made to the Chancellor, or to any of the judges to set aside the order. The Insolvent Court is a court of competent jurisdiction, and its order is imperative on the Marshal. There has not been shown any interference on the part of Capes and Stewart, nor on the part of Tyrrell. M'Nally was the acting party, and he is not sued. If the party proceeds irregularly he is liable, but if the court having jurisdiction proceed *inverso ordine*, he is not liable. The foundation of the action of trespass is the taking without authority—per Mr. Justice Williams in giving judgment in *Codrington v. Lloyd*, (8 A. & E. 449.) The order of the court, however erroneous, is a justification to the parties. There is this distinction between irregular proceedings and those *inverso ordine*, that in the first the party is liable, in the latter he is not. [*Monahan, C. J.*—Have you any authority for the distinction between *inverso ordine* and irregularity? Mr. Fitzgerald says, that if the court has no jurisdiction to deal with the matter before it, it is not *inverso ordine*, but a nullity. You say, that if the court have jurisdiction, but go beyond it, it is *inverso ordine*; what authority is there for this?] The *Marshalsea case*, (10 Coke, 76, A,) shows that in England erroneously is considered *inverso ordine*. *Carratt v. Morley*, (1 Q. B. 19) is in point. *Green v. Elgie* is distinguishable from the present case. [*Monahan, C. J.*—I do not understand why the mere delivery of the warrant to the officer should make the party a trespasser, if the obtaining of it were lawful.] The party's liability only arises from his own irregularity; all the cases establish this except *Bryant v. Clutton*, which is a misreport. [The following cases were cited:—*Price v. Severn*, (7 Bing. 316); *Jones v. Sparrow*, (5 Term R. 257); *Phillips v. Byron*, (1 Strange, 508); *Prentice v. Harrison*, (4 Q. B., n.s., 852); *Cameron v. Lightfoot*, (2 Wm. Bl. 1192); *Marshalsea case*, (10 Rep. 76, A); *Carratt v. Morley*, (1 Q. B. 19); *Cooper v. Harding*, (7 Q. B. 928); *Barber v. Rollinson*, (1 Cr. & Mees. 330.)]

Jan. 22.—MONAHAN, C. J. now delivered the judgment of the court.—After stating the facts already mentioned, his lordship proceeded—After giving this case, which is one of great importance, our best consideration, we are of opinion that the action does not lie, and that the plaintiff must be nonsuited. The case has been very well argued, and a great many authorities referred to, apparently of a conflicting character, but we do not think there exists any difficulty in reconciling them. In the case of *Barker v. Braham and Norwood*, (3 Wils. 368), an action was brought against Braham for false imprisonment, and the nature of the proceedings were these:—The plaintiff's husband having been, before his death, indebted to the defendant Braham, upon a bond, in the sum of

£400, and the plaintiff having obtained letters of administration to him, the defendant, Braham, employed Norwood as her attorney, to bring an action on the bond against Mrs. Barker, as administratrix of her husband, and having obtained judgment by default for £400, to be levied off the goods and chattels of the deceased husband, if she had so much, and if she had not, then to be levied upon the proper goods and chattels of Mrs. Barker. Norwood accordingly sued out a writ of *fi. fa.*, by which the sum of £164 of the goods of the deceased husband was levied, and there was a return of *nulla bona* as to any other of his goods. A *ca. sa.* then issued, and the defendant's person was arrested, the judgment not warranting such arrest. There the court held that an action lay against the attorney as well as against the principal. The next case is that of *Bates v. Pilling*, (6 Barn. & Cress. 38), and in that case the court held that both the principal and his attorney were liable, but there the execution was issued after the debt was paid, and the facts were different from the present case. There are several cases which establish the general rule, that a party to an illegal writ is liable for anything done under that illegal writ. In *Coomer v. Latham*, (16 Mees. & Wels. 713), the only plea was the general issue, and the Court of Exchequer there held that if the acts of the defendant lead, in the regular course of proceeding, to the issuing of the warrant, it is the same as if he had directly authorized its issuing, and that he is bound to justify; but the judgment of the court went on this point, that if the defendant had pleaded a justification he had ample grounds to sustain it, but having only pleaded the general issue, he was liable. In *Kinning v. Buchanan*, (8 Com. Bench, 271,) there were two pleas—not guilty, and a justification; a replication was filed. The case went to trial, and there was a verdict for the plaintiff on the plea of the general issue, and the evidence was sufficient on that issue to warrant that verdict; we have, however, no means of knowing what evidence the defendant gave of his innocence on the justification issue, and the court did not think he had well justified, inasmuch as he justified under a warrant which was bad. So here, if the defendants had been obliged to justify they could not have done so, the warrant being bad. But the question in this case is, whether a party employing an attorney in the Insolvent Court, when the court makes a bad order, and that attorney delivers that order to the officer, this party is responsible. The case of *Carratt v. Morley* is important on this question. There the action was brought against three sets of persons—the original plaintiff, the Commissioners of the Court of Requests, and the Sergeant of the Court. The judge who tried the case thought no action lay against the principal, and doubted as regarded the commissioners, but considered that the officer of the court was liable. The Court of Queen's Bench decided that the principal was not liable, as he only stated his case to the commissioners; but held that both the commissioners and the officer were responsible, the latter, however, only because the warrant was bad in form, but thought that had the warrant been good in form he

would not have been liable, as he was bound to obey the order of the court. The next case is *Green v. Elgie*, (5 Q. B. 99), and on this case both parties here rely, and the facts there were something like the present. I have read the pleadings from the brief which Mr. Napier furnished to the court, and as it gave all the facts, the report of the case appears accurate. [His Lordship then stated the facts of that case and proceeded.] In the course of the proceedings Elgie opposed them, and this I think material; then followed an appeal, which was refused with costs, and it was for these costs that Green was imprisoned, and he remained in prison for six or seven years. During his imprisonment an application was made to discharge him, which was opposed by Elgie and refused. Subsequently another application for his discharge, on a writ of *habeas corpus*, was made, and was opposed by Toulmin, the attorney, and on this occasion he was discharged, because the warrant was informal on the face of it. That case was like the present as regards the principal, and the pleas were the same as here, and Mr. Justice Coleridge, who tried the case, directed a verdict for Elgie, but left the case to the jury as regarded the attorney, and suggested that there was evidence that Toulmin was actuated by malice. The result was a verdict for Elgie, and against Toulmin, and I confess I cannot see upon what grounds it should have been so. Another case has been referred to, and which appears to us very like the present, viz., *Cooper v. Harding*, (7 Q. B., 928,) and it is even a stronger case than the present, and differs only in one particular—there both the defendants, who were attorneys, urged the issuing of the warrant, but the commissioner, who appeared to think the warrant not quite right, told them they must take it at their peril. They said they would, and told the officer the warrant was ready, and desired him to execute it; and the only difference between the two cases is; that here M^cNally *actually delivered* the warrant, while there they only *told* the officer it was ready, and *told* him to execute it. We think there is no substantial difference between the two acts, and that it would be a trifling with justice to hold that there was. Upon a careful consideration of all the cases we have been referred to, we think the plaintiff here ought to have been nonsuited, and accordingly now direct that a nonsuit be entered—but, as there was great difficulty in the case, we give no costs.

Nonsuit accordingly.

DUNNE v. COOPER.—Jan. 24.

Pleading—Uncertainty—9 Geo. 4, c. 56—
16 & 17 Vic. c. 113.

A defence to a plaint for assault and false imprisonment, which professed to deny and justify, but which left it uncertain, whether the justification extended to the act of the defendant, or of the magistrate and constable by whom the plaintiff was arrested, was set aside for uncertainty.

THE summons and plaint contained four counts:—first, for trespass and assault; secondly, for forcing plaintiff along the public streets, and falsely impri-

soning him; thirdly, for, without reasonable or probable cause, procuring bills to be found by the Grand Jury at the Commission of Oyer and Terminer, and arraigning him thereon; fourthly, for maliciously employing an attorney and counsel to prosecute defendant at said commission.

The defence was in effect as follows: “Saith he did not make an assault on the plaintiff as alleged in the introductory part of said writ of summons and plaint. And, in reference to the other charges in said plaint against this defendant for seizing, and forcing, and compelling the said plaintiff to go from the dwelling-houses in said plaint mentioned, and along the public streets to the Head Police Office, and then and there detaining and imprisoning the plaintiff without any just or probable cause for so doing, and then and there falsely charging the plaintiff with wilfully and maliciously dilapidating the premises in said plaint mentioned, and for the detaining said plaintiff in prison in said police office, and without any probable cause for so doing, causing the plaintiff to be conveyed in the Prison Van to Richmond Bridewell, and for having there imprisoned the plaintiff without just cause, and for having without reasonable or probable cause for so doing, caused the plaintiff to be indicted at the Commission of Oyer and Terminer, and for having arraigned plaintiff thereat, and for having maliciously employed an attorney and counsel to prosecute the plaintiff on the trial of said indictment, saith, that being agent to one T. G., who was and is the landlord of the premises in said plaint mentioned, and having been credibly informed that waste and dilapidation was being committed on the said premises by the persons in occupation thereof, or by persons colluding with them, defendant having reasonable and probable cause for so doing, and having duly made an affidavit of the grounds of his information and belief of such waste being committed, obtained from Thomas Magee, Esq., one of the magistrates of the Head Police Office, a cautionary notice, signed by the said magistrate, admonishing all persons concerned not to proceed with such waste and spoliation to said dwelling-houses until his special leave in writing for that purpose should be first procured.” The defence then averred service of said notice on the plaintiff personally, and the posting of same, and proceeded: “Saith that notwithstanding the service and posting of such notice as aforesaid the said plaintiff, with divers persons in his employment, having wrongfully persisted in such waste and spoliation to said houses, this defendant, having made a further affidavit of said facts, obtained a special warrant, signed by Thomas Magee, under the provisions of the 26th sect. of 9 Geo. 4, c. 56, directed to one Patk. Barnes, a constable in the Dublin Metropolitan Police, for the apprehension of all persons who might be found dilapidating the said premises. And defendant further saith, that the said constable, by virtue of said warrant, legally arrested the said plaintiff, who, at the time of such arrest, was unlawfully employed in removing and carrying off the timber of the said dwelling-house in said plaint mentioned therefrom, and then conveyed him to the police office, and afterwards, by order of the magistrate pre-

siding, to the Bridewell in said plaint mentioned, as he lawfully might, and having just and probable cause for such arrest and detainer for the reasons aforesaid." The defence then proceeded to deny that the defendant was actuated by any improper or sinister motives in endeavouring to procure the plaintiff's conviction, or that he maliciously employed an attorney or counsel to act in the prosecution of plaintiff, but averred, that, being bound to prosecute the plaintiff, he acted as his own attorney, and employed counsel to prepare the indictment, as he lawfully might, and having reasonable and probable cause for so doing.

McDonogh, Q. C., (with whom was *B. Cox*,) applied to set aside the defence as embarrassing and uncertain, and on other grounds which would amount under the late system of pleading to grounds of special demurrer.—No issue can be taken on this defence; it is, in fact, only an argumentative general issue. The defendant does not deny the charges contained in the plaint directly; he does not say, *I did not arrest him—I did not imprison him, &c.*; but—the constable arrested him—the magistrate imprisoned him; and it is uncertain whether it is the act of the defendant, or of the magistrate and constable, that is justified. The defendant does not bring himself within the 26th section of the 9 Geo. 4, c. 56, by any of the essential averments—and, even if he did, the defence only amounts to the general issue. [*Monahan, C. J.*—My objection to the plea is, that I cannot say whether it amounts to the general issue or not.] The defence only states that the defendant was the motive power; it is also double, and open to general demurrer.

J. D. Fitzgerald, Q. C. (with him *J. F. Walker*,) —If the objection to this defence be tantamount to special demurrer, it cannot be entertained now, as it would be repealing the Common Law Procedure Act; the plaintiff must go further, and show how he is embarrassed. The precedent of the summons and plaint was taken from that in *Cantwell v. Cannon*, (6 Ir. Jur. 151 & 153,) and the language is most embarrassing. The defence is, first, a denial of the assault—and then a justification under the Act of Geo. 4. [*Monahan, C. J.*—The difficulty here is, the uncertainty whether you intend to justify your own act in imprisoning the plaintiff, or only the act of the constable; and it is difficult to say whether it is a plea of not guilty or of justification, and the very circumstance that any argument can be raised, whether it be a plea of justification or of the general issue, makes it calculated to embarrass.] It is simply a special plea professing to justify the act complained of. The notice does not point out any of the objections, and a ruling against us would be to give the plaintiff the benefit of a special demurrer, without specifying the grounds. The objection here should be by general demurrer if the statutable defence be bad.

PER CURIAM.—The defence must be set aside for uncertainty. The first part of it would appear to deny the assault, and the latter part to justify the imprisonment; but the middle part would lead to the impression that what the defence contemplated was, that the defendant merely put the law in motion, and that the illegality was that of the magistrate and constable—and for this uncertainty it

must be set aside, with liberty, however, to amend. If we thought this objection was tantamount to a general demurrer we should have directed the plaintiff to demur—but we do not think it is.

Defence set aside, with costs.

COURT OF EXCHEQUER.

HILARY TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

ELLIOTT v. ELLIOTT AND ANOTHER.—Jan. 27.

Amendment of record of judgment.

The court will give liberty to amend the record of the judgment on consent, if it appear that there are no judgments against the defendant subsequent to the one sought to be amended.

Carson applied that the plaintiff might be at liberty to amend the record of the judgment entered up in this case, by substituting the sum of £177 for that of £127, for which judgment was erroneously stated to have been recovered. The bond and warrant of the defendants was for the penal sum of £177, and, through a mistake arising from the illegibility of the writing in the document, a judgment had been entered for the sum of £127. There had also been a *scire facias* to revive the judgment, and judgment of revivor had been entered up for the wrong sum.

GREENE, B.—Let the mistake be rectified on the original record of the judgment as well as on the revivals, a consent having been given with that intention, if on a general search it appears that there are no judgments affecting the estate of the defendant subsequent to the one in question.

Rule accordingly.

UNIACKE v. DOWNING.

Application to stay proceedings—Affidavit of defendant—"Just and legal defence on the merits."

In an affidavit on which a defendant grounds an application that proceedings should be stayed until the plaintiff gives security for costs, he must state facts sufficient to satisfy the court that there is a good defence on the merits.

R. R. Warren moved, on behalf of the defendant, that the proceedings in this cause be stayed until the plaintiff gives security for costs. The affidavit of the defendant's attorney stated that the plaintiff was resident at Anglesea, in North Wales, was possessed of no property within the jurisdiction of the court, and that the defendant "had a just and legal defence upon the merits" against the action.

Exham contra.

PENNEFATHER, B.—It is not sufficient merely to state in the affidavit that there is a just and legal defence on the merits; there must be facts set forth satisfactorily to show the court that such is the case. On a former occasion, when the court laid down that rule, my brother Richards was not present, but he concurs in the propriety of making it. We will not make any rule on the motion, the costs of the motion to be costs in the cause if the plaintiff succeed in the action.

No rule on the motion.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq., Barrister-at-Law.]

BOURKE v. KANE AND OTHERS.—Jan. 22.

Will—Minor—Maintenance—Legacy—Interest.

A testator who, before his death, had adopted his niece at the age of three years, and maintained her as an inmate of his family until his death, made the following bequest: "I give, devise, and bequeath, and hereby charge upon all my aforesaid lands and premises to my niece D B the sum of £3000 sterling, to be payable to her upon her marriage with the consent of my wife A M H; but in case of her marrying without such consent in the lifetime of my said wife, the said charge of £3000 is to merge in the inheritance, and I hereby charge thereon, and give to her the sum of one shilling and no more. It is my wish and will that my said niece D B should live and reside at Queensborough with my said wife." The testator also bequeathed to a brother and sister of D B, an annuity of £100 per annum, directing that it should be payable out of certain lands and at certain times. At the time of the testator's death D B was nineteen years of age and unmarried. A petition having been presented by her for the purpose of enforcing payment of interest upon the sum of £3000 by way of maintenance. Held, that she was not entitled to interest upon that sum.

THE petition in this case was filed for the purpose of carrying into effect certain provisions in the will of Martin Honan deceased. The petitioner, Delia Bourke, whose mother was sister of the testator, had been taken into his house by the latter, who had no children of his own, when only three years of age, a few weeks after her mother's death, on account of the inability of her father to provide for her, and had been maintained and educated by him until his death, she having no other means of support. The testator, who was possessed of considerable real and personal estate, made his will in the year 1848, and after various devises and bequests of his real and personal property, he made the following bequest to the petitioner: "I further give, devise, and bequeath, and hereby charge upon all my aforesaid lands and premises to my niece, Delia Bourke, the sum of £3000 sterling, to be payable to her upon her marriage with the consent of my wife Anna Maria Honan; but in case of her marrying without such consent in the lifetime of my said wife, the said charge of £3000 is to merge in the inheritance; and I hereby charge thereon and give to her the sum of one shilling and no more. It is my wish and will that my said niece, Delia Bourke, should live and reside at Queensborough with my said wife Anna Maria Honan." The petitioner had continued to reside at the testator's house until his death, at which time she was nineteen years of age and unmarried, and had been always regarded as his adopted child; and after his death she applied to his personal representatives (of whom his widow, who was also residuary legatee, was one,) to have the legacy of £3000 secured out of the personal estate of the testator, and for

interest thereupon, which they refused, upon the ground that the legacy was contingent upon the marriage of the petitioner with the consent of the residuary legatee; that it was payable out of the real and not the personal assets, and that the legatee was not entitled to interest thereupon for her maintenance; but the petitioner relied upon the provision in the will that she was to reside at the testator's house (no obligation to support her being imposed upon the widow), as indicating an intention that she should have the means of support. The testator had also bequeathed to the brother and sister of the petitioner an annuity of £100 to each for life, chargeable upon certain lands therein named, and payable upon certain days, directing that the first payment should be made on the first of those days that should happen after the testator's death. The petition prayed a declaration that the petitioner was entitled to interest upon the legacy of £3000 from the day of the death of the testator, and that an account should be taken, and that the respondents, as devisees of the real estate, should be directed to pay petitioner what should appear due at foot of such account, and that if the respondents should not admit assets sufficient to pay the same, that an account should be taken of the testator's real and personal estate.

Martley, Q.C., in support of the petition.—The position of the testator in regard to the petitioner during his life, and the fact that the latter has not married since his death, entitle her to the interest upon the sum of £3000 until her marriage, or in case she should not marry at all. It is not disputed by the other side that the testator stood *in loco parentis*, and that the petitioner was treated as his adopted child; but it is contended that this is a charge solely confined to the real estate of the testator, and not chargeable upon his personality: therefore the question is, whether there are sufficient words to discharge the personality, the general rule of law being, that, in order to exempt the personal estate of a testator in such cases, the will must show a plain intention by clear and express indication, and it will not be sufficient if it merely contains a provision that the charge shall affect the real estate of the testator, without expressly exempting the personality.—*Bridges v. Phillips*, (6 Ves. 567.) The same principle is recognized by Vice-Chancellor Wigram in *Collins v. Robins*, (1 De Gex & Sm. 141,) where he says, (quoting the judgment of Lord Alvanley in *Booth v. Blundell*,) "It is not by the intention to charge the real, but by the intention to discharge the personal estate, that the question is to be decided." [*Lord Chancellor*.—There is in the present case a strong expression of intention as to charging the real estate, for the testator provides, that, should Delia Burke marry without consent, the charge is to "merge in the inheritance."] The next question is, whether or not this gift is to go to the legatee only in case of her marrying with consent. There certainly is a provision that the bequest is to go over in case of her marrying without consent, but it is to be observed that there is no provision for the case of her not marrying with consent. Interest upon such a legacy is not in some cases payable when the le-

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gacy is contingent, but it is otherwise where the relation of parent and child exists between the testator and legatee. The rule is thus stated in 2 Will. Ex. 1226: "For then," (viz., where the testator is to the legatee *in loco parentis*), "whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy shall be allowed as a maintenance from the time of the death of the testator, if there be no other provision for that purpose." This is an established rule in cases like the present.—*Incleton v. Northcote*, (3 Atk. 438); *Mole v. Mols*, (1 Dick. 310); *Atcherly v. Vernon*, (10 Mod. 518); and the principle has been subsequently upheld upon the ground of the relation subsisting between the parties.—*Mills v. Roberts*, (1 Russ. & Myl. 555); *Leslie v. Leslie*, (Cas. temp., Sugden, 4); *Rogers v. Soutten*, (2 Keen. 598); *Russell v. Dickson*, (2 Dr. & War. 133); *Brown v. Temperly*, (2 Russ. 263.) It may be contended that upon the legatee becoming an adult the interest should cease, where there is nothing but the constructive relation of parent and child between the parties; this, however, is not so in the present case, for the will contains a provision that Delia Bourke should live and reside with the widow of the testator after his death—but, as there is nothing to bind the widow to give effect to this intention, it must be supposed that the testator intended that the legatee should have the means of doing so, as she could not, while residing there, follow a calling for her support. [*Lord Chancellor*.—It may be contended that this is a trust binding the widow.] Such an argument is not relied upon, there being nothing in the will charging anything devised or bequeathed to the wife for the purpose of compelling her to perform such a trust. The present petition does not seek payment of the principal sum, nor that it should be payable out of the personality; but merely the payment of interest until the legatee comes of age, and, as we contend, until she is married.

The Attorney-General for the tenant for life.—This is a contingent charge affecting the real estate alone. *Roberts v. Roberts*, (13 Sim., 336.) This appears still more clearly from a subsequent charge in the will, directing that in case the legatee marry without consent in the lifetime of the testator's wife, the charge is to merge in the inheritance, and that the sum of one shilling, *chargeable thereon*, is to be given to her in such case. The obvious reason why he did not intend that she should have this sum unless she married, and that with consent, was, that he did not wish that she, being a Roman Catholic, should become a nun. The relation between the parties is not disputed, but the rule in such cases is this in reference to the payment of interest upon bequests of this nature: that it is the duty of the parent to provide for the child in such cases, and that interest is payable to the minor until he or she can give a receipt; but that rule is subject to this qualification—that the child must be altogether unprovided for in other respects; and if there be the least provision made for the child, the court cannot take into consideration the nature or the amount of it. The provision made in the present case, that Delia Burke is to reside at the tes-

tator's house, creates a trust for her support. In *Ryan v. Ryan*, (12 Ir. Eq. R., 226,) the testator gave his house and furniture, &c., to his nephew, and directed that his widow should, if she wished, be entitled to reside in his house, and have her diet and lodging there; the latter left the house, but subsequently elected to return and reside there, and the nephew was compelled to support her. It is quite clear in the present case that the testator did not intend that his niece was to starve; and then the question arises as to the effect of this provision, which if it amounts to anything, will disentitle the legatee to payment of interest. *Donovan v. Needham*, (9 Beav., 264;) *Rudge v. Winnall*, (12 Beav., 357.) Even supposing that she was entitled to the payment of interest upon this charge, it would only be during her minority, the reason for which is the inability of the minor to support herself, and it is only during that period that a parent is bound to support a child. *Raven v. Wait*, (1 Swans., 553;) *Wall v. Wall*, (15 Sim., 513;) and in any case interest is only payable from the death of the testator. *Knight v. Knight*, (2 Sim. & Stu., 490.)

Sergeant *O'Brien* appeared for the executors.

Sergeant *Christian* (with him *D. O'Reardon*), for the remainderman in tail.—The petition only seeks payment of interest out of the real estate; the court will therefore decide nothing as to the liability of the personal estate, so as to preclude the discussion of the latter question hereafter. The general rule is, that the interest upon a sum of money given as a legacy is not to be paid until the time for payment of the principal sum has arrived. To this rule there are exceptions in cases where, on account of the minority of the object, and the position of the parties, the court is satisfied that the testator intended that the legatee should have maintenance; and in such cases, no other provision being made, the interest upon the sum bequeathed will be given for that purpose; but in the present case it is clear that the testator intended that his niece should reside in the house of his widow, and be maintained by her, and therefore the necessity of providing maintenance does not arise. This will further appear from the provision made in the will for the brother and sister of the petitioner, by an annuity chargeable upon certain lands and payable upon certain days, whereas no such provision is made for the support of the petitioner, although the adopted child of the testator: from which it must be concluded that she was to be maintained by the widow; therefore the general rule as to interest must apply in the present case. It has been contended that the court should treat this case upon more general grounds, regarding this legacy as both future and contingent, not depending upon the capacity or incapacity of the legatee, but upon the happening of an event that may not occur during her life; but there is no decision supporting such an argument, nor is there any authority for extending the right of maintenance to an adult. *Raven v. Wait*, (1 Swans., 553;) *Young v. McIntosh*, (13 Sim., 445.) It appears from the judgment of the Vice Chancellor, in the latter case, that when the minority of the legatee appears to be the only reason for postponing the

payment of the principal, the court will presume that it was on account of the inability of the minor to give a receipt, and will therefore order the interest to be paid in the meantime, by way of maintenance; but it is otherwise where there appears to be any other event to regulate the time of the payment of the principal sum; besides it may be very difficult to ascertain the amount of maintenance necessary for an adult who is able to maintain herself.

Deasy, Q. C., (with him *Graydon*), for other legatees.—Even where the legatee is a minor, the court does not of necessity give the entire interest upon the principal sum by way of maintenance, but a certain adequate amount, not exceeding that sum. *Bredin v. Bredin*, (1 Dru. & War. 497); nor does the principal sum bear interest, if the object of the testator's bounty be otherwise provided for. *In re Rouse's estate*, (9 H. 653.)

Michael Barry was heard in reply.

LORD CHANCELLOR.—Several questions have been discussed during the argument, as to which it is not necessary that I should express an opinion; as there may be a time when they may be submitted for the decision of the court: but what it becomes necessary to consider upon the case as presented to the court is this, whether or not there should appear upon the face of the will something more express than the words used, for the purpose of entitling the petitioner to interest upon the sum of £3,000 upon her becoming an adult, or even during her minority. There can be no doubt but that the testator was *in loco parentis* with regard to his niece, having maintained her from her early years, and made her an inmate of his house; and we may therefore suppose that he considered himself as bound to provide for her, as much as for other members of his family. But the question for the decision of the court in this case is, whether it was the intention of the testator that interest should be paid upon this sum of £3,000 for the purpose of maintaining the young lady. There are no express words to that effect, but it appears that he gave an annuity of £100 per annum to her brother and sister, which he charges upon certain lands, and makes payable upon certain days, specifying the days upon which the first payment is to be made; and it may be fairly argued that if he had intended that an annual sum should be paid to the petitioner, he would have made a similar provision with regard to it. It has been contended that the testator intended that the niece should reside with the widow, and that he therefore must have intended to leave her the means of support; but I do not think that he intended that interest upon this sum should be paid to her as long as she continued so to reside. It is a very different thing to create a trust in order to maintain and educate children, for in such cases it is usual to provide a fund for that purpose; but here I do not see anything in the will to lead to the supposition that the testator intended that his widow was to be paid anything by this young lady for her maintenance, nor does she make any claim for what has been already supplied: therefore, I do not think that there is a sufficient indication of an intention on the part of the testator that interest should be paid upon this legacy. The

petitioner appears to have resided in the same house with the testator and the widow for many years, and the legacy was bequeathed in such a manner as to indicate in the strongest terms his reliance upon her opinion. As to the maintenance of the petitioner, the testator was the best judge of that; but is not the provision contained in his will, *quasi* a provision for her maintenance? Although I do not mean to decide that there is anything in it sufficient to create a trust obligatory on the widow to support her. It is, however, sufficient to decide as to the question of interest, and I do not see sufficient upon the face of the will to entitle the petitioner to interest upon the fund. Probably the parties will continue to reside together as heretofore. I shall therefore dismiss the petition, but without costs.

Decree accordingly.

GIBBON v. LORD CLONCURRY.—Feb. 14.

Annuity—Defective grant by tenant for life—Satisfaction out of personal assets—Misjoinder—Multifariousness.

A, tenant for life without a leasing power, had made a lease in 1832 to F for three lives or 31 years, G, who was the sister of F and the petitioner in the suit, being one of the cestui que vies. F left the country in 1834, and had not since been heard of up to the commencement of this suit, and G entered into possession of the demised premises. The rent having fallen into arrear an ejectment was brought by A, but subsequently an arrangement was entered into between A and G that the latter should pay the rent in arrear and give up possession, and that she should receive an annuity for life to the amount of the profit rent in the premises. There was no written agreement produced, except letters from A and B his son to G relative to the payment of the annuity. Upon the death of A, B took possession as his heir-at-law, being also his personal representative, and he having refused to continue the payment of the annuity, upon the ground that A had no power to create such a charge beyond his own life, G filed a petition praying for an order that B should pay what was due on account of the annuity, and for a decree that the annuity was an equitable charge upon the lands demised, and for the appointment of a receiver, and that the annuity should be payable out of the assets of A. Held, that G was entitled to a personal annuity for her life, and that the assets of A were liable thereto.

Held also, that the real estate was not liable to the charge.

Held also, that the petition was not bad for multifariousness or misjoinder.

THE late Lord Cloncurry, father of the present respondent, had granted a lease of the lands of Skeagh in the year 1832 to one James Gerrard, brother of the petitioner, for the term of three lives or thirty-one years, (the petitioner being one of the *cestui que vies*), at a yearly rent of £242 2s. 8d., to be reduced to £192 4s. 1d. in case certain improvements should be executed by the tenant, and the rent ultimately was reduced to £185 0s. 8d.

In the year 1834 James Gerrard left this country and had not been heard of since, leaving his sister, the petitioner, in possession of the lands so demised, but without having made any disposition of his interest in the term. In the following year, the rent having fallen into arrear, a proposal was made to the petitioner on behalf of the late Lord Cloncurry that he would pay to her an annuity of £80 per annum for her life, on condition of her giving up possession of the lands in question and paying the arrears of rent then due; and an ejectment was accordingly brought, with her concurrence, and possession given under the *habere* to Lord Cloncurry, and the rent due paid by the petitioner. It appeared that the interest so surrendered by the petitioner amounted to about £80 a year. The annuity was regularly paid until the year 1838, when the petitioner received the following letter from the late Lord Cloncurry:—

“My dear Miss Gerrard,

“My son Edward has signed an agreement to pay to you during life £80 per annum, if during your life the farm of Skeagh shall yield to him so much over the rent which your brother had agreed to pay. You will now call on him from time to time as suits your convenience, &c.

(Signed)

CLONCURRY.

“16th May, 1838.”

And shortly after that the following letter from the respondent:—

“Dear Miss Gerrard,

“I have to apologise to you for not being more punctual in my engagements, but I assure you I told Cassidy to remit the £40 the day it was due; I now inclose it to you.

Yours, &c.,

E. LAWLESS.”

At the time of making the above lease to James Gerrard the late Lord Cloncurry was tenant for life, (without leasing power,) and the respondent (then the Hon. E. Lawless,) was tenant in tail, but upon the death of his father in 1853 he became entitled to the estates held by the latter for his life, and since that period had refused to pay the annuity of £80 per annum to the petitioner, (which he had regularly paid up to the decease of the late Lord Cloncurry), upon the grounds that his father had no power to saddle the estate with any incumbrances beyond his own life. There had been no written agreement entered into at the time of the granting of the above annuity to the petitioner, and the respondent denied having in his possession the agreement alluded to in the first of the above letters. It appeared that the lands so surrendered had continued to produce more than £80 per annum, above the rent reserved by the lease of 1838, since the surrender of them to the late Lord Cloncurry; and that the latter had by his will appointed the respondent his executor, having left considerable personal property. The present petition was presented to raise the arrears and accruing gales of the above annuity, and the relief prayed was threefold: first, for an order that the respondent should pay to the petitioner the sum claimed to be due; secondly, for a decree that the annuity was an equitable charge on the lands of Skeagh, and for the

appointment of a receiver; thirdly, that the annuity was properly payable out of the assets of the late Lord Cloncurry. The respondent in his answering affidavit relied upon the following facts and arguments: that the possession of the demised lands had been recovered under the *habere*; that the annuity of £80 had been given to the petitioner without consideration, and solely through compassion for her poverty; that the late Lord Cloncurry having been strictly tenant for life, had no power of either making the lease, that had been evicted, or of creating any charge beyond his own life; that the respondent never signed an agreement to pay any annuity beyond his father's life; and that the petition was bad for multifariousness.

F. Fitzgerald, Q. C. in support of the petition.

The first question is, whether or not this annuity was granted for the life of the grantee; and it is submitted that under the terms of the letter of the 16th of May, 1838, which contains the words “to pay to you *during life*,” it must be so construed: besides that it was given upon the understanding that she would not defend the ejectment; and she has also paid the arrears of rent for the premises for which she might have taken defence, having been in possession at the time the ejectment was brought. As to the objection that this agreement should have been in writing under the provisions of the Statute of Frauds, it is submitted that this was a mere personal annuity, and therefore cannot be treated as “any interest in or concerning” lands so as to come within the terms of the Act (29 Car. 2, cap. 3, sec. 4); but, even supposing that a writing had been requisite, the agreement has been carried out by the delivering up of possession and receipt of the rents and payment of the annuity for eighteen years, and therefore this objection comes too late. The respondent contends that he is not liable to this demand, not being in privity with the late Lord Cloncurry, who granted the annuity; but the contrary appears from their letters to the petitioner, who is at liberty not merely to rely upon the original agreement, but also to prove an additional consideration. In *Clifford v. Farrell*, (1 You. & Coll. 138,) in which a bill was presented to raise the arrears of an annuity, it was held, that the plaintiff might not only rely upon the consideration as appearing upon the face of the annuity deed, but might also prove a further consideration *aliunde*.

Christian, Sergt. (with him *J. McMahon*), contra. This petition seeks to establish a personal charge against Lord Cloncurry, and also against the assets of his father, and these two demands cannot be combined in the same petition, being dissimilar in their nature, whether the defect arise from multifariousness or misjoinder. In *Ward v. The Duke of Northumberland and the Earl of Beverly*, (2 Anst. 460,) the plaintiff was tenant to the father of the defendants under a lease and subsequent agreement made by him, and after the father's death continued to hold under one of the defendants, who was heir-at-law of his father, upon the same terms, and the bill was filed by him against both defendants as executors of their father, and against one as his heir-at-law, for an account at foot of the agreement, both during the lifetime of the father, and since his death;

but a demurrer was taken to the bill for misjoinder, and allowed. The case is thus referred to in *Campbell v. Mackay*, (5 Myl. & Cr. 619,) by Lord Cottenham: "The Duke" (of Northumberland) "could not say that there was any portion of the bill with which he was not necessarily connected, because he was interested in one part of it as owner of the mine, in the other as representing his father; but his defence was, that it was improper to join in one record a case against him, as representative of his father, and a case against him arising out of transactions in which he was personally concerned." The petitioner had no title to the lands, and held possession during the absence of her brother, (who must be presumed to have died,) and was evicted by ejectment, under which possession was regularly taken. The letters may be explained by the fact that the late Lord Cloncurry gave up to the respondent his life estate in part of his property, including that as to which he had created the annuity, and thereby the respondent became paymaster of this annuity during his father's life, but he denies any knowledge of an agreement for payment of any charge beyond the life of his father. The purport of the letter of May, 1838, is, that so long as the respondent derived a benefit out of the life estate of his father, he would be liable to pay this charge, but upon his death all such benefit ceased, the respondent becoming absolutely tenant for life. Therefore, even if the words "during life" be held to mean during the life of the petitioner, there is no privity between the late Lord Cloncurry and the respondent to bind the latter, so as to charge this annuity upon the lands in question; in the first place, a writing is requisite under the Statute of Frauds, and, even if a writing was produced, there is no consideration moving from the petitioner to the respondent. [*Lord Chancellor*.—I do not think any case has been made to support this portion of the petition.] Even supposing this to be a mere personal annuity, it should have been in writing, being for the payment of an annual sum and therefore "not to be performed within the space of one year from the making thereof," as required by the Statute of Frauds. It is not requisite that the statute should have been pleaded, as the writing should have been produced. As to the alleged part performance, even supposing that it did exist, it would be insufficient if it flowed out of anything but the parol agreement; but the alleged part performance is the proceedings under the *habere*. The prayer of the petition is in the conjunctive, not in the alternative. In *Dunne v. Dunne*, (2 Sim. 329,) a testator gave all his real and personal estate to and appointed J. M. Dunne his sole executor. The latter proved the will, and died leaving a son, three daughters, and a wife: the latter took out administration to her husband, and entered into possession of his real estate, as the natural guardian of her son. A bill was filed by the son and his sisters against the mother, for an account of the real and personal estate of the intestate (who had left some real property in his own right) and of the testator, and a demurrer for multifariousness was allowed. When a bill could not be sustained, a cause petition is equally bad for multifariousness—*Cumming*

v. Taylor, (1 Ir. C. R. 25.) There has been no positive proof made of the death of J. Gerrard, the original lessee, and he might return immediately.

Deasy, Q. C. (with him *Graves Cathrew*,) in reply.—As regards the objection of multifariousness, it is admitted that this is not a charge upon the lands of the respondent, and the petitioner seeks relief against the respondent personally, and also against the assets of his father; but it is only sought to charge the respondent personally upon one or other of two grounds, viz. the dealing between him and his father in reference to this annuity, or, in case of failing to establish that, then upon the ground that his father was personally liable, and that the respondent is in possession of his father's assets, chargeable upon his father's contract, and that personally. *Ward v. The Duke of Northumberland* is distinguishable, there being in that case two entirely different demands against two entirely different persons, who could not be sued jointly; in the present case there is but one object of relief, and but one respondent: the grounds upon which that relief is prayed may be different, that is the only objection, and that distinction is taken in *Campbell v. McKay*. There was clearly a part performance and acceptance of the contract in this case, the petitioner having not only given up possession, but also paid rent which could never have been recovered from the deceased tenant; and all the benefit that might have been derived from resisting the ejectment or reducing the amount of the rent has been resigned, and money for which she was never liable has been paid by her. The terms of the late Lord Cloncurry's letter shows that the annuity was for the life of the petitioner, according to the rule *fortius contra proferentem*. [*Lord Chancellor*.—To A B "during life" must be taken to mean "during the life of the grantee."] As to the objection raised upon the Statute of Frauds, no such defence is set up in the answering affidavit, as should have been done if the respondent meant to rely upon it; the grant is merely stated to have been voluntary: but the objection does not apply, as the words "not to be performed within the space of one year from the making thereof," means something that *cannot*, and not merely that may not, be performed within that period. *Souch v. Strawbridge*, (2 C. B. 808,) decides that where the agreement distinctly shows upon the face of it that the parties contemplated the performance to extend over a greater space of time than one year, the case is within the statute, but that where the contract is such that the whole may be performed within one year, and there is no express stipulation to the contrary, the statute does not apply—(per Tindal, C. J.) It is alleged that Lord Cloncurry could only grant a lease for his own life, but he purported to make a lease for a longer term, namely, for the life of the petitioner, and, therefore, the presumption is that the annuity which he granted upon a surrender of that lease, and equivalent to the profit rent derivable under it, was for a longer period than his own life, and consequently for the life of the petitioner.

LORD CHANCELLOR.—I was much struck at the commencement of the argument by the objection raised upon the ground of misjoinder; but, upon

further consideration of that point, it does not appear to me to be sustained. This is substantially a petition to raise the arrears of a life annuity granted to the petitioner by the late Lord Cloncurry. She does not seek for an account of the arrears that became due during the lifetime of the grantor, and that distinguishes the present case from *Ward v. The Duke of Northumberland*, which has been relied upon in support of the objection of misjoinder. It is a substantial demand to which the petitioner seeks to render the assets of the late Lord Cloncurry liable; and also to impose a liability upon the present Lord Cloncurry at foot of the same transaction. Such is a case of common occurrence in mercantile affairs, where a person takes property, and at the same time undertakes to pay a debt due to a third person; and in such cases it is proper that this third person should, for the recovery of such demands, bring both the other parties before the court. The present case resembles such as those; and therefore, if such be the nature of the case, it would not be improper to join in this petition the representatives of the late Lord Cloncurry, and also the present lord; consequently I conceive this case is not open to the objection either of misjoinder or multifariousness, upon the grounds put by Sergeant Christian. This is the first point in the case. The next which I shall consider is whether or not the lands are liable; and I do not think any case has been made to sustain that position; and it is not probable that the present Lord Cloncurry, getting up the lands free from this charge, would again incur them: there are, therefore, no grounds for this argument. The next question is, whether or not there was a contract entered into by the late Lord Cloncurry to grant this annuity to the petitioner; and as to that, the condition and position of the parties was such, that it was very probable that a contract to that effect might have been entered into by the late Lord Cloncurry. He had granted a lease of the lands in question for lives, whether or not he had the power to do so; and in that lease the petitioner was one of the lives. Her brother, to whom the lease was made, left the country, and has not been heard of, and the petitioner took possession of the lands. It may be that she had no title under the lease, but at any rate she had possession; and under such circumstances it is very probable that the late Lord Cloncurry should be anxious to get the farm into his own hands; and it appears that an agreement was entered into between the parties to the effect alleged by the petitioner. There is nothing improbable in such an arrangement. An ejectment having been brought, she had the option of taking defence; and, as Mr. Cathrew has argued, if the petitioner's demand were established in other respects, the court would not listen to an argument that she had no title under this lease. Such an arrangement is not uncommon; and the petitioner has sworn that it was entered into. No doubt, an ejectment had been brought, and a writ of *habere* obtained; and although no return appears to have been made upon that *habere*, yet it was executed, and the petitioner has paid upwards of £180 arrears of rent then due upon the lands;

and possession was taken by Lord Cloncurry, and has been retained ever since. Could it be supposed that she, having the means of redeeming the lease on her own account, or, at any rate, standing in a fiduciary position with regard to her brother, would be willing, under these circumstances, to accept an annuity of this amount merely for the life of Lord Cloncurry. It has been objected that this is merely a parol agreement, and that it should have been in writing. I am not called upon to say how far this agreement is or is not bound by the provisions of the statute of frauds; but there is so much part performance in the case, that it cannot be disregarded. The general character of this case is to be viewed in reference to the transactions between the parties; and I cannot suppose that the petitioner would have given up this lease upon the trust of the mere bounty of Lord Cloncurry. Then it is said that this annuity was only to last during the life of the late Lord Cloncurry; but this is by no means probable, as he was at the time advanced in life: and although the late Lord Cloncurry may have granted a lease beyond his power, yet it is improbable that the present owner of the estate would have interfered for the purpose of breaking such a lease, especially after considerable outlay had been made by the tenant; besides the general effect of such negotiations is, to give validity to leases made for a time beyond what the lessor was entitled to grant, in such cases as the present. As to the late Lord Cloncurry's letter, it cannot be contended that it described the annuity as limited to his own life. The words are these: "My son Edward has signed an agreement to pay to you *during life* £80 per annum,"—and the plain import of these words appears to me to be, "I have arranged with my son Edward to pay to you a sum of £80 a year for your life, upon his getting up possession of this farm," showing that she was to have had a security from one party or the other for an annuity for her life, and therefore I must construe that letter according to the principle *fortius contra proferentem*; and as the common sense of the transaction would tend to the same conclusion, I must hold that at the time of the negotiation she was under the impression that the annuity was to last for her life. I have then the petitioner's oath in this matter, the letter of the late Lord Cloncurry, and the transaction itself, and from a consideration of all these it appears to me that there is quite a sufficient consideration moving from the petitioner to entitle her to this annuity; and therefore I must give her a right to a personal annuity for her life to this amount, as against the assets of the respondent's father. I do not see anything in the matter sufficient to bind the present Lord Cloncurry, as his father's letter cannot have that effect. If there had been a deed entered into between him and his father, at the time of the giving up of the lands to him, and he had undertaken by such deed to pay such debts as this annuity, it might have been otherwise, but that is not so. It has been asked why did not the petitioner bring this demand in the lifetime of the late Lord Cloncurry. The reason was, that she was paid. I do not mean to impute that anything has been improperly kept back by the present Lord Cloncurry; but as to the assets

of the late Lord Cloncurry, I think that she is entitled to be paid her annuity as far as these assets will extend. The petitioner has also made a personal charge upon Lord Cloncurry, in which she has failed; and therefore, although upon the whole she has established her right to the annuity, I will not give the costs of the application.

Decree accordingly.

MASTER LYLE'S OFFICE.—1854.

FERGUSON v. COOTE.—Dec. 21.

Receiver—Appointment of by Court of Chancery in England over property in Ireland.

The appointment, in a suit in the Court of Chancery in England, of a receiver over lands in Ireland, operates only as against the parties in that suit, but does not affect the jurisdiction of the Court of Chancery in Ireland to appoint a receiver over the same lands, and to punish by attachment any interference with him in the exercise of his duties. An attachment was accordingly awarded against the bailiff of a receiver appointed by the Court of Chancery in England over lands in the County Cork, for interfering with the collection of rent by a receiver subsequently appointed by the Court of Chancery in Ireland.

THIS was a cause petition which had been referred to Master Lyle, under the 15th section of the Chancery Regulation Act. It prayed for an account on foot of an annuity charged on certain estates in the County Cork, the property of the respondent, Charles Purdon Coote, and for a receiver. The respondent, Charles Purdon Coote, was a minor. On the 24th of July, 1854, Master Lyle made a decretal order, whereby the petitioner's annuity was declared well charged on the respondent's lands, and a receiver was appointed. The receiver so appointed (having perfected his security,) served the tenants with the usual order to pay their rents. A person of the name of Daniels directed the tenants not to pay their rents to the receiver, but to continue to pay them to the agent of Mr. Wingfield, who had been appointed receiver over the same lands by the Court of Chancery in England. The receiver appointed by the order of Master Lyle thereupon obtained a conditional order for an attachment against Daniels. On the motion to show cause against this conditional order, it appeared by affidavits, that in the year 1849 a bill was filed in the Court of Chancery in England, in the name of the minor Coote (the respondent in this matter) by George Digby Wingfield, as his next friend, praying that the plaintiff might be placed under the protection of the Court of Chancery in England; that an account might be taken of his estates (which were all situate in Ireland,) of the rents and profits thereof, and of all charges thereon, and for a receiver, and that directions might be given for the proper management of the estates. By an order made in that suit, on the 2nd August, 1849, Richard Barker Wingfield, one of the defendants, was appointed receiver over the lands in Ireland, without giving security, and

without salary, but with liberty to the Master in this cause to allow any agent in Ireland whom he might appoint a proper salary; and the tenants were thereby directed to attorn, and pay their rents, both accruing and in arrear, to the receiver, who was to be at liberty to manage the estates from time to time, with the approbation of the Master, before whom he was to pass his account; and he was directed to pay his balances into court in the suit. On the 22nd March, 1850, a decree was made in the cause, which (*inter alia*) directed accounts of the incumbrances affecting the lands, and continued Mr. Wingfield the receiver. He, in accordance with the order of the 2nd August, 1849, appointed as his agent a gentleman of the name of Sandes. Mr. Sandes employed Daniels, against whom the conditional order for an attachment had been awarded, as his bailiff.

James Furrell, on behalf of Daniels and George Digby Wingfield, the next friend of the infant respondent, showed cause, and (amongst other matters) relied on the appointment of a receiver by the Court of Chancery in England, and the other proceedings in the suit there.

Alexander Norman for the receiver appointed by Master Lyle's order.

MASTER LYLE.—In this case Henry Daniels comes to show cause against a conditional order for an attachment, which was awarded against him on an application by the receiver for interfering with him in the discharge of his duty, in contempt of the orders of the court, and for this purpose he has filed an affidavit dated the 14th of December instant, in which he states the existence of a cause in the Court of Chancery in England, in which the minor, Charles Purdon Coote, a respondent in this matter, by a person calling himself his next friend, Mr. George Digby Wingfield is the plaintiff, and Mr. John Digby Wingfield and others are defendants, praying that the plaintiff therein might be placed under the protection of the Court of Chancery in England, that an account might be taken there of the estates of the plaintiff and of the rents and profits of same, and of all charges on them, and that a proper person might be appointed by the said Court of Chancery in England to receive the rents, and some other proper person or persons guardian of the person and fortune of the minor plaintiff, and that proper directions might be given for the management of the estates. The affidavit further states that by an order made in the suit dated the 2nd August, 1849, a person of the name of Richard Barker Wingfield, one of the defendants in the suit, was appointed receiver of the rents of the estate of the minor in Ireland in the pleadings mentioned, without giving security and without salary, but with liberty to the Master in the cause to allow any agent he might appoint in Ireland a proper salary. And the tenants of the lands were thereby ordered to attorn and pay their rents, both accruing and in arrear, to the receiver, who was at liberty to manage estates from time to time with the approbation of the Master before whom he was to pass accounts, and pay the balances into the bank, with the privity of the Accountant General of the English court. The affidavit further states a decree of the Court of

Chancery in England made in the cause, directing further accounts, and making references for the purpose, which I do not think it necessary to state fully, as the directions thereby given do not in my mind affect the question before me. The affidavit then proceeds to state that Richard Barker Wingfield, the receiver appointed in the said cause, before the institution of the matter in which the attachment order was made, employed a Mr. George Sandes as his agent, and the defendant Daniels as bailiff, to assist in the collection of the rents of the Irish estates, and that the tenants attorned, and paid their rents to Sandes as such agent of the English receiver, and that neither he nor Sandes have been dismissed or suspended, and in fact still are in the employment of this Mr. Richard Barker Wingfield, the English receiver, who has not been discharged. The affidavit then proceeds to answer the several charges made against him in the affidavits upon which the conditional order was obtained, but it is quite unnecessary to go through it in detail; it is enough to say that Daniels fully admits his interference with the receiver, and justifies the same in the character in which he and his employer, Mr. Richard Barker Wingfield, stood, disclaiming, at the same time, any intention of a contempt of the court in so doing; and, as to this, I may at once say, that I acquit him of any such intention. I believe he acted quite under the idea that he was fully warranted in what he did, and, further than vindicating the authority of this court, I do not, in the order I shall make, propose to take any severe course against him: he is plainly acting under the directions, and by the authority of others; and, to show them that they cannot go further in such a course with impunity will be sufficient, it is hoped, to induce them to desist for the future. Upon this affidavit, thus disclosing this state of things, which in fact are all admitted, counsel for Henry Daniels contends that the conditional order for the attachment should not be made absolute, first, because this interference with the person appointed receiver by this court, and in this matter by Daniels and Sandes, was justifiable and proper, and no more than their duty, as persons employed by the receiver in the English cause, his appointment being proper and his acts rightful, and those of the receiver appointed in this matter being consequently illegal and improper. This at once raises the principal question in the case, namely, whether a receiver appointed by the Court of Chancery in England has any authority over estates in this country, other or different from that of an ordinary agent of the owner of the estate, and upon this question having now for the third time heard it discussed, (first, when I made the order appointing the receiver in this matter; secondly, upon a very irregular motion made on behalf of the persons who have appointed, and who now sustain Mr. Daniels, to rescind that order, and which motion, under protest, I submitted to hear made; and thirdly, on this motion,) and considered it, I have no hesitation in saying, I do not entertain a doubt that the Court of Chancery in England has power to appoint and does frequently appoint receivers over property in all parts of the Queen's dominions, and, amongst

others, over property in Ireland, there can be no manner of doubt, but how that order operates, and what is the effect of it, there is now no doubt also. It is an order altogether *in personam*, affecting, and capable of being enforced against the persons in the suit, but not *in rem*, or having any effect upon property outside the jurisdiction of the court that made it. The leading case upon this subject, and that which in the different features it assumed establishes both the above propositions, is *Houlditch v. Lord Donegal*, (8 Bligh. 301.) In that case a bill was filed by Jones and others, debenture creditors of Lord Donegal, in the Court of Chancery in England, for an account of the rents of certain estates in Ireland, conveyed upon trust for the benefit of creditors, of whom the plaintiffs were two, and for a receiver, and by an order made in the cause in June, 1803, a receiver was appointed. Notwithstanding this order, the validity of which, however, was not questioned, Lord Donegal having returned to Ireland, went into possession of the estates, to the exclusion of the receiver. A supplemental bill was afterwards filed by Houlditch, who was also a debenture creditor under the trust deed, and a decree made, giving him the benefit of the original suit, ascertaining the amount of his demand and declaring his rights. In 1828 Houlditch filed his bill in the Court of Chancery in Ireland, stating the decree of the Court in England, the appointment of the receiver, that the Marquis of Donegal, notwithstanding, was in possession of the estates, and that by reason thereof and because the estates were all situate in Ireland, he and the other creditors could have no benefit of the suit and proceedings in England without the aid of the Court of Chancery in Ireland, and he therefore prayed to have the benefit of the English decree, and that same might be carried into execution by the decree of the Court of Chancery in Ireland, and that a receiver might be appointed. This case came on to be heard before Lord Plunket, and he, on the 23rd of January, 1832, dismissed the bill on the grounds that the Court of Chancery in Ireland could not be made auxiliary to carry out a decree of the Court of Chancery in England. But this decree of Lord Plunket was afterwards reversed by the House of Lords, which, on the 29th of July, 1834, declared that the plaintiff in the English suit was entitled to have the assistance of the Court of Chancery in Ireland for carrying out the order of the Court of Chancery in England, whereby a receiver was appointed, and it was referred to the Master of the Court of Chancery in Ireland to appoint a receiver over the estates, and with this direction referred the case back to be disposed of by the Court of Chancery in Ireland. Now so far it may be said that this case decides nothing as to the validity or effect of the order for the appointment of a receiver by the Court of Chancery in the original cause, as it merely says that the plaintiffs having obtained such an order were entitled to have the assistance of the court in Ireland in carrying out, but if the order of the court in England bound the Irish estates, or if receivers appointed in it could have enforced the payment of the rents, or dispossessed Lord Donegal, who notwithstanding has gone into possession and received the rents in despite of the English re-

ceiver, why was it felt to be necessary to file the bill in Ireland? The plaintiffs must have felt that their order was wholly inoperative as affecting the lands in Ireland, and could not be enforced against tenants, and therefore they were obliged to file the bill in Ireland; and that they judged rightly, and were well advised in this, appears clearly from the result of proceedings in the meantime taken by other creditors; for subsequently to the order appointing the receiver in the English suit in the year 1825, a person of the name of Salt filed a bill in the Court of Chancery in Ireland, for an account on foot of certain debts due by Lord Donegal, and for a receiver; and on the 13th July a receiver was appointed over a portion of the estates. In April, 1821, another creditor (J. Cocker,) filed a bill also in Chancery in Ireland, and obtained an order for a receiver, in May, 1832, over another portion; and on the 4th of November, 1834, a receiver was appointed pursuant to the decree of the House of Lords, in *Houlditch v. Lord Donegal*, over all the estates. By an order of the Master of the Rolls in Ireland of the 1st December, 1834, made in the three causes of *Salt v. Donegal*, *Corker v. Donegal*, and *Houlditch v. Donegal*, it was ordered that the receiver in the first cause should be extended to the second, and that the receiver in second cause should be removed as a separate receiver, and should lodge the balance in hands to the credit of the first and second causes, and that the receiver in the first cause should also lodge the balance in his hands, being £5290 18s. 9d., and that the plaintiffs in the third cause were at liberty to make the plaintiffs in the first and second causes parties to the third. A motion was then made on behalf of Salt, the plaintiff in the first cause, for the sum of £5290 18s. 9d., received by his receiver; and a counter or cross motion was made by Houlditch, the plaintiff in the third cause, to stay the proceedings in the first and second causes, and that the plaintiff should come in and prove in the third, and that the sum in bank should be transferred to the third cause, and that the receiver in the first and second causes should be discharged. This motion came on to be heard before Sir Edward Sugden, the parties desiring that their rights should be so decided; and in doing so Sir Edward says—"Mr. Houlditch obtained at an early period a decree against Lord Donegal, establishing the rights of the creditors against the estates, but as the decree was inoperative (speaking of the decree of the court in England,) as the court had no power to enforce its decree against lands not within its jurisdiction, he was compelled to have recourse to this court, which, as decided by the Lords, was bound to give effect to that decree." Again he says—"In 1827 a decree was pronounced in England to carry into execution the trusts of the deed of 1827; and supposing the estates to have been situated in that country, that decree would have operated to bind those estates from the time it was pronounced, but in consequence of the Court of Chancery in England not having jurisdiction over lands in this country, it was found necessary to enforce that decree. A decree was afterwards obtained for that purpose, which should have been

made in 1834; in the meantime, between 1832 and 1834, the other creditors, through the medium of receivers appointed in Ireland, realized the sum of £5000, and I cannot deprive them of the fruits of their diligence." And accordingly he gave the plaintiff in the third cause only so much of the funds in bank as had been produced by rents received after the making of the decree of Lord Plunket, which was afterwards reversed, "or in other words," from the time that he was entitled to such decree. Now during all this time, from the year 1803, there was a receiver over the estates, appointed by the Court of Chancery in England, yet throughout it was never attempted to be contended for, that such an appointment bound the lands; in fact no such thing could for a moment be contended for or insisted upon, and accordingly, and in conformity with this and other cases, I am clearly of opinion that the order made by the Court of Chancery in England in the cause of *Coots, a minor, by his next friend, v. Wingfield*, is wholly inoperative, and not binding upon the estates in this country or the tenants thereof, and attached none of their rents, and that the order for a receiver in this matter, notwithstanding the existence of such order in the English suit, not discharged or suspended, was a right and proper order, and that the receiver was rightly appointed thereby, and could not and cannot be interfered with without incurring a contempt of this court. Such being, in my opinion, the rights of the two receivers in this case, the English receivers having none as regards the lands, and the one appointed in this matter being the person properly entitled to receive the rents, counsel for Mr. Daniels endeavours to take exception to his appointment, and endeavours to show an irregularity or invalidity in the order by which he was appointed. Now it might be sufficient to say, with that Mr. Daniels has nothing to do; he is no party in the cause. The order stands confirmed, there having been no appeal, and it is to be obeyed—not questioned. But a case of *Donovan v. Irwin*, (2 Law Rec.) has been cited for the purpose of establishing the right of a person coming in to show cause against an attachment order to question and dispute the validity or regularity of the order, but that was a very different case to this: the question in that case was, whether the lands of Harristown ever were included in the order for the receiver, which was one made upon consent, and limited to authorising the receiver to collect only so much of the rents as would be sufficient to pay certain annuities, and it appears that for five years after the making of the order, three several receivers who succeeded successively to the office, never served the tenants of the lands of Harristown, the defendant remaining in full possession and receipt of the rents, and he having become a bankrupt in the meantime, his interest in the lands having passed to Kelly and Beatty, his assignees. After all this, the receivers five years in possession, and a transmission of title to new parties, the receiver takes it upon himself, without any further order of the court, to serve notice on the tenants of the lands of Harristown to pay their rents to him; and Kelly and Beatty having distrained the lands, the receiver

applied and got a conditional order for an attachment; Kelly and Beatty came in to show cause, and were allowed to insist, not that the original order was irregular or invalid, but that it was a *qualified*, not a general, order, and that under the specific agreement under which it was obtained, it did not and never was meant to affect the lands which they claimed. The Chancellor said he could not make any order in such a state of the record, and Mr. Blackburne pressing that his clients Kelly and Beatty should be parties to the suit before an order was made against them, the Chancellor affirmed the order of the Master of the Rolls, allowing the cause shown against the attachment. Now, are the circumstances of that case at all like the present? or is it an authority, that any person who takes it upon himself to oppose a receiver, can be permitted to come in and, in showing cause, endeavour to pick holes in the constitution of the suits in which the order has been made, either for want of parties or imperfect services of the original process, as has been attempted here? Neither is the party so circumstanced without his remedy: his course is to apply to be examined *pro interesse suo*.—Dan. C. P., 1141. But suppose that such course is legitimate, and the party sought to be attached so entitled, let us see what are the imperfections in the suit which he relies upon here, and whether they have any foundation. The first is, that the suit is defective for want of parties, the person in possession of the lands not being before the court. Now, who is the person in possession? Counsel says the possession must be considered to be in the person who has by his receiver attached the rents. Well, who is that person? He says the plaintiff in the English suit. True; and who is the plaintiff in the English suit?—The minor plainly. He is the plaintiff, suing by his next friend. It will not be said that the next friend is the plaintiff. He is a mere shadow, necessary only to have before the court, a person responsible for the costs. The minor is to all intents and purposes the plaintiff, and if the possession of the receiver be his possession, he is a party to the suit here. But not only is he by intendment and necessary inference the party in possession, but he is so in reality, and by the confession of the parties themselves. For it appears that Mr. Sandes does not give receipts to the tenants in his own name or that of Mr. R. B. Wingfield, but he gives them, as for rent due to the representatives of the late Mr. C. P. Coote. Neither are they entitled in the cause, or allude to the existence of a receiver. The representative of C. P. Coote, I take it as respects real estate, is clearly his only son and heir-at-law, the minor. There is therefore nothing in this objection, the party both really and by intendment of law in possession, is before the court. It will not be contended that the English receiver should be a party to the suit. The other objection, namely, that the minor was not served with the summons before he appeared, and that by reason thereof the appointment of his stepfather as his guardian *ad litem* is irregular, has still less foundation. Indeed I do not know how the fact is, or how it appears that the minor was not served, he is named as a respondent in the petition, and I take it for

granted that the court at the first hearing, when the matter was transferred into my office under the Chancery Regulation Act, saw that the proper parties were served, and I must give myself the same credit when it was first brought before me. I always have the affidavits of service read before I proceed to hear a cause petition, unless there be an appearance for the respondent. A solicitor appeared for the minor here, whether brought informally by service of a piece of paper or parchment at the door of the house where the minor resides, or not, I do not know, and will not stop to inquire. It is enough to say that the person against whom the receiver applies has no business with it, and cannot be heard to raise any such objection. I made an order which I am empowered to do under the statute, appointing the Hon. Mr. Hewitt, the minor's stepfather, his guardian *ad litem*. This may have been a prudent or imprudent appointment. The bailiff over the Cork Estate (for I am not at liberty to deal with the case as if any other person was before me) thinks it an imprudent choice. Well, I differ from him, so does the mother of the minor; but whether prudent or not, that is no reason why the receiver should be resisted or interfered with in the discharge of the duty which the court has cast upon him, and for which it will hold him responsible. The petitioner in the matter when before me, which it is to be observed she is not upon this motion, will no doubt be able to sustain the regularity of her proceedings if they shall be called in question. I am now only called upon by the receiver to give him the assistance and protection of the court, and he is clearly entitled to it. As I said before I do not mean to exercise the powers of the court in a harsh or vindictive manner towards the only person before me, who has resisted or interfered with the receiver; I shall therefore disallow the cause shown, and make the conditional order absolute, the attachment however not to issue until further order. I must, however, save the receiver harmless in the course which he has adopted, and which I consider in all respects proper, and must therefore make the order absolute with costs, and direct that Henry Daniels do pay to the receiver the costs of the proceedings for the attachment, and refer it to the Taxing Master in rotation to tax the same.*

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq., Barrister-at-Law.]

THE MARQUIS OF SLIGO v. O'DONEL.

Lease—Renewal—Exception—Reservation—Construction—Mines and minerals.

By a lease for lives renewable for ever, and made in the year 1775, A, being seised in fee-simple, demised to B certain lands at a certain rent, and at a pepper-corn renewal fine; and in the year 1776, by another lease of the latter date, reciting that there had been an informality in the lease of 1775, which the parties were desirous to correct, A, for the considerations, and upon the terms mentioned in the lease of 1775, demised to B the

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said lands, "and all manner of mines and minerals of coal, lead, iron, tin, and other mines upon said lands, and bog timber, forest trees, and young saplings of oak, ash, yew, and elm, and all timber and other trees, the benefit of fishing, fowling, hunting, and hawking on the premises always excepted and reserved out of the said demise." This lease also contained a covenant that B should be at liberty to cut all such trees as he himself should plant. The estate of A in the lands subject to this lease having devolved to the respondent, and the interest in the lease to Y: the former, in the year 1832, by indenture of lease reciting that it was made in pursuance of the covenant for perpetual renewal contained in the lease of 1776, demised to the latter "all the said lands, (all manner of mines and minerals of coal, lead, iron, tin, and other mines whatsoever upon said lands, and bog timber, forest trees, and young saplings of oak, ash, yew, and elm, and all timber and other trees, the benefit of fishing, fowling, hunting, and hawking on the said premises always excepted and reserved,") omitting the word "and," which appeared at the commencement of the exception in the lease of 1776. Held, that under the lease of 1776 the only rights reserved to the lessor were the benefit of fishing, fowling, &c. and that the mines and minerals passed under the demise.

Held also, that the lease of 1832, purporting to be a renewal of the lease of 1776, and being made in pursuance of the covenant for renewal contained therein, but containing a clause at variance with the corresponding clause in that lease, this court would order the lease of 1832 to be made conformable to the lease of 1776.

THE petition in this case was filed in order that a lease executed in 1832, and purporting to be a renewal of a lease made in the year 1776, should be made conformable with the provisions of the latter lease. [The facts of this case are stated in the judgment of the Lord Chancellor, and they will also, with the cases cited at argument, be found more fully detailed in *O'Donel v. Ryan*, (6 Ir. Jur. 327,) the question at issue in the present case having been argued at length before the Court of Common Pleas, as reported in that volume.]

February 4.—LORD CHANCELLOR.—The petition in this case was presented on behalf of the Marquess of Sligo, and its object was in reference to a renewal of a lease for lives renewable for ever. The original lease was made in or about the year 1775, by John Thomas Medlicott, who was tenant in fee simple of the lands in question, to Patrick M'Loughlen, his heirs and assigns, for the term of three lives, at the yearly rent of £100, and in consideration of the sum of £650, paid as a fine upon the execution of the lease; and this lease also contained a covenant for perpetual renewal upon payment of a peppercorn fine upon the renewal of each life; but some informality having been apprehended to exist in that lease, another lease was executed in the following year, and between the same parties, upon the terms and for the considerations mentioned in the lease of 1775; and by that lease J. M. Medlicott demised to Patrick M'Lough-

len the lands in question, with their rights, members, appendances, and appurtenances, situate in the barony of Burrishoole, and county of Mayo, (with the following clause,) "and all manner of mines and minerals of coal, lead, iron, tin, and other mines upon said lands, and bog timber, forest trees, and young saplings of oak, ash, yew, and elm, and all timber and other trees, the benefit of fishing, fowling, hunting, and hawking, on the premises always excepted and reserved out of the said demise." The interest of the lessee, under this lease, in these lands and mines, appears to have been assigned to J. M'Loughlen; and in the year 1785 J. T. Medlicott, the lessor in the original lease, made a conveyance of all his interest in these lands, and all royalties, mines, and minerals therein, to Sir Neal O'Donel. The interest of Sir Neal O'Donel in these lands became vested in the respondent, Sir Richard Annesley O'Donel, previous to the year 1832, and the interest under the lease was vested in the Rev. P. Brown, as trustee for the Marquis of Sligo; and all the *cestui que vie*s in the lease of 1776 being dead, Sir Richard Annesley O'Donel, upon 28th Sept., 1832, by indenture of lease, purporting to be made in consideration of the covenant for perpetual renewal contained in the lease of 1776, and for other considerations which are set forth, demised the lands in question to the said Rev. P. Brown, his heirs and assigns, under the following words—"all the said lands, with their rights, members, and appurtenances, being in the lordship and manor of Burrishoole, and County of Mayo, (all manner of mines and minerals of coal, lead, iron, tin, and other mines whatsoever upon said lands, and bog timber, forest trees, and young saplings of oak, ash, yew, and elm, and all timber and other trees, the benefit of fishing, fowling, hunting, and hawking on the said premises always excepted and reserved to said Sir Richard A. O'Donel, his heirs and assigns,) for three lives therein named," and it is now sought, on behalf of the Marquis of Sligo, to obtain a renewal in the terms of the lease of 1776, in pursuance of the covenant for perpetual renewal, and conformable with the language of that lease—between which and the last renewal of 1832 there is a manifest discrepancy as regards the grant of the mines and minerals. The question now before the court has already been very fully discussed in a case that came before the Court of Common Pleas in Hilary Term, 1854, under the name of *O'Donel v. Ryan and others*, in which the present respondent sought to enforce by an action of ejectment the exception as it appears in the lease of 1832 with regard to the mines and minerals upon these lands, against the person then occupying the lands as lessee; and the effect of the grant of the mines in the original lease as contrasted with the renewal of 1832, was very fully discussed, but the several members of that court regarded that question in different lights, and from the judgment pronounced we cannot say what their decision upon this point was, for the case was decided upon the effect of a sale in the Incumbered Estates Court, and how far that was to bind persons who were not parties to the proceedings; but the question now before this court is solely in reference to

the leases of 1776 and 1832, namely, whether in the latter, which purported to be a renewal of the former, there was a departure from the terms of the original grant, and whether, if there be such a discrepancy between these two leases, the court has the power of correcting that fault, and rendering the latter conformable to the terms of the former. The facts of the case will be found very fully stated in the judgment of Jackson, J. in the Court of Common Pleas. There appears to have been some informality in the lease of 1775, but what that may have been is not stated, and therefore it is merely a matter of conjecture; and I must take the instrument before me, that is, the lease of 1776, and go upon its provisions; and the question upon that will be, at what part of the clause the exception commences, whether at the beginning of the clause commencing with the words—"and all manner of mines and minerals of coal, tin," &c., or at a subsequent part of it. In the renewal granted by Sir Rd. A. O'Donel in 1832, the word "and" (which appears in the lease of 1776) has been omitted at the commencement of the excepting clause, and therefore the latter lease purports to be a demise of the lands in question, with their rights, members, and appurtenances, "all manner of mines and minerals of coal, lead, iron, tin, &c. upon said lands, and bog timber, forest trees, and young saplings of oak, ash, yew, &c., and all timber and other trees, the benefit of fishing, fowling, hunting, and hawking on the said premises always excepted,"—and it is contended on the part of the petitioner that these mines should not be excepted. Upon this portion of the case, therefore, two questions arise, or rather one question arises, which involves two others. As to the construction of the lease of 1776, it is, I think, very hard to maintain the proposition that the mines and minerals were excepted under its provisions. That lease was a grant of certain lands and premises in the County of Mayo, "and all manner of mines and minerals of coal, lead, iron, tin and other mines upon said lands, and bog timber, forest trees, and young saplings of oak, ash, yew and elm, and all timber and other trees." If the demise had stopped at that portion of the lease, there can be no question but that the mines and minerals would have passed under it. Then come the words, "the benefit of fishing, fowling, hunting and hawking on the premises always excepted and reserved out of the said demise." The plain construction of this clause I never should have doubted if others had not done so—namely, that the lease merely excepted and reserved the benefit of fishing, fowling, hunting and hawking. It has been urged that there is in the body of the lease of 1776 a subsequent covenant empowering the lessee to enter and cut such trees as he himself should plant, and it is contended that this provision would be inconsistent with the notion that the trees had been already granted under the terms of the lease, but perfectly consistent with a construction treating them, and therefore the mines or minerals, as excepted, but covenanting that this exception should not extend to such trees as should be planted by the lessee; but I do not think that fact affects the present case, as far as regards the property excepted; for even

if there be such a special power in the lease it is only as to timber planted by the lessee, and it has been held that a special liberty of this kind will not derogate from a general grant. This was decided in *Lord Cardigan v. Armitage*, (2 B. & C. 197.) But there is a case cited by Judge Ball in his judgment that may throw some light upon this part of the case, in which it was held that although a demise of timber already growing upon the demised premises may have been valid, yet that a demise of the trees hereafter to be planted upon the premises would have been utterly void at law; and therefore appears the necessity of a special covenant to this effect, for the purpose of enabling the lessee to cut down such timber as he himself should plant during the demise. An exception of mines is a different thing; for the power of the lessee to open new mines is quite a different question from his right to trees subsequently planted upon the premises. However, it has been contended that these exceptions must be extended to all the things in question, upon the grounds that although there may be a valid reservation of such rights as fishing, fowling, hawking, &c., yet that they cannot be excepted, there being no grant of them, and that where there is no grant there can be no exception to that grant, and, therefore, that the word "excepted" in the deed of 1776 would otherwise be ineffectual. But I cannot yield to this argument, there being nothing more common in conveyances of this kind than to use the words *excepted* or *reserved* indiscriminately, and to apply them to things of this nature, which are not properly the subject of demise, and as to which, therefore, there is, strictly speaking, nothing to except. This appears from the pleadings in the case of *Moore v. The Earl of Plymouth*, (3 B. & Ad. 66; s. c., 7 Taunt. 614; s. c., 1 Moo. 346.) That was an action of trespass, and the defendant pleaded that Lord Windsor, being entitled to the equity of redemption in the premises, and others seised in fee subject to that equity of redemption, had leased the premises, there being "excepted and reserved" out of such demise by Lord Windsor, to himself and his heirs, free liberty of hunting, hawking, &c., and the case was fully discussed without any observation as to the effect of these words. Abbot, C. J. in giving judgment uses the words: "The person who excepts and reserves appears upon this record to have no legal estate in the lands." I need not refer to other instances in which these words are applied to such subject-matter. It is said that these words coming at the end of the sentence are calculated to throw some doubt upon the clause; but we often find the words "quit and crown rents" in the same position in a sentence, and there is no reason why we may not divide the entire clause according to the sense of the language. In the present case there is a manifest break in the sense between the words "all timber and other trees," and "the benefit of fishing, fowling," &c., which is a guide in a question of construction of this nature. As to the division of sentences of this kind, there is an old case, *Wiltshire v. James*, (Dyer, 58, C.), which will afford an example. In that case the Prior and Convent of Christ Church in Southampton made a

lease of the Manor of Fleet, with the appurtenances, "together with a dove house and the tenements in the said manor, with the tythes of corn belonging to the church there, fines, heriots, perquisites of courts thence coming, and all other emoluments and profits to the said manor belonging or forthcoming the advowson of the church there, and wreck of sea, and probates of the spiritual courts there, and fines of wills there proved, and other profits of the spiritual courts there (to hold of the said prior and convent and their successors) only excepted and reserved:" and it was held that in that case the exception did not commence until the words "the advowson of the church," and that the former part of the clause was not included. The force of this decision appears more clearly in the original Latin report than in the English translation. The plain intention of the parties is what is to guide the court in cases of this kind. In the present case it was clearly the intention of the parties that the mines, and minerals, and timber should pass under the original demise, and these expressions are plainly connected by a copulate with the preceding part of the sentence; and it is, therefore, only the latter part of it that we can treat as coming within the exception. I, therefore, concur with those members of the Court of Common Pleas who were of opinion that this was the proper construction of the lease of 1776. The next question, therefore, is, in what manner relief is to be afforded; and there can be little difficulty upon this part of the subject, as nothing remains but a simple covenant for a renewal of the lease of 1776, which the court is bound to carry out. If a bill had been originally filed for a renewal, the relief would have been just what the court is asked to grant under the present petition. As to this variation between the original lease of 1776 and that of 1832, it is hard to say how it originated. One of the parties alleges that there was a dispute as to the royalties in reference to kelp, but as to nothing else; and that it was in that manner that the word "and" was omitted. The other party says that there was no mistake at all. However, these considerations will not authorize the court to depart from the clear words of the original instrument. As to the first explanation that I have alluded to, I cannot imagine anything more unlikely to occur for the purpose of clearing up a disputed question of this sort, than that the parties should introduce into the renewal a misrecited clause taken out of the original instrument, and thus leave the matter subject to all its original ambiguity. The deed of 1832 contains no covenant for renewal, and for that reason, when it should become necessary to obtain a renewal, the parties would have been obliged to fall back upon the original lease. If, therefore, there had been any new understanding or agreement as to this particular thing, the parties would have noticed it in the deed of 1832. I do not conceive that this is a case in which the error is capable of being corrected by the admission of parol evidence. This is a case in which one of the parties comes here for relief under a clear covenant for the renewal of his lease, a matter which does not depend at all upon parol evidence; and, when once the meaning and con-

struction of this sentence is settled, what remains to be done is clear; and I, therefore, cannot refuse to introduce into the new lease the same words that are found in the original one, whether or not that will make any difference in the construction of the latter instrument. No doubt the petitioners have lain by for a long time before they thought fit to apply to this court for relief; but it cannot be refused to them for that reason, as property may become valuable at one time although it may have been worth little or nothing previously. I must, therefore, comply with the prayer of this petition, but shall give no costs.

Decree accordingly.

ROLLS COURT.

M'NALLY v. MURPHY AND OTHERS.—Feb. 10.*

Practice—Cause Petition—Substitution of service—Trustee Act, 1850.

Henry Fitzgibbon applied for an order to substitute service of the notice of filing the petition upon the respondents, Mr. and Mrs. Murphy, by serving their solicitor and agent, and for liberty to set down the petition under the 49th section of the Trustee Act, 1850, without serving the respondent, a trustee whose residence was unknown. It appeared from the affidavit of the petitioner that the object of the petition was to raise a charge created by Mrs. Murphy, subsequently to her marriage with the respondent, her present husband, on her separate estate, which had been conveyed on a previous marriage to two of the respondents in the petition, in trust for herself for life, and which life interest she had conveyed on her marriage with her present husband to two other of the respondents in trust for herself for life. Mr. and Mrs. Murphy resided in France since their marriage, and the trustees of the first settlement allowed Mr. Doyle to receive the rents of the separate estate, and he transmitted them to Mrs. Murphy. Doyle had paid to the petitioner, in April, 1853, an instalment on foot of the charge, and he held a situation in Mr. Murphy's Court in Cavan. In October last the petitioner had an interview with Mrs. Murphy in France respecting the charge when she referred the petitioner, and transmitted by him to her solicitor, Mr. Bate of Dublin, a letter. Mr. Bate had appeared for the trustees of the first settlement, but refused to appear for Mr. and Mrs. Murphy. He and Doyle had been served with notice of this application. The respondent, Mr. Keane, one of the trustees of the second settlement had, since being served with notice of the petition, served upon the petitioner a notice disclaiming the trusts of the settlement, and it appeared that the other trustee was somewhere in France, but could not be found.

The Court substituted service upon Mr. Bate and Doyle, and allowed the petition to be amended by striking out the respondent who could not be found, and so stating in the petition.

* *Ex relatione H. Fitzgibbon, Esq.*

COURT OF EXCHEQUER.

HILARY TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

CONNOLLY v. EVANS.—January 26.

Practice—Common Law Procedure Act, sec. 89—Service of amended summons and plaint.

The court will not permit the original summons and plaint, when once filed, to be taken off the file of the court, after amendment by side-bar order, for the purpose of being re-served on the defendant, but will order the service of an attested copy of the writ, as amended, to be served on the parties named, and, in future, every side-bar order for amendment shall provide that the service of an attested copy shall be deemed good.

THIS was an action brought to recover the sum of £24 5s. 10d. for conveyance of goods, and for work and labour executed for a sugar-refining establishment in the City of Cork. The plaintiff had issued a summons and plaint, and served it duly, on the 23rd of November. A notice had, on the 6th of December, been served on plaintiff's attorney, requiring the plaintiff to amend his summons and plaint, by adding, as parties defendants, J. F. T. and D. T., as being jointly liable, if at all. On the 7th of December (being the last day for pleading) the defendant took defence. The plaintiff amended his summons and plaint by adding on the file, by a side-bar order, the above parties as defendants.

E. Sullivan moved that the plaintiff be permitted to obtain the original summons and plaint from the files of the court for the purpose of serving it, as amended, on certain co-defendants.—The eighty-ninth section of the Common Law Procedure Act provides, "That in any action or contract, where the non-joinder of any person or persons as co-defendant or co-defendants has been objected to by notice or plea in abatement, the plaintiff shall be at liberty to enter a side-bar rule to amend the writ of summons and plaint by adding the name or names of the person or persons named in such notice as joint contractors, and to serve the amended writ upon the person or persons so named in such notice, and to proceed against the original defendant or defendants, and the person or persons so named in such notice, provided that the date of such amendment shall, as between the person or persons so named in such notice and the plaintiff, be considered for all purposes as the commencement of the action." The 32nd section of the Act provides that the service of the summons and plaint shall be effected by delivery of a copy of such writ to the defendant in person, if practicable. The difficulty is that *no provision is made in the Act for serving the amended writ.* [*Greene, B.*—There is that difficulty in the Act; what is to be done with the original defendant?] The action proceeds against him as originally, and the Act provides for that.

GREENE, B.—It is impossible that I could permit the original writ to be taken off the files of the

court. It is an omitted case in the Act. I must construe the section in the only way by which the Act can be rendered efficacious. I will make an order that the attested copy of the writ, as amended on the file, be served on the parties named, the costs of the motion to be costs in the cause; and, in future, the officer will make it a part of the side-bar order for amending the summons and plaint that the service of an attested copy be deemed good.

CONSOLIDATED CHAMBER.

[Coram RICHARDS, B.]

BROWNE AND OTHERS v. O'BRIEN.—March 2.

Practice—Several Pleas—16 & 17 Vic. c. 113, s. 57.

The court will give a defendant liberty to plead several matters under 57th section of the Common Law Procedure Amendment Act, when it appears that it is not the facts, but the legal consequences of them, that is in controversy between the parties.

Curtis applied in this case for liberty to plead several defences to the summons and plaint, which contained two causes of action, viz., one for the non-delivery of a cargo of oats, and the other for interest on foot of a sum of £612 12s. 6d., and to these the defendant purposed to plead—first, accord and satisfaction to the whole action; second, performance of the contract to the first cause of action; and third, that no interest had ever accrued due on foot of said sum, inasmuch as the sum was not one payable on foot of any written instrument, and at a certain time, and no demand for payment of it had been made on the defendant apprising him that interest would be charged as required by section 75 of 3 & 4 Vic. c. 105. [*Richards, B.*—Have you got an affidavit?] An affidavit is not necessary here, as the facts of the case are not in dispute, although the legal consequences of them may be. The facts are: the defendant, residing in Dungarvan, in Ireland, sold to the plaintiffs, residing in Bridgewater, in England, the cargo in question in the month of last October, and undertook to deliver it. He accordingly shipped it for the plaintiffs on board a vessel in the port of Dungarvan, and received from them £612 12s. 6d. in part payment. The vessel sailed, but had to return to port through stress of weather, and it was then found she wanted repairs, which took some time to effect, and the plaintiffs, becoming impatient, sent their attorney to the defendant to ask him to refund the £612 12s. 6d., which the defendant accordingly did refund, and obtained the attorney's receipt for it on the 7th of November following. All those facts would be admitted on both sides of the case, but the defendant contends that the payment on November 7 was an accord and satisfaction of the whole action; that the shipment of the oats was in law a delivery to the plaintiffs; and that the claim for interest is evidently illegal.

RICHARDS, B.—You may take the order.*

* *Ex relatione.*

COURT OF EXCHEQUER CHAMBER.*

[ERROR FROM THE EXCHEQUER.]

HILARY TERM, 1855.

[Reported by SAMUEL V. PHEE, Esq., Barrister-at-Law.]

DOWDALL (IN ERROR) v. KELLY.—Jan. 17, Feb. 1.

Trespass for illegal arrest—Setting aside judge's fiat to hold to bail—3 & 4 Vic. c. 105.

In an action of trespass for an illegal arrest and false imprisonment, A, the defendant, (plaintiff in error,) justified under a judge's fiat to hold B, the present plaintiff, (defendant in error,) to bail in an action in which A had been the plaintiff, the suing out of a writ of capias ad respondendum pursuant to the provisions of the 3 & 4 Vic. c. 105, and the arrest and detention thereunder of B. B replied that the special order in question had been obtained on affidavits filed by A, alleging that B was about to quit the country; that the said order was subsequently, by the order of another judge acting in Chamber, set aside, and that the special order was so set aside upon the grounds that the former judge had been induced to make the same upon a misrepresentation of facts touching the alleged intention of B to quit Ireland, and that he had been induced to and did make said order inadvertently, wherefore the said order was so set aside. The defendant having demurred to said replication, judgment was given by the Court of Exchequer in favour of B (the plaintiff below.) A having brought his writ of error to reverse said judgment, Held, by a majority of the court, five judges to four, (Monahan, C. J., Ball, J., Pennefather and Greene, B.B., dissentientibus,) reversing the judgment of the court below, that, it not appearing by the replication that the original fiat had been set aside by reason of any fraudulent or wilful misrepresentation on the part of A, the order, although since set aside, was a sufficient protection for acts done under its authority whilst it remained in force.

THIS was an action of trespass *vi et armis* for an arrest of the plaintiff. The declaration (which had been filed under the former system of pleading) alleged that the defendant on the 27th of July, 1852, with force and arms, &c., assaulted the plaintiff, at Headford, in the County of Galway, &c., and forced and compelled him to go to a certain gaol or prison, &c., and then and there imprisoned the plaintiff and kept and detained him in prison without any probable or reasonable cause whatsoever, for a month, contrary to law, &c., alleging special damage. There was also a second count with general damage, and one for a common assault. The defendant pleaded first, not guilty; secondly, that before the time when and so forth in the declaration mentioned, to wit, on the 14th July, 1852, the Right Hon. John Richards, one of the Barons of her Majesty's Court of Exche-

quer at Dublin, by a special order directed that the plaintiff should be held to bail for £287, and thereupon, afterwards, and before the said time when and so forth, to wit, on the 19th July, 1852, a certain writ of our Lady the now Queen, commonly called a *capias*, was issued out of the Court of our said Lady the Queen, before the Queen herself, the said court still being holden at Dublin, &c., directed to the then sheriff of the County of Galway, by which writ our Lady the Queen commanded the said sheriff that he should take the said plaintiff if he was to be found in his bailiwick, and him safely keep so that he should have his body before the said Lady the Queen at the Queen's Courts, Dublin, on the 13th August then next ensuing, to answer the same defendant of a plea of trespass, which said writ was then and there duly endorsed for bail for the sum of £287, by order of the said Baron Richards, and which said writ so endorsed for bail as aforesaid, afterwards, to wit, on the 26th day of July, in the City of Galway aforesaid, was delivered to Thomas A. Joyce, Esq., who then and there, from thenceforth, until, at, and after the execution of the said writ upon the said plaintiff as hereinafter mentioned, was sheriff of the said County of Galway, to be executed in form of law, and thereupon the said Thomas A. Joyce, so being sheriff as aforesaid, afterwards, and before the said time when, &c., to wit, &c., made his certain warrant in writing, under his hand and seal of office of sheriff as aforesaid, directed to William Morris and the said sheriff's bailiffs, and thereby commanded them that they should jointly and severally take the said plaintiff if he should be found in his bailiwick, and safely keep him, so that the said sheriff might have the body of the plaintiff before our Lady the Queen at the Court of Queen's Bench, at her Majesty's Courts of Dublin aforesaid, on the 13th day of August then next, to answer the said defendant of a plea of trespass, which said warrant afterwards, and within one calendar month from the date of said writ, and before the time when and so forth, a writ, &c., was delivered to the said William Morris, to be executed in due form of law, by virtue of which said writ and warrant the said W. Morris as such bailiff afterwards, and before the time appointed for the return of the said writ, to wit, &c., and within the bailiwick of the said sheriff, to wit, &c., took and arrested the plaintiff by his body and kept and detained him in the custody of the said W. Morris, at the suit of the defendant for the cause aforesaid, for the space of time in the declaration mentioned, as it was lawful for him to do for the cause aforesaid, and which are the alleged trespasses, &c. To this plea the plaintiff replied as follows, viz.: that the said special order was obtained on affidavits filed by the defendant alleging that the plaintiff was about to quit the country and should be held to bail, and that after the suing and prosecuting out of the said court the special order and said writ of *capias*, by a rule of the said court then duly made by the Hon. Justice Crampton, one of the Justices of the said Court of Queen's Bench, sitting in Chamber, and which rule of said court was entitled in the said cause, it was upon debate and in the presence of counsel for plaintiff and counsel for said defendant, ordered by the said Hon. Justice Crampton so act-

* *Coram* Lefroy, C. J., Monahan, C. J., Crampton, Perin, Ball, Moore, and Jackson, J.J., Pennefather and Greene, B.B.

ing in Chamber, that the said special order of the said Right Hon. Baron Richards, in said plea mentioned, should be, and the same was thereby set aside, (referring to the said proceedings on record); that the said special order was so set aside on the grounds that the Right Honourable Baron Richards had been induced to make said order, and had made said order upon a misrepresentation of facts touching and relating to the alleged intention of the said Michael Kelly to quit Ireland, and that said Right Honourable Baron Richards had by such misrepresentations been induced to make and did make said order improvidently, wherefore the said order was as aforesaid set aside. The defendant demurred to this replication upon the following grounds, namely, first, that trespass was not sustainable on the proper form of action, in respect of the matters in the pleadings mentioned; secondly, that the replication was no answer to the plea; thirdly, that it was not averred what the particular representation was, which was alleged to be false; fourthly, that it is not averred by whom or in what affidavit any such representation was made; fifthly, that it is not averred that such alleged misrepresentation was maliciously made, or that the order for the *flat* or writ of *capias* was maliciously procured; and also that said replication was a departure from the declaration. The plaintiff having joined in demurrer, the latter came on for argument in the Court of Exchequer, which, in Trinity Term, 1853, gave judgment in favour of the plaintiff. The cause was subsequently tried upon the issue in fact raised by the plea of "not guilty," and a verdict for £30 damages was given for the plaintiff. The defendant brought his writ of error to reverse that judgment. The principal errors assigned were, that trespass was not the proper form of action in respect of the matters in the pleadings mentioned; and that the replication was insufficient in not showing wherefore the said rule of the Hon. Justice Crampton was made, and did not state that the writ of *capias* was set aside, nor the grounds of setting said writ of *capias* aside. The plaintiff below joined in error.

Morris and Macdonagh, Q. C. were heard on behalf of the plaintiff in error, and *Concannon and Lynch, Q. C.* on behalf of the defendant in error.

The arguments and authorities referred to sufficiently appear from the judgment of the court.

Cur. adv. vult.

Feb. 1.—GREENE, B. (after stating the pleadings.) In this case there was a special demurrer upon the grounds, first, that trespass was not the proper form of action; secondly, that the replication was no answer to the plea, as the latter had not averred the nature of the particular misrepresentation complained of, which was alleged to be false. The demurrer seems to regard that as an allegation of a false statement having been made. [His Lordship stated the other grounds of demurrer.] That demurrer was overruled by the Court of Exchequer, and on that judgment a writ of error has been brought. The question is, whether, upon any of the grounds so stated in the demurrer, it ought to be allowed. This leads to the consideration of the several grounds of demurrer upon which it has been alleged that this replication

is bad. The first and main point which has been raised is, whether, under the circumstances stated in the plea, the action of trespass is sustainable, and was the proper form of action. *Prima facie* the injury complained of is an act of trespass, for which an action of trespass is the proper remedy; but then the defendant's justification amounts to this, "I did not commit a trespass, for I had the authority of law for the act which I have done." That supposed authority was this: a judge of one of the superior courts made an order, under the Act of Parliament, directing the defendant in the action then pending to be held to bail for a debt of £287. Upon that order a writ of *capias* issued, and was delivered to the sheriff to execute, for the purpose of compelling the defendant to be forthcoming to answer the plaintiff's suit. Then the plaintiff below in this present action replies to that plea, admitting that such an order was in fact made, and writ of *capias* sued out accordingly, but alleging that that was afterwards set aside. Now, the main question which arises in this case is, as to what, in the *abstract*, is the effect and result of setting aside that order as it affects the person who obtained it. May it, though set aside, still be used to protect that individual in respect of what he has done under its authority while still in force, or is it to be considered, when set aside, as if it had never been issued? No doubt, such an order is indispensable for the protection of the party himself putting the law in force, though for that of the officer the writ alone is sufficient. The 3 & 4 Vic. c. 105, s. 1, provides that no person shall be arrested on *mesne* process in any civil action in any superior court, unless in the cases and in the manner therein provided for. That mode is to obtain a special order from a judge, directing the defendant to be held to bail in such sum as the judge shall think fit. It follows that an arrest without such an order would be a trespass, and the imprisonment of a party would be false. The order is essential to the legality of the *capias*, so far as the party himself is concerned. In the cases where an arrest has taken place under a writ of *ca. sa.* and the judgment itself has been afterwards set aside, a distinction has been established between the situation of the officer who has executed the writ and that of the party himself suing it out. *Britton v. Cole*, (1 Salk. 408,) where it was held that the officer may justify under the writ solely; on the other hand, the party who has put him in motion must show a valid judgment to support the writ. This order is in degree analogous to a judgment in a superior court. Let us consider, supposing that this arrest had taken place under final process, what would have been the effect of setting aside the judgment, and then let us see whether there be any substantial distinction between that and the setting aside of this order. If, indeed, the judgment were reversed for error, the acts done under that, before reversal, would be valid, and no one would be deemed a trespasser for acts done under that. *Hos's case*, (5 Rep. 181); *Drury's case*, (8 Rep. 418.) The reason for that is simply this, that the old judgment and the judgment of reversal both remain of record. But then, with regard to the effect of setting aside the judgment, that, on the other hand, operates

to remove it altogether, as if it never existed.—*Parsons v. Lloyd*, (3 Wilson, 341; s. c., 2 Wm. Bl. 845.) There the defendant justified under a *ca. sa.* The replication was that the said *capias* had been issued erroneously, showing wherein the irregularity lay, in the intervention of a Term between the *teste* and the return of the writ, whereby it was objectionable on the face of it, and had been set aside. On demurrer to this replication it was argued that the process, although erroneous and set aside, was still an excuse for anything which had been done under it until set aside. But it was unanimously held that the writ was void and not merely erroneous, and that trespass accordingly lay, as the process was irregular, which is the same as void. In *Phillips v. Biron*, (1 Strange, 508), it was also held that trespass lay under similar circumstances. Both parties there joined in their defences. Had they defended separately possibly the sheriff, who was one of the defendants, might have justified under the *ca. sa.* So in *Turner v. Filgate*, (1 Lev. 95,) a judgment was vacated as having been unduly obtained, and there trespass was held to lie, because, by reason of its having been vacated, it was as if no judgment had ever been. In *Barker v. Braham and Norwood*, (3 Wils. 368; s. c., 2 W. Bl. 866,) the writ of *ca. sa.* was set aside for being illegal and void, and a question having arisen, whether the plaintiff's attorney was liable in an action of trespass and false imprisonment, it was held that he was, and De Grey, C. J. said, "Mr. Norwood (the attorney) has pleaded 'not guilty.' He could not justify by a special plea, because there is no record to award a *ca. sa.* against Mrs. Barker; then could he have justified himself by pleading that he ignorantly sued out the writ, for ignorance is no excuse?" He next meets the objection that an action of trespass *vi et armis* would not lie under the circumstances, and shows that if injury resulted to the person by the suing out of a void writ, trespass was the proper remedy. The case of *Codrington v. Lloyd*, (8 Ad. & Ell. 449,) is a very strong authority upon this subject. That was an action of trespass against an attorney for an illegal arrest. Amongst other pleas the defendant pleaded that the arrest of the plaintiff had taken place under a marked writ sued out of the Court of Exchequer. To that plea the plaintiff replied that, by an order of Baron Parke, which was afterwards confirmed by the full court, the writ was set aside for irregularity. The question arose upon a demurrer to the replication, whether the plaintiff's attorney in that action was liable to an action of trespass, and it was held that he was liable. Lord Denman said, in delivering judgment, "The plaintiff here was arrested on a writ which was afterwards declared by the court irregular. It was, therefore, as if there had been none." Patteson, J. said, "It (the action) lies against him, because the process, when set aside, is as if it had never existed, and if the party, therefore, cannot justify under it, neither can the attorney. The clear effect, therefore, of the setting aside a judgment, as distinguished from that of its being reversed upon a writ of error is to remove it off the records of the court as if it never existed, and to deprive the party of any protection under it for the

acts done previous to its having been set aside. Is there any distinction between this case and that of a *capias ad respondendum*? That, since the passing of the Act of Parliament to which I have referred, is, in case its requisites are not observed, neither erroneous nor irregular, but simply void. It is now a collateral proceeding. It may be applied for at any stage of the suit, wherever it is shown that it is the intention of the defendant to leave the country. It is not essentially the commencement of the suit, as it may never issue, and without the order of a judge no court now has authority to issue such a writ, which would, in that case, be simply a nullity. The corresponding Act in England is the 1 & 2 Vic. c. 110, and in the practice adopted under that it has been considered that the proper mode of proceeding with regard to such cases as the present is, to set aside the order of the judge and to allow the *capias* to remain. In *Hopkins v. Salembier*, (5 M. & W. 42,) which recognises the propriety of that practice, Lord Abinger, C. B. says, "If we were to set aside the *capias*, we should make the sheriff a trespasser. In cases of this nature the application should be to set aside the judge's order." He evidently thought the setting aside of the writ went to deprive the party of its protection for antecedent acts. In *Riddell v. Pakeman*, (2 Cr. M. & R. 30,) the defendant pleaded that the plaintiff had been arrested upon a *capias* marked for £200. The replication thereto was that no affidavit of the cause of action had been filed pursuant to the statute then in force, to which the defendant rejoined that such had been done. The plaintiff demurred upon the ground that the affidavit relied upon by the opposite side did not show the amount of the promissory note for which the action had been brought. The court held that the action of trespass would not lie. Lord Abinger, C. B. said, "In this case there must be judgment for the defendant. This affidavit to hold to bail is indeed irregular, but the proceedings which have taken place upon it are only voidable and not void. The defendant, therefore, ought to have applied to the court for the purpose of having them set aside, before he commenced the present action. There is no colour whatever for maintaining it." Parke, B., "Where the process is irregular merely, no action for false imprisonment can be maintained until that process is set aside." Alderson, B., "Where process is set aside for irregularity, the court in general makes it part of the terms that they shall bring no action. The reason of that is that the right to bring such action accrues upon the process being set aside." Now comes the case which has been mainly relied upon by counsel for the plaintiff in error, but I do not think that its effect has been properly apprehended. I refer to the case of *Prentice v. Harrison*, (4 Q. B. 852.) I have already referred to the distinction between the setting aside of process for the error of the court or a judge and for irregularity. In the case I have last referred to the defendant justified under a writ of *ca. sa.* The plaintiff replied generally that the writ of *ca. sa.* had been subsequently set aside, to which replication the defendant demurred. The court held that inasmuch as it was consistent with the statements in the replication that the writ might

have been set aside for want of form, which would have rendered it erroneous, and therefore reversible on writ of error, and that such a state of facts might thus have existed as would not have rendered the defendant a trespasser, that it lay upon the plaintiff to oust the presumption that such might have been the case. I merely advert to that case to show that you must not leave an opening on the pleadings which may lead to the implication that the process was set aside for error. In *Ewart v. Jones*, (14 M. & W. 774,) it was held that a *ca. sa.* issued upon a judgment against a party, after his discharge under the Irish Insolvent Act, furnished an answer to an action of trespass for the arrest, inasmuch as the writ was regular in itself, and had never been set aside. That case was relied upon by the plaintiff in error for the purpose of showing that, where process has been set aside, an action of trespass will not lie, but in that case the process itself had not been set aside. *Brown v. Jones*, (15 M. & W. 191,) bears materially upon the present case. There the replication showed that the judgment in question was founded on a warrant of attorney which was to remain in escrow, unless in a certain event, which never occurred, and that the judgment was accordingly obtained in fraud of the plaintiff, under colour of the warrant, and there it was held that the replication was good. It has been argued on behalf of the plaintiff in error that under the 3 & 4 Vic. cap. 105, though the writ of *capias ad respondendum* should be set aside for irregularity, trespass does not lie, but that the proper form of action is one upon the case for maliciously holding to bail. That argument is founded upon a supposed analogy between the old action for maliciously holding the plaintiff to bail, and that for holding the plaintiff to bail under a judge's order. Now, is there any such analogy, or does it follow that you cannot now bring an action of trespass, where the judge's order has been set aside? In the old cases trespass could not have been maintained, for the process itself remained. That was never interfered with. The process was the foundation of the action, and to set that aside would have been tantamount to putting the plaintiff out of court. That remained in full force, and was capable of production by the officer at the trial. Thus the only remedy was to proceed against the opposite party for maliciously holding to bail. Until the 43 Geo. 3, cap. 53, the defendant might have been held to bail for any amount, without affidavit, and that Act was passed for the purpose of preventing an arrest upon the mere motion of the plaintiff. After the passing of the Act the plaintiff in the action should have made an affidavit of the amount of debt, and that was then lodged in the office, and on the authority of that a writ of *capias* issued, marked for a certain sum, and the mode of getting rid of the effect of that, on the part of the defendant, was, by the entry of an *exoneretur* on the bail piece, or of entering a common appearance, and so making the writ, as without indorsement, mere common process to bring the party into court. For that reason, the action for maliciously making an affidavit to hold to bail alone lay, for the arrest itself was legal, inasmuch as the writ itself remained to warrant the arrest. But we cannot infer from

this that if the *mesne* process were actually set aside, an action of trespass would not lie, and it appears to me that a contrary inference is directly warranted by the case of *Codrington v. Lloyd*, where the *mesne* process was set aside, and an action of trespass was held to lie. Therefore, this supposed analogy between an action for holding a defendant to bail under the old law and the action under the present law does not hold good. Now, the other argument which was urged was that since the passing of the corresponding Act in England, (1 & 2 Vic. c. 110,) the course of precedent has fixed that an action of this nature is not maintainable, but that it should be an action on the case. It will, however, be found that at best this course of precedent resolves itself into a single case. *Gibbons v. Alison*, (3 C. B. 181,) was an action on the case for maliciously arresting the plaintiff under a *capias* issued upon a judge's order. There, however, it did not appear that the order or *capias* had been set aside. No case which is analogous to the one before us goes to establish a precedent to show that if a writ be set aside trespass will not lie. In *Ross v. Norman*, (5 Ex. 359,) the writ had not been set aside. The only case in which the fact of that having been set aside did appear was *Daniels v. Fielding*, (16 M. & W. 200,) but in that case no question arose as to whether the action of trespass would lie, or whether an action on the case was the proper form of action. There the action was one of case, and the question there was, whether the general allegation of fraud was sufficient, and whether the declaration was void for not having averred the falsehood of the affidavit, and it was held, that since the Act the party complaining of the proceedings must aver both falsehood and fraud in the obtaining of the order. It does not however follow, that because case will not lie, unless there be a want of probable cause, that no action will, for if case will not lie, and trespass will not either, it is the same as saying that no action will lie. Now it is not universally true that where case can be maintained trespass cannot be maintained. That is a *non sequitur*. I believe that the only other instance in which the action was in the form of case, and in which it appeared that the writ had been set aside was *Goslin v. Wilcock*, (2 Wils. 303.) There case was held to be maintainable, though it appeared that the court below had no jurisdiction, and it is clear that trespass would have lain there. Now, if I am right, that was a case where process was set aside for irregularity, as distinguishable from reversal for error, and there trespass would have been maintainable. I now come to see whether the defendant in error here has by his replication brought himself within the principle of the cases referred to, and I shall then proceed to examine whether the case of *Prentice v. Harrison* will sustain the cause of demurrer assigned in this case, namely, that the plaintiff by his replication did not aver upon what grounds the proceedings had been set aside. He certainly did not allege that that order was set aside generally, but he did not specifically state the nature of the misrepresentation of facts upon which Baron Richards made the original order; he only says that he made the misrepresentation touching the alleged intention of the defendant in that

suit to leave the country, and that, in consequence of this misrepresentation, the order was made. It is quite impossible to suppose, consistently with the allegation in that replication, that the order in question was afterwards set aside in consequence of any mistake, error in judgment, or miscarriage of the judge who originally made it. The meaning of the replication necessarily is, that the order, as first made, was right according to the facts first presented; that those facts, as sworn to, were misrepresented; and that the subsequent judge was induced to reverse the order, because it was established to his satisfaction that the former statement of facts was incorrect, and the implication that the order was set aside by reason of the miscarriage of the former judge is ousted by this circumstance—that the facts upon which the order was set aside were adduced subsequent to the making of the original order. It is clear, therefore, that the effect of the replication is, that whoever it was who presented this statement by the affidavit to the former judge presented so untrue and incorrect a statement that the second judge arrived at that conclusion, and that such was the reason of his setting aside the first order, and it is not to be presumed that there was any error in that order, properly so called. Then it is said, “True, but you are bound to show ~~what~~ misrepresentations were made when the original affidavits were sworn. These are the special grounds. If such exist, you are bound to show that these statements were wilful or malicious.” This is a misconception of what *Prentice v. Harrison* is supposed to decide, for the proposition established by that is not, that it ought to be shown *affirmatively* that the proceedings were set aside for irregularity, but *negatively* that they were not set aside for error. In *Ross v. Norman* it was held, on special demurrer, that the particulars of the alleged false statement need not be set out; all which that averred was, the fact of such a false statement having been made. It is, however, contended that this replication ought not simply to state the right of the plaintiff, but should repel the existence of any defence on the part of the defendant. It appears to me that a fallacious use has been made of these cases on the part of the counsel for the defendant, contending, as they have done, that in order to maintain trespass you must show that it was through the moral fault of the defendant that the former proceedings were set aside. But it is not necessary to show the existence of moral misconduct on his part; it is sufficient in case by his default the proceedings have been set aside. It appears to me that we are not warranted in drawing an inference from the word “fault,” which merely means the *act* of the party. In the case of *Ran-kin v. De Medina*, (1 C. B. 183,) which was an action of trespass for breaking and entering the plaintiff's close, and taking his goods, the defendant justified under a writ of *fi. fa.*, to which the plaintiff replied the irregularity of the proceedings, which were afterwards set aside by a judge's order; it was held that the replication was good. Tindal, C.J., said, “We are not at liberty to assume that the writ was set aside for any other cause than that which appears on the face of the replication, and

which is a sufficient cause.” So here the court is not at liberty to say that the process was set aside for any other reason than misrepresentation of facts, and the principle decided in *Prentice v. Harrison* is therefore out of the case; and then what is the effect of setting aside the order where the court is not in default? It is this, that an order to warrant the issuing of process no longer exists. It is just as if such had never been; it is swept away, and cannot be relied on by any party for any purpose. Hence it is totally immaterial whether it were or were not averred in this replication who made the false statement in question, or whether malicious or otherwise, for the defendant in his plea has justified the arrest by alleging that he sued out the process. He identified himself with that. Then the real question arises—“Did you do anything which led to the reversing of the order under which you have sheltered yourself?” The defendant (plaintiff in error) used an affidavit, and availed himself of the facts stated therein; and whether he did or did not know the facts to be false is immaterial, for by a statement of facts, either known or unknown to him to be untrue, he procured the order which was afterwards set aside. Therefore that ground of demurrer fails. With regard to the proper mode of proceeding in cases where the court does not desire to deprive the plaintiff of protection; in *Lorimer v. Lule*, (1 Chitty R. 184,) after the proceedings had been set aside for irregularity, and the court granted an order to restrain the defendants from bringing an action, it was said, in delivering judgment: “We shall not suffer a party so applying to prosecute an action of trespass merely on account of such a slip in practical accuracy.” So where an application is made to set aside proceedings, it is the proper time to put a party under terms to bring no action, or to keep the writ in force, for otherwise the opposite party is absolutely divested of protection. The inference which I should draw here is this, that a party, in the absence of such restraint, is not to be deprived of his common law right of action.—1 Chitty R. 185, n. In the case of *Finkley v. Ellefsen*, (2 East. 453,) an attempt was made to procure the discharge of the defendant upon an affidavit denying the facts already deposed to on the part of the plaintiff, and the question was, whether the court could enter into an examination of the truth or falsehood of the affidavit; there the original affidavit was held conclusive. That case occurred when an action of trespass would not have lain for such an arrest, for the affidavit was then to be held conclusive in favour of issuing the writ, and that is sufficient to account for an expression of Lord Kenyon in *Belk v. Broadbent*, (3 T. R. 183,) “If a party is arrested without any cause of action he has his remedy by action on the case for maliciously holding him to bail, but it is incomprehensible to us that a person should be considered as a trespasser who acts under the process of the court.” That applies to the state of the law at the time, but had there been a right then to nullify the writ, it is clear that such would in that case have done away with all the authority which existed for making the arrest. The present writ of *capias* is one

which exists only under the authority of the Act of Parliament, and therefore depends upon the validity of the judge's order. In the case I referred to Lord Kenyon was of opinion that the writ was in full force, and the party could not, therefore, have brought the action of trespass. If a party has justified under a writ of *capias* issued without a judge's order at all, that process is null and void, and has no more effect than if a party not a judge had issued such a writ. It has been said that it is a hard case, and so it would be if there were no default on the part of the defendant, but the default complained of is that of having presented to the former judge a certain state of facts, and that the order founded upon that representation was afterwards set aside. It is, therefore, impossible for the party thus to protect himself, and, if it were a fit case, he should have appealed at the time to the full court, but, as the case stands, there is no distinction between the order of a single judge, setting aside the previous order, and that of the full court. In my opinion, therefore, the judgment of the court below ought to be affirmed, as the replication sufficiently discloses the fact that the order was set aside not as erroneous, but as irregular, and hence that the process became irregular, and consequently void.

MOORE, J.—I am of opinion that the judgment of the Court of Exchequer should be reversed. The subject has been so fully and clearly stated by my brother Greene, that I shall state very shortly the view which I have formed upon the case. This was an action of trespass for arrest and false imprisonment. (His lordship stated the pleadings.) The substantial grounds relied on by the replication are, that the order of Baron Richards, under which the writ of *capias* was sued out, was subsequently set aside by an order of Judge Crampton. I shall more particularly refer to the language of the replication, but that which I have already mentioned is its substance. The defendant in error has relied upon two principal grounds. He argues first, that as since the statute 3 & 4 Vic. c. 105, no person can be arrested for debt on *mesne* process, without having previously obtained a judge's order, the *capias* without such was illegal, the arrest thereon was illegal, and as the order was set aside it was the same as if no such order had ever been made, and that the case consequently stands as if no writ of *capias* had ever issued. I shall refer only to two cases with respect to this, *Parsons v. Lloyd*, (3 Wils. 341); and *Codrington v. Lloyd*, (8 Ad. & El.) In *Parsons v. Lloyd*, the *capias* was void upon the face of it, and having been set aside, it was held that the plaintiff was not justified for anything done under it. In *Codrington v. Lloyd*, the *capias* was set aside expressly for irregularity. The principle established by these two cases is this, that if the *capias* be void on the face of it, or irregular on the face of it, and afterwards be set aside for irregularity, the party cannot justify under it. This principle is one in conformity with justice and reason, namely, that if a man act under process which is void on the face of it, he shall not be allowed to justify; and with regard to cases of the second class, to which I have adverted, namely,

those apparently regular that are set aside for irregularity, that is the act of the party himself, and for his own irregularity he ought not to be allowed to justify. I do not controvert the soundness of this principle, but I do controvert the fact of this case being governed by it. Another principle of law is, that if the error be one in the court and not in the party, he may justify under the erroneous process. Thus, if judgment be given originally in favour of the plaintiff, and a *ca. sa.* issue on that, even though that judgment be subsequently reversed for error, the plaintiff may justify for what he has done before the reversal. That principle is recognized by *Prentice v. Harrison*, and it will not be denied to be good law. It has appeared to me that by that principle this present case ought to be ruled. In order to show this I must consider how the law stood with respect to arrest on *mesne* process before the Statute of 3 & 4 Vic. Before that statute there was no need of a judge's fiat. A party swearing to the amount of a debt before the passing of that Act, might have taken out a marked writ and arrested the debtor. The latter might then have put a rule on the plaintiff to show cause why he should not be discharged, and then the affidavit, if regular, would have been good cause against making that rule absolute; but if it proved defective, the defendant was discharged, leaving the process intact. The cases in the books in which the debtor subsequently brought his action against the plaintiff, were actions on the case for malicious arrest; but there is no case in which trespass was held to be maintainable on account of the insufficiency of the affidavit. There are some cases in which the plaintiff failed at the trial to prove the debts sworn to, and so showed that the affidavit was unfounded; and yet I do not find among them any instance where the action was brought in the form of trespass. The class of cases where actions were brought in respect of the affidavit of debt having been made without any foundation, will bear very strongly on the case before the court; and in all such cases the action was brought in the form of case, and there are no precedents of actions of trespass. Under the old law there was nothing to prevent the creditor making the arrest, provided he chose to make the affidavit regular in form; but the Legislature subsequently interposed, and by the 3 & 4 Vic. c. 105, sec. 22, no person can be any longer arrested upon *mesne* process. An affidavit must now be laid before a judge in order to satisfy him that a debt is due, and besides that, to satisfy him that the debtor intends to quit the country. The creditor has a clear right to ask the judge to make an order to hold the debtor to bail, and if the judge be satisfied in the above respects, he is bound to grant such an order. The judge is the tribunal appointed by the Legislature to act judicially upon the facts laid before him. There is no distinction in point of principle, between the judgment of the mind of a single judge upon those facts, and the decision of the full court upon a special case or a special verdict; and if an error of judgment on the part of the latter be not sufficient to make the party who acts under their authority a trespasser, no more should be that of a single judge. The conclusion which my mind draws from these considerations is,

that if a creditor honestly lays a case of this sort before a judge, it would be both contrary to reason and contrary to justice to make the party a trespasser, merely because that when the case has come before an appellate judge he has exercised his own discretion differently from the former judge, either upon the same or upon a new and more explanatory state of facts. The *capias* is not touched, as the order is regular on the face of it, and as by the old practice the *capias* still remained on record, not set aside; that law appears to me to apply to the case now before the court, and the reversal of the order does not operate to disturb the *capias*, and the proceedings thereunder, just as it was before the passing of the 3 & 4 Vic. c. 105; and I will say again that the plaintiff, in an action, honestly availing himself of that privilege which the law gives the creditor, namely, that of taking the opinion of a judge in the manner I have described, is not to be made responsible by reason of the contrariety of two judicial minds. I therefore think that by the setting aside of this order the party was not stripped of the protection which it would otherwise have afforded. The second ground taken by the defendant in error in the argument was that at all events the order in this case was set aside for *mala fides*. Let us examine the replication for this purpose, to see how far it bears out this position. If, however, I be right on the first ground, namely, that the mere setting aside of the order is not enough and that *mala fides* must be shown, it follows that the action ought to be one on the case and not in trespass. A man may be a trespasser, however honest his intentions may have been, but *mala fides* is a necessary ingredient in an action of trespass on the case. However the replication, which is before the court on both special and general demurrer, contains no statement of *mala fides*. It appears to me that *Prentice v. Harrison* has an important bearing on this part of the case. Here the replication states that the fiat was set aside by a judge's order; there the replication was that the writ was actually set aside, while there was no disturbing of the writ here. There it was held that the replication should have proceeded to negative the fact that the writ was set aside upon grounds which would have amounted to error. Suppose that in this case Mr. Justice Crampton had set aside the order because he thought that Baron Richards had arrived at an erroneous conclusion, that error would have been a judicial act, and that would not make the plaintiff in that action liable for the consequences of the arrest. So the plaintiff in the present suit ought to have shown in his replication that the order of Baron Richards was set aside for the error of the party and not of the judge. What does the replication show? It does not show whether the affidavit in question was made by the plaintiff or by any other party, and so, although this affidavit has been filed by the plaintiff, it might not have been made by him. The first observation which I shall make upon this subject is, that there is nothing upon the face of the replication to show that there was any other affidavit in the case except that filed by the defendant (plaintiff in error,) upon the occasion of the making of the original order, and there is nothing from which

to intend that further affidavits were made; and so consistently with the replication Baron Richards may have formed one opinion on the case, and upon the same facts Judge Crampton may have formed another opinion which he states in the presence of counsel for plaintiff and defendant. This is not analogous to the setting aside of proceedings by the full court, for by this Act of Parliament a second single judge may exercise an appellate jurisdiction over the decisions of the first judge. That second judge has before him both parties and a better opportunity for learning the real state of the case than the former judge, but still the only difference between the two judges may be one of opinion about the same state of facts. I may further observe that the *misrepresentation* complained of here is with respect to what could have been in the knowledge only of the opposite party, namely, his intention to quit Ireland. An incorrect statement of fact is in one sense a misrepresentation; but is a party to be made liable to an action because a judge falls into the same error with himself upon a state of facts, which may warrant a different conclusion? The word "misrepresentation" has in fact two meanings. It has an innocent meaning and again it has also a bad meaning, namely, a false representation of fact. Is the court then, upon a demurrer to a replication, for the purpose of supporting the latter to put on an ambiguous word used there a bad sense, in exclusion of the admitted good signification? If you show that the proceedings were irregular or void that would furnish a ground for argument, but *Prentice v. Harrison* shows that you must exclude the case of the proceedings having been set aside for the error of the court. The mere intention to leave Ireland was a thing of which the plaintiff could have no certain knowledge, but was an inference to be drawn from facts. Baron Richards drew a conclusion opposite to that at which the second judge arrived, when he had counsel before him, the *capias* remaining untouched. I think that it would be contrary to every principle of justice that where a man, seeking to secure his just demand, takes the judicial opinion of a judge upon his right to arrest his debtor; he shall be made a trespasser for acting on that opinion in case another judge subsequently forms a contrary opinion. For these reasons I consider that the judgment given in this case should be reversed.

JACKSON, J.—I entirely concur with the judgment delivered by my learned brother who has last preceded me, and for the reasons which he has expressed. As this is the first case in which an action of trespass has been brought against any party who has acted under the provisions of the 3 & 4 Vic. c. 105, which enables him to have a writ issued upon a judge's fiat to hold to bail, I feel it right to make a few additional observations. In the first place, I think that the form of action has been mistaken, for if the matter complained of be actionable at all the redress ought to be sought for in an action of trespass on the case and not in one of trespass *vi et armis*. Again, I think that the replication is bad both generally and upon the grounds specially pointed out. The replication does not allege that the order of my brother Crampton stated that the

previous order of my brother Richards was grounded on a misrepresentation of fact, but simply avers the fact of such having been the ground of the subsequent order, namely, that it was made through a misrepresentation of fact as to the intention of the party to quit the country, and thus that the order of Baron Richards was improvidently made. I think that this replication is bad. By section 2 of the 3 & 4 Vic. c. 105, a defendant may, under particular circumstances, be arrested and held to bail, when the amount of the debt sworn to shall amount to £20. The course to be taken by the plaintiff in such a case is to lay before a judge affidavits of the facts, who, in case he shall think it probable that the defendant is about to leave the country, is to grant an order to hold the latter to bail. In the nature of things the affidavit, which has been brought forward, must be the affidavit of some person other than the creditor. The latter must repose some trust in this party. He ought, however, to satisfy himself that the affidavit is true in fact, and if he falsely or maliciously brings forward an affidavit made by himself or another party, or if he recklessly bring forward the affidavit of another, in either of these cases the proper remedy for the party aggrieved is not by an action of trespass, but by one on the case. But on the other hand, if all which the creditor, seeking to hold his debtor to bail, has done in the matter, has been to tender certain affidavits to the judge after making proper inquiry, it would be unjust and almost monstrous that a man, whose act was legal and merely laid the foundation for the process which the statute required, should be converted into a trespasser, and that by a proceeding *ex post facto*. That being so, I feel disposed to look closely into the case and see whether we are constrained to hold the state of the law to be such as would necessarily work so great an injustice. The creditor, who has obtained the fiat, may have acted perfectly *bona fide*, and it would be hard that a party so acting *bona fide* and innocently should be converted into a trespasser by the fact of the second judge having arrived at a different conclusion, either, as my brother Moore has observed, upon a more full debate of the matter, or, what we are not at liberty to presume, by reason of the creditor's affidavit being unsatisfactory. As this is the first case of the kind which has come before us it is most desirable that, by the present writ of error, a course of proceeding should be established which should afford adequate redress to a party who has suffered wrong, and yet should not work such a gross injustice as such a doctrine would be calculated to produce. There is no decided case which binds us to hold that there is a strict analogy between a writ of *capias ad satisfaciendum* issued upon foot of a final judgment, and a writ of *capias* sued out upon a judge's order; but if such an analogy does hold good, the case of *Prentice v. Harrison*, furnishes a principle, upon which the defendant below, (plaintiff in error) would be entitled to the judgment of this court, if such a state of facts could be supposed to exist consistently with the present replication, in which no default would be attributable to the defendant. Patteson, J., in giving judgment in that case of *Prentice v. Harrison*,

(4 Q. B. 856,) says, "The plaintiff was bound to show by his replication that the writ under which the defendants justify, was set aside under such circumstances that it must have been illegal, when put in force, to put it in force. Now if any case can be suggested in which the writ might be set aside, and yet the party enforcing it not liable, the replication is bad, as we cannot presume that the fact was one way or the other." In this present case there certainly was no place at all for a writ of error, but the same principle appears to me involved in this decision, namely, that where a judgment is set aside for irregularity, it is a nullity, but where it is set aside for error, it is protected, and the foundation of that principle is, that in the one case the mistake is the act of the party himself, in the other, it is the act of the court. Now the replication here does not show that the reason of the order having been set aside was the fault of the party. Upon these grounds which I have expressed, and also those which have fallen from my brother Moore, I think that this replication is bad, inasmuch as it does not exclude every supposable state of facts consistent with the order having been set aside for that which was no default of the defendant, and that the judgment of the Court of Exchequer must be reversed.

BALL, J.—I take the view of the case which was opened by my brother Greene, and I am of opinion that the replication furnishes a good answer to the plea. Where a judgment has been set aside by reason of its having been unduly obtained, it is the same as if it had never existed, and the party who obtains it derives therefrom no protection. So where an order of this description has been set aside, as having been unduly obtained, it is void as from the beginning. For that very reason it has been, as we know in practice, the course for the court frequently upon setting aside such orders, to put the party against whom such an order has been enforced, under terms to bring no action. Where, however, a judgment has been reversed for error, the effect, as my brother Greene has observed, is altogether different, for there everything which has been done prior to the reversal stands good. This protection so afforded to parties for acts done upon the reversal, is founded upon a principle of justice. That is the principle which is the foundation of the decision in *Prentice v. Harrison*. Now, in the present case, we are dealing not with final judgment, or a writ of error on such, but with a mere interlocutory order. Is it the law that the reversal of such an order is attended with the same consequence, as attend the setting aside of a judgment upon a writ of error, where it is voidable only? No authority has been cited for the purpose of establishing that where an interlocutory order has been set aside, it affords any source of justification to parties who have acted under it before its reversal. Certainly there is no direct authority for such a position, nor is there any inferential authority in its favour. I merely give the law as it stands; but even supposing that such an analogy did exist between the law which applies to this case, and that which governs cases of writs of execution, and that a justification were afforded in respect of what was done in consequence of the error of the judge, the question would next arise, whether this

order can be deemed to have been set aside by reason of a mistake of the judge. We cannot say here what may have passed in the mind of either of the judges. We cannot say what may have been the reasons of this difference of their opinion, upon the same state of facts. We must look to the replication, which states that the order was made upon the reading of the affidavit filed by the plaintiff as to the intention of the defendant to quit the country; and if the judge were induced to make the order which he issued, by such misrepresentation, how is it consistent with that statement in the replication that such was the mistake of the judge, and not of the party? Another ground of demurrer relied upon by the plaintiff in error was, that the action was trespass, and that the action should have been upon the case, but that ground of special demurrer does not appear to me to be sustained, and upon the whole case I am of opinion that the judgment of the Court of Exchequer should be affirmed.

PERRIN, J.—I concur in the judgment of my brother Moore, for the reasons which he has expressed, as also for those assigned by my brother Jackson. We are called upon to come to the conclusion that the order of Baron Richards never existed, and is just as if it were cancelled. I could understand that, if the pleadings were different from what they are, but as they stand, that former order is set out thereon, and is not denied by the opposite party; and it must be observed that the statute gives a second judge authority merely to discharge the former order, not to annul it. Here we have on the pleadings that Baron Richards made a certain order which he was warranted by law to make, and that upon that order a writ issued, which still remains in full force, and is an answer to an action for a false arrest. The replication does not assert that no such thing as the order in question existed, but only that the propriety of that order was further considered, and that it was afterwards vacated. It is argued that, therefore, we should hold that it never existed. If the proper course had been taken by the plaintiff in this action, upon his own showing, he should have denied the existence of any such order as that alleged to have been made by Baron Richards, but having admitted that that once existed, I cannot well understand the doctrine which has been contended for on his part. Again, the replication does not set out my brother Crampton's order, which, if it had so done, would have spoken for itself. On the contrary the pleader says that that learned judge acted upon certain grounds. If the reasons, upon which the judge acted, are to decide the question, is the fact of such to be tried by a jury, and who is to be the witness? I am of opinion, therefore, that this judgment should be reversed.

CRAMPTON, J.—I am clearly of opinion that this judgment should be reversed. The grounds upon which I have arrived at that conclusion have already been put forward with great force and accuracy by my learned brethren who have preceded me. This case is one of great importance as involving a question of the practice of the court, and, if the judgment of the Court of Exchequer were affirmed, the practical effect would be to make the question whe-

ther a party should or should not be a trespasser for antecedent acts to depend upon the fallible opinion of a judge upon matters brought before him upon affidavits, and upon his differing from or agreeing with the opinion of another and former judge. Upon this present record, as it stands, we must assume that the materials laid before the first and second judges were identical. The latter order is now a rule of the Court of Queen's Bench, and is exactly similar to a rule made by the court in Banc, and similar in effect. Consequently the proceedings resemble an order made by a judge of that court, and reversed on appeal to the full court. The facts of this case have been stated more than once, and it will not be necessary to repeat them. A question has been raised upon the construction of the Act of Parliament for abolishing arrest on *mesne* process, and it has been said that it was not right for the judge to make an order to set aside the former order of Baron Richards. I need not state any opinion upon this subject, and will only remark that the course pursued in England from the time of the passing of the similar Act was not merely to order the discharge out of custody of the party imprisoned, but to set aside the order, not, however, to set aside the writ of *capias*. The *capias* has not been set aside in this case, and that is a circumstance of some importance. That has been kept on foot for the purpose of affording protection, and whether that protection can be extended to the defendant in this present action of trespass *vi et armis*, it is not necessary for me to say. It would certainly be hard that by the terms of the order of the court an innocent man should be converted into a trespasser. With regard to the argument of one of my learned brethren I may just say that if the previous order were one merely erroneous, it would not appear to me to be necessary to make any addition to the order setting it aside with respect to the giving of an undertaking. I do not, however, mean to give any testimony as to what passed in the mind of the judge who made the order in question, but merely observe that the result has been the setting aside of the former on account of a difference of opinion. There are then three different situations in which a party may be placed. First, where the proceedings are irregular and therefore void. In such a case, where the judgment has been set aside, according to all the authorities, the party who has acted thereunder is subjected to an action of trespass, and to that action his attorney would be equally liable. All parties would be so liable, except the officer whose duty it is to arrest the party in obedience to the writ. The second case is that in which the proceedings have been proved to be erroneous by the award of a competent tribunal. In such a case a different rule applies to superior and inferior jurisdictions. However, where the erroneous proceedings are those of a superior court, no action will lie against the party as a trespasser for what he has done under the authority of these proceedings. So in this case the error committed is the act of the court, and the party cannot be made answerable. The third case is where the proceedings are regular upon the face of them; but such proceedings have been set aside on the ground of deceit or misrepre-

sensation on the part of the person obtaining the order. In such a case the action would not be one of trespass, but on the *case*. Now under which of the three classes does this present cause of action come? It does not come under the first class, for the writ was not set aside for irregularity, in which case trespass *vi et armis* would lie. On the contrary, we are bound to presume that the error here was on the part of the judge; hence, if malice were an ingredient, the action should be upon the *case*. But does it come within the third class? Here the action is one of trespass *vi et armis*. The special matter of the affidavits is not set out. We do not know what they are, nor by whom they are made; only that they were followed by allegations that the defendant was about to quit the country. If we had the affidavits before us, we might probably be able to say which of the judges were in error. We have not before us the order made by the appellate judge, containing any statement or allegation as to the grounds of the making of that order. It is clear and established by all the authorities, that if the plaintiff had brought his action of trespass, and in his replication simply alleged that the order of Baron Richards had been overruled by a subsequent order, that would be bad. *Prentice v. Harrison*, (4 Q. B. 852.) was a very important case. In that case the arrest had taken place under a writ of *ca. sa.*, and there the writ, not the judgment itself, was set aside, and the replication only showed that the writ had been ordered to be set aside by one of the judges of the Court of Queen's Bench. A demurrer to that replication was allowed, because the replication did not state the grounds upon which the order for discharging the writ had been made. Patteson, J., said, in giving judgment:—"The plaintiff is bound to show by his replication that the writ, under which the defendants justify, was set aside under such circumstances that it would have been illegal, when put in force, to put it in force." Here it is argued that it is to be assumed to be error of the *party* himself, unless it be shown to be the error of the judge. It appears to me to be in accordance with common sense and common law that unless the plaintiff show the grounds upon which the proceedings have been set aside, the replication should be deemed bad, and no answer to the plea. Is there anything in the present case which shows the error to be on the side of the party, not on that of the judge? It must be taken that the same materials were before the first judge and the second; that there were no new affidavits brought before me. They are in fact stated in the replication to have been the same as those laid before Baron Richards. Patteson, J., also said, in the case I have just referred to: "If any case can be suggested in which the writ might have been set aside, and yet the party enforcing it not liable, the replication is bad, as we cannot presume that the fact was one way or the other." How many supposable cases exist here. It has been alleged that the order was obtained "upon a misrepresentation of facts" touching the alleged intention of the present plaintiff to quit Ireland. Even this is no part of the order of discharge itself. Was the alleged misrepresentation on the face of the affidavits? If

so, the judge had only to look to the affidavits themselves. Was it made independently of the affidavits? It cannot be supposed that the judge's decision was founded on extrinsic information. The alleged misrepresentation may have been merely with respect to the intention of the party to quit the country, which allegation must necessarily have been made only upon belief. Suppose that the state of circumstances were such as that one judge might take one view of it, and the other judge another view. Now all that I at present want to show is, that the two conflicting orders *may* have been the result of the opposite views formed by two different judges of the *same* matters of facts contained in the defendant's affidavit. The replication contains no allegation that this was done maliciously, but merely of a misrepresentation of facts which induced Baron Richards to make an improvident order. Are we to consider this allegation tantamount to one charging that representation to have been dishonest or false, or is it such as casts upon the party who is stated to have made it the charge of default, and to make him a trespasser for having acted under an order which was rightfully made in the first instance, upon which a judicial opinion was exercised, and upon which the party acted by the issuing of a *capias*, which up to this moment has not been set aside? I would recommend all lawyers to the meaning which, in his celebrated Dictionary, Dr. Johnson attaches to words; and under the head of the word "misrepresent" he gives the following signification: "to represent not as it is." Thus it does not follow that everything which is a misrepresentation implies a *guilty* misrepresentation. Thus a man may innocently misrepresent when called upon to swear as to what is passing in the mind of another. Dr. Johnson proceeds to give another meaning for this term,—"to falsify to disadvantage." So we see that a "misrepresentation" may be either innocent or malicious. If innocent, it cannot be the ground of an action; if, on the other hand, a malicious misrepresentation were made for the purpose of getting the order for holding to bail, the present would not be the proper form of action, for it ought to have one upon the *case* for a malicious arrest. In England it is not the practice to set aside the *capias*, which remains upon record. In *Prentice v. Harrison* the court did set aside the writ, which was a *ca. sa.* Where the writ has stood, not a single instance will be found in which the action was brought in the present form. I therefore think it clear that in every respect this replication was bad, and I should deeply lament if it were established to be the law of this country that the error of a judge should lead an innocent party into the situation of being a trespasser, and that the protection afforded by the order of one judge should be made to depend upon the opinion of another.

PENNEFATHER, B.—This case, I must say, strikes me as having been treated as one of much greater importance than it deserves. All the inconvenience which has arisen, might have been avoided, if my learned brother who made the second order had attended to the provisions of the Act, or had added to that order that the party should bring

no action. We must, however, dispose of the case as it comes before us. My opinion is, that if the order were set aside, it must be considered that no order had been pronounced at all, and that the writ which was not set aside was permitted so to stand, not for the justification of the party, but of the officer who executed it; and that if the order be taken out of the way by the express provisions of the statute, the proceedings become void. The section of the statute clearly and explicitly provides that no writ for the arrest of any party for mesne process, shall issue without the order of a judge, and so the writ without such an order is a mere nullity. It is not therefore, necessary that the writ should be set aside, for the foundation is taken away, without the support of which that becomes a mere nullity, subjecting the party to an action of trespass, without making it necessary that the writ should be expressly set aside. It was said by my brother Moore, that this was like the case of an action at common law, for an arrest under mesne process; and as that arrest could not take place without the making of an affidavit, nor without the order of a judge, he accordingly puts them both upon the same footing, and he says that the course is not to set aside the writ, but only the arrest thereunder. That view must be founded upon the old usage, where the course never was to treat such a writ as void. That was the writ of the court, which was issued thereout by the authority of the court, and not by that of the plaintiff in the action. That writ was the offspring of a usage as ancient as the practice of the court; the present writ springs out of a modern Act of Parliament. That being so, we must consider the effect of the order, to which he attributes, and I agree with him, the same force as if it had been made by the Court of Queen's Bench. The effect of that will have to be considered in reference to the jurisdiction of what has been commonly called the appellate judge. That is a misnomer. The authority of that judge only extends to the discharging of a party out of custody, upon the ground that if the additional circumstances had been known to the former judge, he would not have made the order for the arrest. I think that the order made by my brother Crampton, was one not made by the authority of the Act of Parliament, but one made by virtue of his original jurisdiction as a judge of the Queen's Bench, and we must infer that grounds existed for making that order, which was more than sufficient to attain the object of liberating the individual in custody, as allowed by the 6th section of the Act. If the judge went further, we must suppose that there was some good reason for it, more especially as the order to set aside the proceedings does not impose any restriction upon the defendant in the action, nor does it put him under terms not to bring an action. It has been stated that the course of proceeding in England is, to discharge the order for the arrest, leaving the writ to stand, and Lord Abinger, in a case which has been cited, refers to that being done for the purpose of protection. But he had not given his attention to the question at issue in this case, and all that he said amounted to this, that the court did not wish to withdraw from the officer the protection of the writ, and therefore allowed it to stand, while

they discharged the order merely. But in that case the party who had issued the writ had not been proceeded against, but only the officer. I think that there was a mistake on his part, inasmuch as under the 5th section of this Act, and the corresponding English Act, the authority is to discharge the person out of custody, not to set aside the writ; therefore, it must be intended that the order of the second judge, subsequently adopted by the court, where it afforded no protection to the party at whose instance the first order was obtained, must have been made upon the ground of the misconduct of that party, and so it affords a clue to the sense in which the language of the replication should be construed. It may have been that the party here innocently stated facts to the first judge or wilfully did so; but where we find the court subsequently setting aside the order, because it was obtained by reason of misrepresentation, can it be said that this misrepresentation was not wilful? Especially where no undertaking was imposed on the party discharged from custody; and I shall take it that the averment in the replication, with respect to the act of the court, shows that the misrepresentation in question was a wilful one, as this was the ground upon which the decision of the judge appears to have been made. If that be so, it brings the question round to what the effect was of setting aside that order for wilful misrepresentation. If the order were set aside, which was the foundation of the writ, that takes effect *ab initio*, and the arrest accordingly is not justified. *Prentice v. Harrison*, does not strictly apply to this case. It would certainly go this length, that where writs are set aside, it is incumbent upon the party who would take advantage of the situation in which the opposite party is placed in consequence of that, to show the grounds upon which the writ was set aside, and that if it can be intended that the writ was set aside for error, it is not void, and the party must make out his case fully. I do not quarrel with that case; but that does not apply to the case now before us, for it does not apply to the case of setting aside a judge's order. The setting aside of a judge's order is not the same as the setting aside of a writ; and if the setting aside of that order was unnecessary, so far as regards the purposes of the Act, an intendment must be made that that was done upon the ground of misrepresentation. I therefore think that the judgment in this case ought to be affirmed. It appears to me that to avoid all difficulty, it is only necessary to attend to the provisions of the Act; and in case it should be necessary to discharge the order itself, that is to be done, not by reason of any power conferred by the Act itself, but by the original inherent jurisdiction of the court. It has been said that it is hard to set aside the order without compelling an undertaking, but the matter rests with the judge himself. I think that the replication shows that the protection of the order has been taken away, and that the action accordingly lies.

MONAHAN, C. J.—This is a case which forcibly illustrates that which has been termed the "glorious uncertainty" of the law. This was an action of trespass. It is a well known principle of law, that where a man has been arrested and put in prison,

and another takes part in that proceeding, unless he can justify, he is responsible for his acts. The defendant has, in general, one of two things to answer in reply to such a charge. He may say, though you have been arrested, it is no act of mine. *Green v. Elgie*, (5 Q. B. 99,) is an instance of such a defence as that, as also the recent case in the Common Pleas, of *Dickson v. Capes*, (7 Ir. Jur. 165.) However, that is not the defence relied on here. The only question in the present case is, whether this was a legal arrest, although the party has, upon the record, availed himself of both defences, namely, first, that he did not imprison the defendant, and secondly, he pleads a justification. Now, he cannot justify simply by alleging the issuing of a writ of the court, and an imprisonment under that. He is bound not merely to allege that, but to aver the existence of the order under which the writ issued. The replication alleges that this order was set aside by a rule of the Court of Queen's Bench, duly made by the Hon. Justice Crampton, one of the justices of the said Court of Queen's Bench, sitting in chamber, and I think it must be taken that this order was made by his own authority as a judge of that court. If this order had been made professedly by virtue of this Act of Parliament, I would agree with my brother Pennefather that that Act did not authorize such an order to have been made. It is true that that course has been adopted in England with reference to the corresponding Act there; but I think that the Act ought to be read and followed, and when the attention of the judges there has been called to it, I am quite sure that they will see that the course they have been adopting is not in accordance with the letter of the Act. In the case of *Hopkins v. Salembier*, (5 M. & W. 42,) the judges are reported to have assumed that in case the writ were set aside, the protection afforded by it would be taken away from the sheriff, but I differ from them, as to that, for the law says that writs of execution after they have been set aside, shall still afford a protection to the sheriff. But it has been said in this case that because the order was in force at the time of the arrest, an action of trespass on the case is the only remedy, thus giving no force to the fact of the order having been set aside. No authority or dictum has been cited in support of the position, that where an interlocutory order or an interlocutory proceeding has been set aside, no matter on what ground, it will still afford a protection for intermediate acts. My brother Greene referred to cases in Chitty's Reports and elsewhere, in which, upon setting aside an interlocutory order, a party has been put under terms not to bring an action, upon the assumption that without such the opposite party would be exposed to an action, without any justification, which he would have had if the order had remained in force. It has been argued that *Prentice v. Harrison*, is an authority to bind the present case. I do not quarrel with that decision, though I own I would have been better satisfied had it been the other way. A case to which the judges in that case referred, was one of *Blanchenay v. Burt*, (4 Q. B. 707.) There a writ of execution had issued upon a judgment more than a year old without a *sci. fa.* It did not appear upon the pleadings that the writ had been set aside.

The court held that till the writ had been set aside, that it afforded protection, and they said that the writ was not void but merely irregular. It appears to me to be a strange thing that though a writ might have been set aside on motion, still that till it was set aside it would afford a justification. I shall adhere to the opinion expressed by Tindal, C. J. in *Rankin v. De Medina*, (1 C. B. 183,) which was decided prior to *Prentice v. Harrison*. In *Rankin v. De Medina* it was alleged in the replication that the writ had been irregularly sued out and it was afterwards set aside, but it was not expressly averred that it had been set aside upon the ground of that irregularity. Tindal, C. J. said, "It seems to me that we are not at liberty to assume that the writ was set aside for any other grounds than that which appears upon the face of the replication, and which is a sufficient cause." Therefore I should require more authority than I have heard cited, that where an interlocutory order, which cannot be reversed on writ of error, is set aside, it affords, after its having been so set aside, any justification for what has been done under it. In *Codrington v. Lloyd* the replication was that the writ, not the order, had been set aside for irregularity; but Lord Denman in his judgment says, that the case was precisely as if there had been no writ. If process when set aside be the same as if it had never existed why should not an interlocutory order be as if it never had existed? The reason which has been given at the other side is, that it is to be compared to a judgment. Therefore, they say that an order of this class, which is not reversible by writ of error, is nevertheless incapable of being set aside as if it had never existed. I cannot, however, find anything that would justify me in coming to the conclusion that an interlocutory order when set aside gives effect to anything previously done under it. With regard to another branch of the case I concur with my brother Ball in thinking that trespass on the case is not the only remedy, and indeed when it is said that trespass on the case is the only remedy no effect is given to the fact of the order having been set aside. Are we to import into the consideration of the case the grounds upon which the previous order was reversed? It is said that it may be inferred that the affidavit before my brother Crampton was the same as that which had been originally laid before Baron Richards. All that I say to this is, that if such were the fact the defendant here might have successfully taken issue upon the statement in the replication and have traversed the alleged misrepresentation, because the allegation is not that Baron Richards made the order in consequence of a misrepresentation of intention, but of facts. Misrepresentation does not necessarily mean that which is false to the knowledge of the party who makes the same, but the term must mean an untrue statement of facts; and if so, the inference to be derived from that allegation is that the facts so alleged to be untrue must have been displaced; and I concur with my brother Pennefather in this, that whatever questions may arise as to interlocutory orders in general, none such can do so with respect to interlocutory orders under this Act, which only authorizes the judge upon appeal to discharge a party

from custody. A great deal has been said about the hardship of the case. This is a good argument to show that the first order should not have been set aside, but the statute gives the right of appeal from the judge to the full court, and in the present case there was nothing to have prevented him from bringing the matter before the full court, which might not only have set aside the judge's order but have had full power and authority to have set aside only *so much* of that order as related to the discharging of the former order. If the judgment of the court below shall be affirmed I do not consider that it will be of much importance hereafter, for in any event we shall not again adopt the practice of setting aside the order under which the *capias* has been issued, but will confine ourselves to the provisions of the statute, unless we want to deprive a party of all the benefit of the proceedings, in a mode, the injury of which it will be difficult to repair.

LEFROY, C. J.—In this case not only the divided opinions of my learned brethren, but the importance of the question itself, render it difficult for me to dispose of the case at this advanced period of the evening. However I will state one or two views of the case which do not appear to me to have been dwelt upon with all the force to which they are entitled. The cases which have been cited in argument principally relate to process, in the execution of which the parties acted for themselves and at their own peril; but it is important to look at this Act of Parliament and to see the peculiar provisions which it contains, and to see who alone here is authorized to make this order, and to allow a party to obtain a fiat for holding a defendant to bail. Before the passing of this Act the party himself, of his own accord, obtained from the officer of the court a marked writ. Then, nothing could have been more reasonable than that the party who took out such a writ irregularly, or one which was void in itself, should be answerable for his own act. But what has the late Act done? It has abolished arrest on *mesne* process, but it equally provides that under certain provisions a creditor should be entitled to get bailable process. Thereby another has to make an affidavit, the contents of which are pointed out generally by the statute; and then the creditor may, upon going before a judge, and laying before him the affidavit, take his opinion as to whether it is such a case as entitles him, in the opinion of that judge, to obtain the bailable process. What, then, is the duty of the judge? Is it merely ministerial? The judge has to consider whether the affidavit is sufficiently explicit in the statement of the debt, and the intention of the debtor to leave the country; and, if he be satisfied upon these points, he makes his award that the officer shall issue a writ, for what he thinks that it ought to be marked. If that be a judicial act, how is it to be at the peril of the party who takes it out? Suppose that he has been himself entrapped. Put, however, the extreme case of a man who has made false representations. I do not mean to say that it is necessary to put this case with reference to the one before us, but only with reference to that great principle of the law, that a man who acts under the authority of the law shall not be made a trespasser, as, for example, a man

who even by his own false swearing, gets the process of the law, suppose a search warrant, for that is given by a judge of competent authority. A judge, when such affidavits as I have mentioned come before him, must exercise his judgment in a judicial manner. At all events, a party who has obtained a judge's warrant for that, in case that order be set aside, instead of being treated as if he had acted under process of the ordinary kind, obtained under circumstances where the party was not secured by the deliberate opinion of the judge, authorizing him to act, is entitled to protection, unless you show clearly and beyond a doubt that he should not enjoy the protection which the law *prima facie* gives to him. If the protection of those proceedings be taken from him, how are you to give him the benefit of the law? Even in the case of an ordinary order, it is necessary to show that he has acted irregularly, and in bad faith, or, of his own accord, under void process. This principle has been acted upon in many cases where trespass has been held to lie, which was only where the acts done were of his own authority, not sanctioned by the authority of the court. I repeat that in such cases the party has acted either irregularly, or in bad faith, or by void process. Has the replication now taken away from him the protection of a judicial act, and of the principle of law, that every one acting legally under the authority of the law shall be protected? What says Lord Kenyon in *Belk v. Broadbent*, (3 T. R. 385,) "If a party be arrested without any cause of action, he has his remedy by action on the case for maliciously holding him to bail; but it is incomprehensible to us that a person should be considered a trespasser who acts under the process of the court." Take this order as having been set aside; and see what is the effect of it having been set aside? Are you to pay no respect to the sanction which judicial authority gives to this party? The great principle of the common law with regard to the protection afforded in respect of acts done before the reversal for error, has been extended to other proceedings below the class of judgments. For, if the case of *Prentice v. Harrison* be law, that applies not only to cases where proceedings have been formally reversed for error, but to those where writs have been set aside by order of the court. The ground for setting aside such proceedings must, therefore, be made plain to the court before it can be ascertained that the party is a trespasser. Upon the authority of that case it follows that *prima facie*, if there be an imaginable case of error, it must be presumed that the proceedings were set aside for that error of judgment. If it be by process only which was set aside as defective, the court must have brought before it the grounds upon which that was set aside, in order to repel the implication, to the benefit of which the party would otherwise have been entitled, namely, that he was no trespasser. He is not to be exposed to the consequences of the proceedings having been set aside for irregularity or *mala fides*, without distinctly stating the grounds. The only case, which I remember, where a party was made a trespasser by reason of bad faith was where a warrant of attorney had been handed over as an escrow, and was afterwards improperly made use of

in breach of the condition. That document was alleged to have been a warrant of attorney, but it was in reality no such thing. So that case, if viewed strictly, would appear to have been one of a voidable judgment, and the party there could not have been allowed to obtain the protection of the law by the violation of the rules of the law. How is it possible to bring this case within the two classes of cases in which alone it has been held that trespass is maintainable against a party acting upon his own authority and not under the supervision of a judge granting the protection, which he has a right to avail himself of, unless he be stripped of that protection by the plainest possible statement that the judgment under which he has acted was obtained under circumstances which made it impossible to stand? But what are the circumstances here? Suppose this to have been the judgment of the full court; and, although it has been that of a single judge, it is the same as the judgment of the full court. How can it be said that the court was induced by misrepresentation to make the order, and that accordingly he made the order improvidently? The latter term *quia improvide emanavit* is the phrase used in giving judgment to set aside a writ or process when it has issued erroneously, for which I have the authority of Tyndal, C. J. in *Rankin v. De Medina*, (1 C. B. 183.) Here we have it alleged in the replication, not that the proceedings were set aside for irregularity or bad faith, but a misrepresentation which induced the judge to make the order improvidently. If the word "misrepresentation," which is ambiguous, is to have any effect, I fasten upon it the term "improvidently," which is not ambiguous, but a term known to the law, as implying error: and the party is, therefore, protected, for the misrepresentation in question only induced the judge to make an erroneous order, and the second judge set it aside upon that ground. I am clearly of opinion that this judgment should be reversed. I should, however, desire to have an opportunity of expressing my views as to other portions of the case.

Feb. 2.—The Lord Chief Justice stated that upon further consideration he was of opinion that the other learned judges, who were for reversing the judgment, had anticipated him in any additional observations he should wish to make, and that he should, therefore, simply declare that his opinion concurred with the majority of the court, that the judgment of the Court of Exchequer should be reversed.

Judgment reversed.

ROLLS COURT.

[Reported by RICHARD W. GAMBLE, Esq., Barrister-at-Law.]

IN RE MARTIN.—*Jan. 11.*

12 & 13 Vic. c. 53.—*Costs—Taxation—Practice—Several bills furnished at different times.*

Several bills of costs, including costs for business in the Incumbered Estates Court, were furnished to the client at different times, and the attorney having refused to sign an undertaking to pay the

costs of taxation in case one-sixth of the costs were taken off, upon the petition for taxation, it was objected that if less than one-sixth was taken off some of the bills, the costs of the petition and taxation should be apportioned. The order for taxation was made in the usual form, directing that if the costs, when taxed, were less by one-sixth than the costs furnished, that petitioner should pay the costs of petition and taxation, and, if not less by one-sixth, then respondent should pay them.

THIS was a petition under the Solicitor's Act to obtain a taxation of certain bills of costs. It stated that the petitioner had employed the respondent Martin in the year 1852 in certain proceedings in the Incumbered Estates Court and in the Court of Chancery; that in June, 1854, the respondent furnished petitioner with a bill of costs, amounting to £26 12s., principally for business done in the Incumbered Estates Court, and in November, 1854, furnished two other bills of costs, one for £15 12s. 6d. for business in the Incumbered Estates Court, and the other for £14 9s. 7½d. for business in this court; that the petitioner had paid several sums on account of these costs, and that he was willing to pay any balance that might be found due on taxation. The petition then prayed a reference to the Master "to tax and settle the aforesaid three several bills of costs furnished by the said J. Martin to your petitioner, and to ascertain the demand of the said J. Martin thereupon," and that the said J. Martin should furnish a list of credits, and "that the Taxing Master should take an account of such credits, and strike a balance," and "if the costs furnished, when taxed, shall be less by one-sixth part than the costs delivered, that the said J. Martin may pay the costs of such taxation and reference and of this petition," &c., and that upon payment of the balance, the respondent might hand over all deeds and documents. Petitioner's solicitor then furnished to the respondent an undertaking to be signed by him, to the effect that if one-sixth of the costs were taken off upon taxation, that he, the respondent, would pay the costs of taxation, and hand over all necessary deeds upon the balance being paid; but respondent refused to sign any agreement to pay the costs of taxation, but would undertake to proceed with the taxation, and furnish list of credits, and not commence any action for the costs till taxed. This petition for taxation was then presented.

W. P. Carr moved, pursuant to notice, for an order for taxation.

R. Warren opposed the motion.—This petition should never have been presented. The respondent was not proceeding for his costs, and was willing to proceed with the taxation, and furnish the list of credits, and to sign an undertaking to that effect. The petitioner required from his client an undertaking to pay the costs of taxation, which was quite unusual and unnecessary. Further, there were Incumbered Estates Court costs, which could not be taxed by the officer of this court. The second section of the Solicitors' Act says, "In case the business contained in such bill, or any part thereof, shall have been transacted in the high Court of Chancery, or in any other Court of Equity, or in

any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of Law or Equity, for the Lord High Chancellor or the Master of the Rolls, and in case any part of such business shall have been transacted in any other court for the courts," &c. to refer such bill to be taxed by the proper officer of the court in which such reference shall be made. This does not include Incumbered Estates Court costs, for the Act establishing that court was passed since. There were here three bills of costs, and if less than one-sixth was struck off any one of the bills, the costs of this petition and the taxation should be apportioned between the petitioner and respondent. In the petition the subsequent bills are put along with the first bill, and then the petition prays that if one-sixth of the whole amount of all the bills is taken off, that the respondent may pay the costs of taxation and of the petition; but if some of the bills were proper, and one-sixth of them should not be struck off, the respondent should not be charged with taxation of these, nor of the petition which required their taxation.

Carr in reply.—A great portion of the costs were costs of a loan and not Incumbered Estates Court costs. If any one of the bills were excessive, and more than one-sixth of it was struck off, we should be entitled to a taxation and the costs of it, and consequently to the costs of the petition.

MASTER OF THE ROLLS.—I am not quite clear but that if more than one-sixth is taken off any one of the bills of costs the petitioner will be entitled to his costs of taxation and of the petition. If an excessive bill of costs is furnished, and then under plea of taxation several other moderate bills are furnished so as to supplement the amount up to one total amount, from which one-sixth would not be struck off on taxation, I do not think that this should have the effect of getting rid of the rule of the court, which was made to prevent the furnishing of excessive bills of costs. I will consider the matter and see whether the striking off one-sixth of the gross amount, or of one-sixth of only one bill, should entitle the petitioner to the costs of these proceedings.

Jan. 18.—The order was made, in the usual form, as follows:—

“Refer it to one of the Taxing Masters of this court to tax the costs in the petition mentioned as between solicitor and client, and let the said respondent furnish to the solicitor for the petitioner on oath a list of all credits to which the said petitioner is entitled against the said costs, and let the said Taxing Master, in taxing and certifying said costs, take an account of all such credits and strike a balance, the said petitioner undertaking to pay the amount, if any, which shall appear due on such taxation after all credits, within one fortnight after such taxation, or give a plea of confession for same, if so ordered by the court, and the respondent undertaking to pay any balance that may be found due by him to the said petitioner within the like period, and let the Taxing Master, pursuant to the provisions of the 12 & 13 Vic. c. 53, tax the costs of such reference, and if

the costs when taxed shall be less by a sixth part than the costs delivered by the said respondent, let the said respondent pay the costs of such reference and of the petition and this order, and if said costs when taxed shall not be less by a one-sixth part than the costs so delivered, let the said petitioner pay the costs of such reference and of the respondent appearing on this motion, and let the said Taxing Master, in pursuance of such statute, certify what, upon the reference hereby directed, shall be due to or from the said petitioner in respect of the costs and demand, and of the costs hereby directed to be paid as aforesaid, the said petitioner and respondent respectively undertaking as aforesaid to pay any balances and if no balance shall appear to be due to the said respondent, or upon payment by the said petitioner of any balance which may be found to be due by him, let the said respondent hand over to the said petitioner all deeds, documents, and papers in his custody, power or possession, belonging to the said petitioner, and let the said respondent be restrained from commencing any action at law or suit in relation to the costs so furnished, pending such reference, and let the petitioner produce on such taxation any documents in his custody, power, or possession relating to said costs.”

HOUSE OF LORDS.—1854.

(APPEAL FROM THE COURT OF CHANCERY IN IRELAND.)

[Reported by R. W. GAMBLE, Esq. Barrister-at Law.]

SYNNOTT, AND OTHEBS, APPELLANTS, SIMPSON, AND OTHERS, RESPONDENTS.—June 30.*

Marriage settlement—Trust for creditors—Power of revocation—Misdescription of bonds.

F S, being the owner of certain fee-simple, freehold, and leasehold property, executed two several bonds for the sums of £500 and £1700, bearing date respectively in the years 1799 and 1817, to which J E S was now entitled. On the 17th April, 1818, F S, upon the marriage of his eldest son, J, executed a settlement whereby he conveyed his estates upon trust for himself for life, then to his son, the intended husband, for life, and then to secure a jointure for his son's intended wife, with other provisions for the younger children of him, F S. The said F S then conveyed other lands to trustees in trust out of the rents and profits "to pay off, discharge, and keep down all interest now due, or hereafter to grow due, upon all debts and incumbrances now affecting all or any part of the estates, by the said presents granted or assigned, or upon such other debts now due by the said F S, as far forth as the same by law bear interest, and which other debts and incumbrances are specified in a schedule hereto annexed," then, after some other trusts, in

* *Ex relations.*

trust for F S for life, and then for the said son, J, his heirs and assigns; provided, that these last-mentioned estates were to be liable to and "chargeable with the payment of all and singular the debts and incumbrances of F S now due by him, as the same are specified in said schedule, and that such debts and incumbrances shall remain and be liens and charges thereon exclusively, and in exoneration of" other tenements and premises. This indenture also contained a provision that, notwithstanding any of the trusts, these lands so charged with the debts might, in the lifetime of F S, be sold by the trustees for the payment of all or any of the debts charged upon any of the premises, provided it be with consent of F S and his son, J, or the survivor of them. To this indenture was annexed a schedule of the debts, including large items which could not be at all chargeable upon the estates, unless made so by this deed, and, among others, two bonds due the Rev. J S for £600 and £1600 respectively. None of the schedule creditors were parties to the deed, nor had they notice of it, but it was executed by F S, and his said son, J. The marriage took place, and the interest was paid upon the bonds and other schedule debts till 1846, first by F S, and then by his son, J. In 1824 F S conveyed his life estate in the lands to other trustees to keep down the interest upon these debts, and also upon other debts, all of which were contained in a schedule to this second deed, and then upon similar trusts as before. J S died in 1831, having by his will left everything real and personal to his son, J, the younger, whom he made executor, and who proved the will. In 1832 the son, J, married a second time, and made a settlement, reciting the indenture of April, 1818, and that the said J had executed a bond to indemnify the trust estates therein from the debts mentioned in said indenture of 1818, and he subsequently incumbered his estates by several mortgages and bonds, and died in 1845, having by his will bequeathed all his real and personal estates to trustees to pay his mortgage and bond debts, and then bequeathed all to his eldest son, F, subject thereto. A suit having been instituted by J E S, the owner of the first bonds, it was resisted by those mortgage and judgment creditors of the son J. Held, (Lord St. Leonard's dissentiente,) that the two bonds for £500 and £1700 were identical with those mentioned in the schedule to the settlement of 1818 as bonds for £600 and £1600 respectively, and that the son, J, took the trust lands in said settlement, subject to the payment of interest then due, and to grow due, on said bonds, and that the trusts of the will of the son, J, should be carried out, and that these two bonds formed part of those directed by the will to be paid, and were within the trusts created thereby for payment of bond debts.

Per Lord Chancellor.—The schedule creditors were objects of the settlor's bounty, as much as the eldest son, and though the trusts were revocable during the life of F S, yet, when at his death they became irrevocable, the eldest son J could only take the estates as they were given him, viz., subject to the

debts. Some of the debts in the schedule being evidently intended by the settlor as a gift, makes it conclusive that he intended the trust, as to all the schedule debts, to operate as a bounty. Even if such intention did not appear, it is doubtful whether the doctrine of *Garrard v. Lord Lauderdale*, applies to a case when the trust is to come into operation only on the death of its author, and when subject to trusts for the payment of debts the lands charged are conveyed by way of bounty to a third person. The trust for the sale of the lands, with the consent of F S and his son J, is not inconsistent with the trust for the payment of debts, because the sale contemplated was a sale in the lifetime of F S, before the other trust had arisen.

Per Lord St. Leonards.—The schedule creditors could not have filed a bill for the interest on their claims, as soon as the deed of 1818 was executed, as no contract was entered into with them. The fact of the trust being rendered irrevocable by the death of F S did not give them any additional right. The payment of interest on the debts did not entitle them to sue the trustees, nor was there any notice to the creditors or dealing with them, sufficient to give them any rights under the settlement of 1818. The trusts of this deed began immediately, and if the schedule debts and the interest thereon were held to be a charge upon the estates, the creditors could have filed a bill for the recovery thereof, immediately after the execution of the deed of 1818, which would be contrary to the authorities. The deed of 1824, placing other debts *pari passu* with those in the deed of 1818, show that it was not the intention of the settlors that the debts of 1818 were intended as a bounty. The rest of the deed was a contract upon the marriage, and though this was bounty to the schedule creditors, they could not enforce it.

Garrard v. Lord Lauderdale; Gibbs v. Glamis, and Gibbs v. Gibson, observed upon.

THIS was an appeal from a decree of the Lord Chancellor of Ireland, bearing date June 15, 1849, in a cause in which the respondent J. E. Simpson was the plaintiff, and the respondent Francis Syngé, and the other respondents, and the present appellants, were the defendants, by which it was declared that under the trusts of the indenture of marriage settlement of the 17th April, 1818, the plaintiff was an incumbrancer upon certain hereditaments therein comprised, for payment of the interest due or to accrue due on two bonds for the sum of £1,700 and £500 respectively. This was a settlement made upon the marriage of John Syngé and Miss Isabella Hamilton. John Syngé was the eldest son and heir-apparent of his father Francis Syngé, who, at the time of the marriage was entitled to the several freehold and leasehold estates and premises after mentioned, as to some of them absolutely, and as to the others, as tenant for life with remainder to his son John in fee; his interest in the estates was incumbered by mortgages, judgments, and other charges. The settlement of April, 1818, was made between Francis Syngé, the elder, of the first part, the Rev. Doctor Syngé, (as representing the surviving trustee in the settlement of the said Francis Syngé,) of the second part, the Rev. Edward Syngé of the

third part, Richard Pennefather (the trustee in a deed of conveyance of December, 1809,) of the fourth part, John Synge, eldest son of F. Synge, of the fifth part, Alexander Hamilton and Isabella of the sixth part, and several other parties not important to this question; and finally, James Digges La Touche and Edward Synge Cooper of the eleventh part. The deed was executed by the said Francis Synge, John Synge, Alexander Hamilton, Isabella Hamilton, Charles Hamilton, Charles A. Tisdall, Hans Hamilton and Joseph Rawlins, but not by any other of the parties. After reciting certain agreements it was witnessed for the considerations therein, and for making provision for Isabella Hamilton and for the issue of the marriage, that they Francis Synge and John Synge, according to their estates and respective interests, conveyed certain estates therein mentioned to the use of Francis and John Synge until their marriage, then to trustees for 99 years, and remainder to Francis Synge for life, and remainder over; and it was further witnessed that the said Francis Synge thereby granted, bargained, sold, assigned, released, and confirmed to James Digges La Touche and Edward S. Cooper, their heirs and assigns for ever in their actual possession then being, by virtue of a bargain and sale thereof then made by the said Francis Synge in consideration of 5s., bearing date the day next before the day of the date of said presents, for one whole year, and by virtue of the statute for transferring uses into possession, the town and lands of Kilberry in the County Meath, and certain lands adjoining Leeson-street in the City of Dublin, held under leases for lives renewable for ever; and the said Francis Synge, for the considerations therein, assigned, set over to the said James D. La Touche and Edward S. Cooper certain premises, part of St. Sepulchre's and Ahoule, to "hold to the said James D. La Touche and Edward S. Cooper, their heirs, executors, administrators and assigns, for the respective lives and terms therein, to such uses and upon such trusts, and for such intents and purposes as are herein-after mentioned and declared concerning the same, that is to say, in trust that they, the said James D. La Touche and Edward Synge Cooper, and the survivor of them, and the heirs, executors, or administrators of such survivor, do and shall out of the rents and profits of all and singular the hereby last-mentioned granted and assured estates and premises and every part and parcel thereof, pay off, discharge and keep down the several and respective head-rents and other rents, fine or fines for renewal, payable under the several leases and assignments thereof, of all or any part of said freehold and chattel leases hereby granted and released or assigned, and after the payment thereof, then out of said rents, issues, and profits aforesaid, to pay off, discharge, and keep down, all interest now due or growing or which hereafter shall grow due upon all and singular the several debts and incumbrances now affecting all or any part of the several respective estates, in and by these presents granted and released and assigned, or to such other debts now due by the said Francis Synge as far forth as the same by law bear interest, and which other debts and incumbrances are specified in a schedule hereto an-

nexed, and after payment of said rents and interest as aforesaid and subject thereto, then as to for and concerning said last-mentioned fee simple and freehold estates hereby lastly granted and released to the use and as and concerning said leasehold premises, in trust for the said James D. La Touche and Edw. S. Cooper, their executors, administrators, and assigns, for and during and until the full end and term of 100 years, upon certain trusts therein-after mentioned. And from and after the end, expiration, or other sooner determination of the same, and subject thereto as to the said fee-simple and freehold estates, to the use, and as to the leasehold premises, in trust for the said Francis Synge, and his assigns during his life, and after his decease concerning the fee-simple estates to the use of John Synge, his heirs and assigns for ever, and concerning the leasehold estates in trust for John Synge, his executors, administrators, and assigns." After this follows a provision on which the principal question is raised, in these words: "Provided always, that the said last-mentioned fee-simple and freehold estates, and the other leasehold premises lastly hereby granted, released, and assigned to the said Jas. D. La Touche and Edward S. Cooper shall be and continue subject to, and liable, and charged and chargeable with the payment of all and singular the debts and incumbrances of the said Francis Synge now due by him, as the same are specified in said schedule, and that such debts and incumbrances shall remain, and be liens and charges thereon exclusively, and in exoneration of the tenements and premises in Glover's-alley and York-street after mentioned, save and except the mortgage for £3500 after mentioned, it being the express agreement of the parties to these presents that the said mortgage debt of £3500 shall be cast on, and be a lien and charge on said premises in Glover's-alley and York-street, and on them only, and that the said premises in Glover's-alley and York-street shall be free and clear of, and stand exonerated from, every other debt and incumbrance of the said Francis Synge, now affecting the same." The said indenture of settlement then further witnessed, that, in pursuance of the agreement, and for the considerations therein, the said Francis Synge granted, assigned, and transferred to the said Jas. D. La Touche and Edward S. Cooper, their heirs, executors, administrators, and assigns, certain premises in Glover's-alley and York-street, in the City of Dublin, and all the estate, right, title, and interest of the said Francis Synge therein, to hold the same to the said James D. La Touche and Edward Synge Cooper, their heirs, executors, administrators, and assigns, during the respective terms of lives and years for which the same were respectively held, upon the trusts following, that is to say, that in case the farm of St. Sepulchre's should be applied to for payment of the debt of £3500 secured by the mortgage and judgment, or any part thereof, should be endeavoured or sought to be raised out of said farm of St. Sepulchre's, then it should be lawful for the said trustees, and they were thereby authorized and directed, by sale or mortgage of the said premises last conveyed, (viz., Glover's-alley and York-street,) to raise or levy

such sum or sums of money as should be sufficient for the purpose of indemnifying and protecting the said farm of St. Sepulchre's from the payment of said debt of £3500, and that, as soon as the said sum of £3500 should be paid off by the sale of all or any of the premises of Glover's alley or York-street, or in any other way, that then the said trust estate should cease. And after reciting that, by a freehold lease of 16th April, 1818, the said Francis Syngé demised, granted, and set unto the said John Syngé, his heirs and assigns, certain lands of Glassnamullin and Roundwood in the County of Wicklow, to hold the same for the lives of the *cestui que vies* therein named, and of all such persons as should thereafter be added by virtue of the covenant for perpetual renewal therein contained, at the rent of a peppercorn if demanded, and reciting an agreement for making a present provision for the said John Syngé, and for making provision for Isabella Hamilton, in case she survived her husband; and that it had been agreed that the said lease for lives renewable for ever of the lands of Glassnamullin and Roundwood should be accepted by the said John Syngé and Isabella Hamilton in lieu of said annual sum or provision as aforesaid during the life of the said Francis Syngé, and no longer, it was by said indenture witnessed that the said John Syngé granted, re-leased, and confirmed to Henry Moore and Edw. Syngé, their heirs and assigns, the said premises, to hold the same during the continuance of the demise, upon the trusts and for the uses following, that is to say—to the use of John Syngé until the marriage, and after the same to the use of John Syngé for life, with remainder, in case the said Francis should be living, in trust to permit the said Isabella Hamilton to receive thereout during her life, provided the said Francis should so long live, an annuity of £500, and to raise such other yearly sums as therein mentioned, for the maintenance of the children of the marriage after the death of the said John Syngé, and during the life of the said Francis Syngé, and after his decease, discharged from the said trusts, to the use of the said John Syngé, his heirs and assigns. And reciting that whereas the lands of Glassnamullin and Roundwood, and the estate of Francis Syngé therein prior to the lease of the 16th of April, 1818, and the life estate of the said Francis Syngé in the lands of Kilberry were liable to certain debts and incumbrances, and it had been agreed upon by all the parties that the lands of Glassnamullin and Roundwood should be indemnified against all and any of the debts and incumbrances of Francis Syngé in his lifetime. It was by the said indenture agreed and declared that as to the three several terms of ninety-nine years, provided the said Francis Syngé did so long live, and the said term of one hundred years, so before limited to the use and upon trust to the said Henry Moore and Edward Syngé, their executors, administrators, and assigns, the same were so limited upon trust, if at any time thereafter during the life of the said Francis Syngé the said lands of Glassnamullin and Roundwood, or either of them, or any part thereof, should be made liable to the debts and incumbrances of Francis Syngé, or the lease of said lands of the 16th of April, 1818,

be evicted or defeated, or the full benefit thereof be lessened, by reason of any debts affecting the estates of the said Francis Syngé; or, in case the said John Syngé should die in the lifetime of the said Francis, leaving Isabella Hamilton and any issue of the said marriage him surviving, and the interest of the said J. Syngé in the lease of the 16th of April, 1818, be in any way insufficient to satisfy the trusts in which the same were vested in the said Henry Moore and Edward Syngé, then that they should enter upon the lands so limited to them, and raise such sums of money as would indemnify the said lands of Glassnamullin and Roundwood from all mortgages and charges affecting the same, and all costs relating thereto. Then follows a declaration that the lands of Killberry, Coffee's Garden, marked No. 44, and Minchin's Mantle, near Stephen's Green, and the premises in Leeson-street, St. Sepulchre's, and the lands of Ahoule, and all or any part of them, might, in the lifetime of the said Francis Syngé, notwithstanding any of the trusts, be sold for payment of the debts or incumbrances then charged thereon, with desire and consent of Francis Syngé and John Syngé, or the survivor. There was annexed to the deed the following schedule:—

“SCHEDULE of the Debts and Incumbrances referred to by the annexed Deed of Settlement made on the intermarriage of John Syngé, Esq., with Isabella Hamilton, spinster.”

	£	s.	d.
“To Miss Elizabeth Syngé, by notes, bonds, and balances of accounts due to her by the late John Hatch and Francis Syngé, Esq., about	5500	0	0
“To the Rev. John Simpson, sen., by bond of the late John Hatch, Esq.	600	0	0
“To the Rev. John Simpson, jun., by bond of Francis Syngé, Esq.	1600	0	0
“To Colonel William Vincent, by bond of F. Syngé, Esq.	1000	0	0
“To Mercer's Hospital, debt due by John Hatch, Esq.	600	0	0
“To Isaac Ambrose Eccles by bond of Francis Syngé, Esq.	500	0	0
“To family of the late James Stuart, an intended donation to fulfil a supposed intention of John Hatch, Esq.	1500	0	0
“To Mrs. Elizabeth Holmes, by bond of the said John Hatch	100	0	0
“To Joseph Pim, of Wicklow, by bond of F. Syngé, Esq.	400	0	0
“To Sarah Blundel, by bond of the said Francis Syngé, Esq.	200	0	0
“To Elizabeth Bidding, by bond of Francis Syngé, Esq.	200	0	0
“One annuity or yearly sum to Eliza Medlicott	20	0	0
“One annuity or yearly sum to Eliza Kidwell	20	0	0

“The above is a true and correct schedule of the debts and incumbrances, as referred to in the annexed deed. Witness our hands and seals this 17th day of April, 1818.

“Witness present FRANCIS SYNGÉ, (seal.)
“JOHN HILL LINDE. JOHN SYNGÉ, (seal.)”

This deed was executed by several other parties, but not by any of the schedule creditors. The marriage afterwards took place, and there were issue thereof the respondent Francis Syngé, the eldest son, and six other children. The said James

D. La Touche and Edward S. Cooper never acted in the trusts nor interfered with the estates. No notice of this settlement was given to the creditors named in the schedule or any of them. By an indenture of the 7th of July, 1824, made between Francis Synge, the elder, of the one part, and John Synge and Edward Synge of the other part, reciting the settlement of the 17th of April, 1818, it was witnessed that he, the said Francis Synge, did grant, sell, release, and confirm to the said John Synge and Edward Synge, and to their heirs and assigns, the lands of Watterstown, Moorestown, Ferner, Roulestown, also the lands of Kilberry, and the premises in Leeson-street, to hold the same unto the said John Synge and Edward Synge, and the survivor of them, his heirs and assigns, during the natural life of the said Francis Synge, the elder, upon the trusts after mentioned; and also assigned and transferred to the said J. Synge and E. Synge, their executors, administrators, and assigns several other lands and premises including those in St. Sepulchre, and Glover's Alley, and York-street, to hold the same unto the said John Synge and Edward Synge, and the survivor of them, his executors, administrators and assigns, for the several terms of years thereof, upon the after-mentioned trusts, that is to say, in the first place to pay the rents and renewal fines on the same, and all costs incurred in the execution of the trusts, "Then upon this further trust, and to the intent that by and out of the said rents and annual proceeds of all and singular the said hereby conveyed and assigned lands, tenements, and premises, they, the said John Synge and Edward Synge, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor shall and will, from time to time as the same shall accrue and become payable, pay or cause to be paid the several annuities and interest of the said several sum and sums of money and debts, mentioned and set forth in the second schedule hereunto annexed, (which includes all the debts mentioned in the schedule to the said deed of settlement of April, 1818, annexed,) now due and hereafter to grow due thereon, respectively, during the life of the said Francis Synge, amounting together to the yearly sum of £1950, and after payment thereof, upon the further trust to pay the residue and remainder of said rents and annual proceeds of said several and respective lands, tenements, hereditaments and premises, and every part thereof, in each and every year, to the said Francis Synge and his assigns, for and during the term of his natural life." Then followed a proviso that in case the annual amount of £1950 should be lessened by the reduction of interest upon the payment of principal, then that the trustees should apply the overplus of the £1950 in discharge of the principal sum of such debts, in the second schedule, as the trustees should think expedient. To this deed was annexed a schedule of incumbrances and debts to the amount of £34,333, the interest on which amounted to £1950, and which included all the debts in the schedule to the deed of April, 1818, which only amounted to £12,248. Francis Synge died about the year 1831, having made a will, which bore date 10th July, 1815, and thereby gave to his son, the

said John Synge, all his real and personal estates, and appointed him his executor, which will was duly proved by the said John Synge, who thus, in every respect, became entitled to the estate and interest of his father Francis. John Synge died in 1845, having made his will in 1839, and thereby bequeathed to his brother, Edward Synge, and Alexander Hamilton all his real and personal estate, in trust to sell for payment of his mortgage, judgment and bond debts, and he devised and bequeathed to his eldest son, the respondent, Francis, all his real and personal estate, subject to the payment of the surplus of his debts (if any,) and the payment of certain legacies. The respondent, Francis Synge, upon the death of his father, entered into the receipt of the rents and profits of the lands and premises comprised in the deed of 1818, and, having proved his father's will, was the heir-at-law and personal representative of his father, John Synge, and of his grandfather, Francis Synge. Upon a bill filed by Charles Hamilton and other creditors of John Synge in 1847, an account was ordered to be taken of the real and personal estate of John Synge, and of his debts and legacies, and of the personal estate of Francis Synge, the elder, and of his debts, and of his real and freehold estates, and the charges affecting the same. The respondent, John Edward Henry Simpson, not having been made a party to this suit, filed his amended bill in the Court of Chancery in Ireland on the 21st of January, 1848, and the decree made on the hearing of this cause was the subject of the present appeal. His claim arose thus: Francis Synge the elder having been indebted to John Simpson, deceased, in the sum of £500, late currency, the said Francis Synge and one Dorothy Hatch executed to him their bond, dated 30th May, 1798, conditioned for the payment of £500, with interest. The said Francis Synge being also indebted to the respondent, John Edward H. Simpson, passed to him a bond, bearing date the 10th May, 1817, conditioned for the payment of the sum of £1,700, with lawful interest, at 6 per cent. The said John Simpson died intestate, and the respondent obtained administration to his goods and chattels, and was his legal and personal representative. The bill alleged that the said Francis Synge the elder, and John Synge his son, apprised the respondent, Simpson, that his demands were secured upon said trust estates, by the said deed of 17th April, 1818; and that, by reason thereof, the respondent forbore to sue for and take any proceedings for recovery of said two bonds, the interest having been regularly paid thereon up to 1846. That the bonds had been inaccurately described in the schedule as two bonds for the sums of £600 and £1,600 respectively; but that they were the same bonds, and that Charles Hamilton had been appointed land agent of the trust estates, and, as such, had regularly paid the interests on the two bonds to the respondent.

By an indenture of marriage settlement, executed upon the marriage of John Synge, bearing date the 26th December, 1832, a certain jointure of £300 was provided for Frances Steele, the intended wife, in case she survived him, charged upon

part of said trust lands and premises; and in this indenture it was recited that the said lands and premises were subject to the trusts mentioned in the deed of 17th April, 1818; and that, for the better securing the payment of said jointure the said John Synge executed to trustees his bond in the penal sum of £3000 conditioned for payment of the jointure and also for indemnifying and protecting the said lands and premises on which said jointure was charged from all charges and incumbrances particularly mentioned in the said indenture of the 17th of April, 1818.

The bill prayed "that the bonds bearing date respectively the 30th of May, 1799 and the 10th of May, 1817, might be declared to be the same bonds as were referred to in the schedule to the deed of the 17th of April, 1818, for £600 and £1600, late currency, and that the sums secured thereby might be declared to be well charged upon the lands and premises therein mentioned; that it might be referred to one of the Masters to take an account of what was due to the plaintiff for principal and interest on foot thereof, and that the same might be declared to be well charged upon said lands and premises; also that an account might be taken of real, freehold, and personal estate of the said Francis Synge and John Synge respectively; also that an account might be taken of all charges and incumbrances whatsoever affecting the lands and premises so charged as aforesaid by said indenture of the 17th of April, 1818, with the payment of said bond debts, and the nature and priority thereof; and that the trusts of the said will of the said John Synge might be carried into execution by and under a decree of the court; and that it might be declared that said bonds so vested in the plaintiff formed part of those directed by said will to be paid." The bill then prayed a sale of the lands for the payment of plaintiff's demands and of all other demands affecting the same, the plaintiff offering to redeem all such as he was bound to redeem; also that the defendant might be directed to lodge all necessary documents in court, and prayed a receiver over the lands in the meantime.

The bill was answered by Marcus Synnot, who claimed an interest in the lands of Ballymorroghroe, under a mortgage of the 15th July, 1833,—and upon the lands of Leitrim and Roundwood, under an indenture of 1836; and, also, a charge upon all the lands, on foot of judgments obtained against John Synge in 1833 and 1835. Robert James Graves also answered, claiming an interest in the lands of Glassnamullen, under a mortgage of 1838, and a bond and warrant of John Synge, of Trinity Term, 1838. The Rev. Charles W. Wall also answered, claiming an interest in the lands of Ahoule, and also under several judgments of John Synge. The respondent, Simpson, having filed his replication, and issue having been joined, the cause came on for hearing before the Lord Chancellor of Ireland on the 30th and 31st May, and 1st June, 1849; and the Lord Chancellor made his decree on the 15th of June, 1849, whereby he ordered that the Master should take an account of what was due to the respondent Simpson, as the personal representative of John Simpson, on foot

of the bond for £500, bearing date the 30th May, 1799, and the bond for £1,700, bearing date the 18th May, 1817; and declared "that these bonds were identical with the bond debts for £600 and £1,600, respectively, in the schedule to the indenture of marriage settlements of the 17th April, 1818, and in the pleadings mentioned, and to be within the trusts contained in the said indenture for the payment of said schedule debts. And the court further declared that the late John Synge, deceased, in the pleadings named, took the trust lands and premises comprised in the said indenture of marriage settlements of the 17th April, 1818, upon the trusts in said indenture stated, in relation to said lands, and, amongst others, subject to the payment of the interest to grow due on the said respective bonds; and the interest then due, and thereafter to grow due, on foot of said several bonds, were respectively well charged by said indenture on said trust lands, and on the fee of and in that part of the said trust lands called St. Sepulchre's, in the county of Dublin, granted by the Archbishop of Dublin and the Ecclesiastical Commissioners of Ireland to the said John Synge, by the respective indenture of the 15th Nov., 1838, and 1st Dec., 1838, in the pleadings mentioned; and, accordingly, the court declared said last mentioned indentures, respectively, were grafts on the leasehold interests under which the said lands called St. Sepulchre's were respectively held and vested in the trustees thereof by the said indenture of marriage settlement of the 17th April, 1818; and the court reserved any question as to the principal sum secured by the said two several bonds being respectively declared well charged on the said trust lands, until the return of the said Master's report." And it was thereby further ordered, that the Master should take an account of the real, freehold, and personal estates of Francis Synge, deceased; and also of his son, the said John Synge. And it was thereby further ordered, that the Master should take an account of charges and incumbrances whatsoever affecting the said trust lands comprised in the said indenture of 17th April, 1818, and the nature and priority thereof. And it was further ordered, that the trusts of the will of the said John Synge be carried into execution; and the court declared that the two bonds vested in the respondent Simpson formed part of the bond debts directed by the said will to be paid, and were within the trust created by the said will for the payment of bond debts. The decree then contained the directions usual in administration suits. The said Marcus Synnot, Robert James Graves, and the Rev. Charles William Wall, now appealed from this decree.

The Solicitor-General and J. C. Teed, Q.C., supported the appeal.—The following were the reasons assigned: First—Because the indenture of the 17th April, 1818, was a mere deed of arrangement between the said Francis Synge the elder, and John Synge, so far as related to the creditors of the said Francis Synge; and the respondent Simpson, and the other creditors named in the schedule thereto, not being parties or privy to said deed, were not entitled to claim the benefit of its provisions.

Second—Because the indenture of the 17th of April, 1818, was revocable, and was revoked by the subsequent transactions. Third—Because, assuming that the creditors named in the schedule to the deed of 1818 were entitled to the benefit of its provisions, yet, they were not entitled to more than the value of the leasehold interests comprised in that indenture, and could not claim the full value of the fee simple, which was purchased by, and conveyed to, John Synge, by the indentures of the 15th November, 1838, and 1st December, 1838, respectively.

Napier, Q. C., and Rolt, Q. C., on behalf of the respondent John Edward H. Simpson, resisted the appeal for the following reasons:—First, because the appellants did not at the hearing of said cause of *Simpson v. Synge*, on which occasion the said decree of the 15th of June, 1849, was pronounced, allege or contend that the said respondent John E. H. Simpson was not entitled to the relief which said respondent prayed for by his said bill in relation to said bond debts being decreed a specific charge upon the trust estates in said deed of the 17th day of April, 1818, mentioned, but on the contrary thereof, the said appellants did at the hearing of said cause acquiesce in the said respondent being entitled to such relief, and because the said respondent Francis Synge was the only party in said cause who did at the hearing of such cause object to such relief, but by an order in said cause, bearing date the 21st day of July, 1849, (notice of the motion upon which said order was obtained having been duly served upon the solicitors for the several appellants,) counsel on behalf of the said respondent Francis Synge did, as in said order mentioned, expressly admit that the said respondent Simpson was entitled to be paid the principal of his demands under the trusts of the said deed of the 17th day of April, 1818, therefore the respondent submits that the said petition of appeal in this cause should be dismissed with costs without going into the merits of same. Second, because the said deed of the 17th of April, 1818, was a deed executed for valuable consideration, and the said respondent was made aware of the contents of said deed, and by reason thereof forebore to sue said Francis Synge, the obligor in said bonds, in his life time, and after his death, the said John Synge, his personal representative and heir-at-law, and after the death of the said John Synge the present Francis Synge (one of the respondents) who was also the heir-at-law and personal representative of the said Francis Synge, the elder, and because of the recognition by the said Francis Synge, the elder, and John Synge, and the said present Francis Synge of the said bond debts as incumbrances on the said trust estates, and the payment of interest on foot thereof by or on behalf of the trustees in said trust deed of the 17th of April, 1818, mentioned, from the year 1818 to the year 1847; it would be, therefore, contrary to equity and good conscience that said decree of 15th June, 1849, should be reversed. Thirdly, because said deed of the 17th of April, 1818 was not revocable, and the said John Synge took said lands subject to the trusts in said deed in respect to the interest on foot of said bonds and the other debts mentioned in said schedule to said in-

denture, and never having in his lifetime repudiated said trusts, but on the contrary having adopted same, and having, by his land agent, the said Charles Hamilton, paid interest on the said bonds from the year 1825 till the time of the death of the said John Synge in 1845, it is not competent for any creditor claiming under said John Synge on foot of any security created by him subsequent to said indenture of the 17th of April, 1818 now to repudiate said trusts, but that such creditor's claims are puisne and subsequent to the claims of the respondent, the said John Edward Henry Simpson, on foot of said two bonds. Fourthly, because the said John Synge was an executing party to each of said several deeds of the 17th day of April, 1818, the 7th of July, 1824, and the 26th day of December, 1832, by each of which said indentures his rights are made expressly subject to the trusts created by the said deed of the 17th of April, 1818, in relation to said bonds and other scheduled debts, and he never in any manner revoked said trusts; that no creditor of the said John Synge can revoke same, or prevent the representative of the said John Edward H. Simpson from availing himself of the said trusts in respect to his said bond debts. Fifthly, because it was competent for the said Francis Synge, deceased, at the time of the date of the said indenture of the 17th day of April, 1818, to limit and charge said trust estates as he pleased, and that he did accordingly, by said indenture, limit same to the said trustees thereof, charged with payment of the interest on said bond debts and several other debts mentioned in the said schedule to said indenture annexed, and having limited said estates to himself for life charged with the payment of such interest, and his said life estate so charged having, for valuable consideration, been assigned by the said indenture of the 7th of July, 1824, to the said John Synge and Edward Synge, and said trusts, in respect to the payment of such interest, having been always acted on by the said Francis Synge, John Synge, and the present Francis Synge, from the year 1818 to the year 1847, said trusts should now be executed in favour of the respondent, the said John Edw. H. Simpson, a schedule creditor under said deed of the 17th day of April, 1818. Sixthly, because that, even supposing that the said trust so created by the said indenture of the 17th of April, 1818, were such as the respondent, J. E. H. Simpson, could not originally have claimed the benefit of or enforced, yet, inasmuch as the same was, at all events, enforceable by the said Francis Synge, the elder, and by his personal representatives, for the exoneration of him, the said Francis Synge, and his other assets, from the said scheduled debts, and in effect constituted assets of the said Francis Synge, the elder, appropriated by him to the payment of said debts, and, inasmuch as the said John Synge and Francis Synge, the younger, who took the said trust estates under the said indenture of the 17th of April, 1818, subject to the said trusts, successively filled the character of personal representative of the said Francis Synge, the elder, and were, therefore, the persons who (upon the supposition aforesaid) sustained the right and duty of carrying into execution the said trusts; that, therefore, the said respondent Simpson,

by reason of the said union of characters in the said John Synge and Francis Synge, the younger, was entitled to maintain his suit, to enforce the execution of said trust.

On the 30th of June, 1854, the following judgments were given by the Lord Chancellor and Lord St. Leonard's, the former holding that the decree below should be affirmed, and the latter that it should be reversed.

LORD CHANCELLOR.—My Lords, this case, which was heard by your lordships a good while since, was an appeal from the decree of the Lord Chancellor of Ireland, made in a cause which was brought before him in that country by a gentleman of the name of Simpson, the owner of two bonds. He claimed to be entitled to one in his own right, and to the other as the executor of his father, the person who preceded him, also of the same name of Simpson. One of the bonds was for £500, and the other for £1,700—making together £2,200. The object of the suit was to establish a right in respect of those two bonds against certain property in Ireland called Kilberry, and some other property in the city of Dublin; on which property he alleged he had a claim by virtue of a deed in part executed by the obligor of the bond, a gentleman of the name of Francis Synge, on the 17th of April, 1818. My Lords, as everything turns upon that deed, I think it will be necessary to call your lordships' attention shortly to the provisions of the deed. It was a settlement executed on the marriage of John Synge, the son of Francis Synge, with a lady of the name of Hamilton, in April, 1818. It was made between Mr. Francis Synge, the obligor, the father, of the first part, and certain other trustees; then the son, and the lady, and her father, and other parties who were trustees, which it is not necessary now to mention; except that two gentlemen of the names of La Touche and Cooper were trustees for the purpose afterwards mentioned. The deed is rather complicated, and begins by reciting a number of circumstances, showing what the title was to the lands belonging to Mr. Synge, the father, in different parts of Ireland; and, finally, it conveys certain property to trustees in Sligo, Meath, and Dublin, upon trust, to the use of Francis Synge, the father, for his life, and at his death to John Synge, the intended husband, for his life; then to secure a jointure of £500 a year to the wife; and then provisions amongst the younger children, the first and other sons of the marriage, and in default of sons to daughters. Then there was an agreement that the lands should be indemnified against the charge of £3,000, and that that sum should be charged upon other lands, in favour of the younger brothers and sisters of John, that is, the younger children of Francis: they were indemnified by virtue of provisions afterwards contained in the deed, that £3,000 being charged upon lands known by the name of Ballymorroghroe. There were certain other trusts with respect to the £3,000; then there was a provision of fine and recovery, because many of those lands were entailed, of which Francis Synge was tenant in tail, and not tenant in fee simple. Then comes, at page 45, in the re-

spondent's appendix, this witnessing part, upon which arises the important question: "And this indenture further witnesseth, that in pursuance of the said last-mentioned agreement, and for the consideration aforesaid, and also in consideration of the further sum of 10s. in hand, paid by the said James Digges La Touche and Edward Synge Cooper to the said Francis Synge," that is, the father; "the receipt whereof he doth hereby acknowledge, he, the said Francis Synge, hath granted, bargained, sold, assigned, released, and confirmed; and by these presents doth grant, bargain, sell, assign, release, and confirm, unto the said James Digges La Touche and Edward Synge Cooper," the gentlemen whom I have named, "their heirs and assigns for ever, in their actual possession, now being, by virtue of an indenture of bargain and sale thereof then made by the said Francis Synge, in consideration of 5s., bearing date the day next before the day of the date of these presents for one whole year from the date thereof, and by force of the statute for transferring uses into possession, all that and those the town and lands of Kilberry, situate in the County of Meath"—and also certain other property on the road to Donnybrook, and describing that property in Dublin, the property being part of the farm of St. Sepulchre's, containing seven acres, and part in Kevin-street, to have and to hold to his trustees, La Touche and Cooper, "their heirs, executors, administrators, and assigns, according to the nature and quality of the several estates of the said Francis Synge, in each respectively, for and during the respective terms of lives and years in all and each of said leaseholds yet to come and unexpired, to such uses, upon such trusts, and for such intents and purposes as are hereinafter mentioned and declared concerning the same—that is to say, 'in trust that they the said J. D. La Touche and Edward Synge Cooper, and the survivor of them, and the heirs, executors, or administrators of such survivor, do and shall out of the rents and profits of all and singular the hereby last mentioned granted and assured estates and premises, and every part and parcel thereof, or of a competent part thereof, pay off, discharge, and keep down, the several and respective head-rents or other rents, fine or fines for renewal payable under the several leases or assignments thereof, of all or any part of the said freehold and chattel leases hereby granted and released or assigned, and after the payment thereof, then out of said rents, issues, and profits aforesaid, to pay off, discharge, and keep down all interest now due or growing, or which hereafter shall grow due upon all and singular the several debts and incumbrances now affecting all or any part of the several respective estates in and by these presents granted, released, and assigned, or upon such other debts now due by the said Francis Synge, as far forth as the same by law bear interest, and which other debts and incumbrances are specified in a schedule hereto annexed, and after the payment of said rent and interest as aforesaid, and subject thereto, then as to and concerning said last mentioned fee-simple and freehold estates, hereby lastly granted and released to the use and as and concerning the said leasehold premises hereby lastly assigned

in trust for the said James Digges La Touche and Edward Synge Cooper, their executors, administrators, and assigns, for and during and until the full end and term of 100 years," upon certain trusts therein-after mentioned—"and from and after the end, expiration or other sooner determination of the same, and subject thereto as to the said fee-simple and freehold estates to the use and behoof of, and as to said other leasehold premises, in trust for the said Francis Synge," that is the father, "and his assigns during his life, and then after his decease concerning the fee-simple estate, to the use of John Synge, his heirs and assigns for ever, and concerning the leasehold estates, in trust for John Synge," that is the son, "his executors, administrators, and assigns." Then comes this proviso, which gives rise to the present question, "Provided always, that the said last-mentioned fee-simple and freehold estates, and the other leasehold premises lastly hereby granted, released, and assigned to the said James Digges La Touche and Edward Synge Cooper, shall be and continue subject to, and liable and charged and chargeable with the payment of all and singular the debts and incumbrances of the said Francis Synge, now due by him, as the same are specified in said schedule, and that such debts and incumbrances shall remain and be liens and charges thereon exclusively, and in exoneration of the tenements, hereditaments, and premises in Glover's-alley and York-street, after mentioned, save and except the mortgage debt of £3,500 after mentioned, it being the express agreement of the parties to these presents, that the said mortgage debt of £3,500 shall be cast on and be a lien and charge on said premises in Glover's-alley and York-street, and on them only, and that said premises in Glover's-alley and York-street shall be free and clear of and stand exonerated from every other debt and incumbrance of the said Francis Synge now affecting the same." Then it is provided that St. Sepulchre's being a part of the property which was thus conveyed and being liable to that £3,500 with the property in Glover's-alley, should be indemnified from it, and the provisions were framed for that purpose. Then there is a recital of certain other property of Francis Synge, the father, in order to make immediate provision for John Synge, the son, during the life of his father. The other property, called Glasnamullen and Roundwood, was conveyed so as to give it to the son for life, and then to provide £500 a year for the intended wife during the life of the father, and so to make provision for the son and his intended wife during the life of the father. There was a term of 99 years as to all the property, except this so conveyed to the trustees, which was for a term of 100 years. It seems to have been an oversight that there should have been a term of 99 years in the one case and 100 in the other. Then there was a declaration that those terms, or some of them, were to indemnify the parties, so as to secure to the intended husband and wife that sum of £500 a year, and the provision made to the husband during the life of the father. Then there was a proviso that notwithstanding any of the trusts concerning Kilberry, the property to which I have particularly adverted, that the lot or piece of ground No. 44, and other pro-

perty which is specified, should "be absolutely sold and disposed of by the said James Digges La Touche and Edward S. Cooper or the survivor of them, or the heirs, executors, or administrators of such survivor, for the payment of all or any of the debts or incumbrances now charged upon all or any of the herein-before granted, and released, or assigned premises, provided the same be done by the desire and with the consent of the said Francis Synge and John Synge, or the survivor of them." My Lords, those I believe are all the provisions of the deed to which it is necessary for me to advert. Now after the execution of that deed the marriage took effect, and immediately after the marriage the interest on those bonds, and I presume on the other schedule debts, was regularly paid. Francis Synge seems to be a person from time to time very largely incurring his estates. Whether it was that the interest got into arrear or from what other cause I do not know, but in the year 1824, by a deed of 7th of July of that year, a provision was made whereby Francis Synge conveyed away his life interest to other trustees, the trusts being in the same way, to keep down the interest of the debts included in that schedule, and certain other debts which were mentioned in the schedule to that second deed, and on similar trusts or nearly similar trusts to those which had preceded, for the payment of those schedule debts, which included the former debts and some others, and subject to the payment of those debts. It was then to be in trust to Francis Synge, the only difference being that Francis Synge ceased to be legal owner, but he conveyed it away to trustees. There was a provision made for the payment of the interest of the debts, and beyond the interest of the former debts certain other debts, and the surplus to be paid to him for his life. So the matter continued to the year 1831, when Francis Synge died. He had made a will previously to any of these transactions. By that will he had given every thing real and personal to his son, John Synge, whom he made his sole executor. John Synge proved the will of his father, and therefore in every respect took the interest of his father. John Synge continued to pay the interest upon these bonds, and I presume upon the other debts also, till 1845, when he died. After his death there being, as alleged, a deficiency of assets, suits were instituted, and, amongst others, upon the 21st of January, 1848, the present bill was filed, or I believe had been filed before but was amended. It was filed by Mr. Simpson as the holder of and entitled to these bonds. The prayer of the bill was to this effect, that the bonds, one of which was dated the 30th of May, 1799, and the other the 10th of May, 1817, might be declared to be the same bonds as those referred to in the schedule to the indenture of the 17th of April, 1818; that relates to a matter to which I need not refer. In the schedule the bonds were described as one of £600 and the other £1600; in point of fact the one was £500 and the other £1700. A question might have been raised whether they were the same bonds, but no doubt can be entertained upon that subject. Then it prays, "that the sums secured by the bonds may be declared to have been well charged by said indenture

and schedule on such lands and premises therein and herein-before particularly mentioned, which was by said indenture vested in the said James Diggis La Touche and Edward Synge Cooper," and that it may be referred to the Master to take an account of what was due to the plaintiff, as the representative of John Simpson, as to the one, and on his own account as to the other, and he may be paid out in consequence of an arrangement. Now, my Lords, the question is what were the rights of Mr. Simpson, the bond holder, under that bond, it being included in this schedule. The Court of Chancery decided that that deed gave to Mr. Simpson an equitable right, as having an incumbrance or having a charge upon the lands of Kilberry, and the other lands so conveyed to La Touche and Cooper, and made a decree upon the footing of his having that right. One of the defendants, Mr. Synnott, who I may treat merely as an incumbrancer claiming under John Synge, and claiming as a judgment incumbrancer under John Synge, appeals against that decree upon the ground that that deed gave no right whatever to Mr. Simpson as a bond creditor, or at least no right which entitled him to come and claim relief against the estate. The question is, whether the respondent, as the representative of the obligee in the two bonds, is entitled to claim as a *cestui que* trust having a charge on the estate of Kilberry, and the other lands conveyed to La Touche and Cooper. My lords, I do not at all question or doubt the doctrine acted on in the cases of *Garrard v. Lord Lauderdale*, (2 Rus. & My. 451,) and *Walwyn v. Coutts*, (3 Sim. 14; s. c. 3 Mer. 307,) and other cases which have followed these decisions. They proceeded on the principle that where a person who is indebted makes provision for payment of his debts by vesting property in trustees for the purpose of discharging them, if this is done behind the backs of the creditors, and without communicating with them, the trustees do not become trustees for the creditors. The arrangement is one supposed to be made by the debtor for his own convenience only. It is as if he had put a sum of money into the hands of an agent, with directions to apply it in paying certain specific debts. In such a case there is no privity between the agent and the creditor. The debtor may at any time revoke the authority given to his agent, and may recall the money placed in his hands. The agent is the agent exclusively of the debtor, not of the creditor—no action could be maintained against him by the creditor—there is no privity between them. The same principle precisely applies where the debtor, instead of placing money in the hands of another, with directions to apply it in discharge of his debts, conveys real estate to him in order to its being converted into money by sale or mortgage, so that the money raised may be applied in discharge of debts. The person in whom real estate is so vested is a trustee, not for the creditor, but for the debtor. When, in pursuance of this trust, the trustee sells, and pays the creditor his demand, he does so in pursuance of the directions given to him by his *cestui que* trust, that is, the debtor from whom he has received the property, not in discharge of any duty which he owes to the creditor; the

debtor is alone the person to whom the trustee is to look. He, the debtor, may regulate the disposition of the property as he thinks fit—may order the proceeds of the property to be applied in discharge of his debts—and may then, if he please, revoke those orders, and give fresh directions, without regard to the interests of those for whose benefit the prior orders would have operated. My Lords, it would be idle, and worse than idle, to go through at any length the authorities upon this subject; they were all cited at the Bar, but the doctrine is too well established to need illustration. I would advert to two cases in which the doctrine is very clearly laid down, and was acted upon by my noble and learned friend, the then Lord Chancellor of Ireland; I allude to the cases of *Law v. Bagwell*, (3 Dr. & War. 398,) and *Browne v. Cavendish*, (1 Ir. E. R. 369; s. c. 1 Jou. & L. 606,) the first in 1843, and the second in 1844, contained in the Irish Reports. In the first case a person of the name of John Bagwell was indebted to Geo. Putland in the sum of £2000 (it is unnecessary to state how that arose) in respect of an estate which Putland had agreed to purchase, but it went off, he was therefore indebted to him. Putland, of course, had a lien upon that estate, and, being indebted to him, he conveyed other estates, not that upon which Putland had a lien, to two trustees, in trust to pay the debts mentioned in the schedule, which included Putland's £2000. Putland died, and his representative, finding that he was no party to the deed, filed a bill, being the *cestui que* trust named in the schedule, to have that £2000 paid to him under the trusts of that deed, but the Lord Chancellor held at once that there was no doubt upon the question; that was a case that came exactly within the principle of *Garrard v. Lord Lauderdale* and several other cases. *Browne v. Cavendish* was really upon the same principle; it appeared, perhaps, to go a little further. In that case certain lands were conveyed, called the lands of Newton, to trustees to sell and pay off a number of schedule debts of John Browne, and the surplus to John Browne in fee. Amongst the debts in the schedule were a bond or bonds due to another person of the name of Browne. The property having been put up for sale, Cavendish, the defendant, purchased it, and, there having been some question as to the extent of the debt due to those Brownes upon their bonds, it was arranged between Cavendish, the purchaser, and the vendors that Cavendish should retain in his hands £1000 of his purchase money, for the purpose therewith of satisfying that demand. He did retain the £1000, but afterwards, by an arrangement between him and the vendor, Browne, he handed it all over to him, and then the Brownes, the creditors, filed their bill, claiming to be entitled. The same principle was held to apply; the only distinction there being, that the purchaser had for a time retained the money in his hands in order to satisfy their debt. The Lord Chancellor held that it was still a mere arrangement to which the creditor was no party, and consequently the bill would not lie. Those two cases seem clearly to illustrate a principle which needs no further illustration. The doc-

trine was carried very much further in the case adverted to by my noble and learned friend, when this case was in argument, of *Gibbs v. Glamis*, (11 Sim. 584), reported afterwards in *Gibbs v. Gibbon*, and by the case which followed it in the court in Ireland of *Simmons v. Palles*. First of all that the Lord Chancellor of England held in *Gibbs v. Gibbon*, (5 J. 378), that the same principle applied, although there did undoubtedly appear to be a distinction. In that case there were certain persons who were adverse claimants in court of a fund of £4000 or £5000; amongst the claimants was a gentleman of the name of Hele. A bill had been filed upon the subject, and Gibbs had been made a party improperly; at least he had no interest in that suit. The parties who were claiming the fund wanted to divide it among themselves, and they concurred in assigning the fund to a gentleman of the name of Gibbon, and I think another, upon trust first of all to pay the trusts of the deed, and the transaction itself, and to pay the costs that were due from Hele to Gibbs; secondly, to pay a certain sum to Hele, and another sum to the other claimants, and to pay the residue to Lady Glamis. After that transaction had taken place Hele died; I suppose he must have died insolvent—that I do not know—but Gibbs filed this bill in order to have that trust executed, so that he might obtain the costs due to him, and the Vice-Chancellor thought he was entitled. It was taken by way of appeal to Lord Cottenham upon the ground that there was no substantial distinction between that case and the other cases to which I have adverted, and many others that went upon the same principle; so Lord Cottenham held, for he held, that although Gibbs was actually named as the party to whom those costs were to be paid, it was only one mode of expressing that Hele was to have what was due to him, and also that the costs due to Gibbs, that the circumstance of Gibbs being named in it made no difference, and that therefore he had no right to institute such a bill. That seemed a strong case, because the result was, that Lady Glamis, so far as that result was concerned, was to take the residue after paying the costs, and there were no means, at least at the suit of Gibbs, of claiming as against her the amount of these costs; but the truth was, that, applying the same principle, the only person who could have insisted upon that trust being performed was Hele's executor, it being a trust to pay to Gibbs that debt of Hele, and the trust was held to be a trust for Hele's benefit, and not for the benefit of Gibbs. That case was followed by my noble and learned friend in the case of *Simmons v. Palles*, (2 J. & L. 378.) I do not know that it is necessary to state the particulars of that case; there is a good deal of complication in it, but the short way of stating it appears to me to be this: two persons of the names of Triston and Hardy brought an action in which Simmons was their attorney, or two actions, one against two persons of the name of Goold, and the other against one of them. While that action was pending, the defendant agreed to pay to, and the plaintiffs, Triston and Hardy, agreed to accept, in liquidation of their demand, £1000, together with the costs as between attorney and client. The defendant, Palles, was in-

debted to some members of his own family, and he, by arrangement with them, mortgaged an estate of his own to Triston and Hardy, or rather to Hardy in trust for Triston; and Hardy first to secure £1000, and secondly to secure to Simmons the costs as between attorney and client of the action, and then to secure certain other expenses. Simmons was no party to the arrangement. Just upon the same principle upon which that case of *Gibbs v. Gibbon* had been decided, the Lord Chancellor held that Simmons had no title to institute such a suit. Now, my Lords, I began by saying that I did not at all question the case of *Garrard v. Lord Lauderdale*, and the other cases; neither have I the least doubt, I confess, of the propriety of those decisions. I say that with the more confidence, because I collect from the language of my noble and learned friend that he decided as he did in deference to what had gone before them. He rather doubted whether these cases had not gone too far. I confess, I think, that the principle being once established, it follows, as a necessary consequence, that those decisions were perfectly correct. The case is, however, obviously different when the creditor is a party to the arrangement. In that case the presumption is that the deed was intended to create a trust in his favour, which he therefore is entitled to call on the trustee to execute. So even though he had not been made a party, if the debtor has given him notice of the existence of the deed, and has expressly or impliedly told him that he may look to the trust property for payment of his demand, the creditor may thereby become a *cestui que trust*, and may acquire a right as such, just as if he had been a party to and had executed the deed. It was argued that in this case the facts afford irresistible evidence that the existence of the deed must have been made known to the creditor, and that he must be taken to have abstained from enforcing his bonds by action or otherwise, relying on the security afforded by the trust in her favour. The appellants deny that this is a just inference from the evidence; and even if it were so, they say that no such case is made on the pleadings. I do not think it necessary to go into this question, being of opinion that the respondents' title as a *cestui que trust* is good, independently of all considerations arising from notice and conduct. I think the circumstances show here that the scheduled creditors were objects of the settlor's bounty just as much as John the son, who took the estate subject to the debts. It may be that the trust for payment of the debts of Francis Synge was, during his life, a trust which he might vary or revoke at his pleasure. I think it was. Still, when such revocation, by his death, became impossible, I think that John his son could only take the estate as it was given to him; that is, subject to the schedule debts, which, according to the expressed provision of the deed, were to be liens and charges thereon. I come to this conclusion on the following grounds:—The trust in question was not to come into operation until after the death of Francis Synge, the settlor. Among the sums mentioned in the schedule, and directed by the settlement to become liens and charges on the lands in question,

is a sum of £1,500, described as an intended donation to the family of the late James Stewart. Now, so far as relates to this sum, there could be no claim except by virtue of the deed, it was a mere gratuity, or intended gratuity. The settlor certainly meant that it should be paid; and unless the settlor is to be considered as having conferred on the family a right to treat themselves as *cestui que trusts*, having a valid claim against the lands, the benefit which he intended them to have could never be obtained by them. But further, the first item in the schedule is thus described:—"To Miss Elizabeth Synge, by notes, bonds, or balance of accounts, due to her by the late John Hatch, and Francis Synge, Esq., about £5,500." The almost irresistible inference from this language is, that a portion at least of that sum of £5,500 consisted of simple contract debts, as to which therefore the creditors, in the then state of the law, could have no right against the real estate, independently of the deed. In such a case, as well as in that of the intended donation to the family of Stewart, the provision would be altogether inoperative, unless it is understood as having been intended to be a benefit to the creditor, as having been introduced for the purpose of giving her a security which she did not previously enjoy. For it certainly did not, in favour of the executor, make the debt a charge on the real in exoneration of the personal estate; so that if the creditor did not acquire a right to enforce the execution of the trust, no one ever could do so. I rather think that these remarks may apply to some of the other items of the schedule besides those which I have particularly mentioned. But I do not think it necessary to inquire further, because I feel satisfied that the intention must have been the same as to all the persons named in the schedule. It could not, I think, be that the settlor intended the trust to operate by way of bounty as to some of them, and not as to all. I have pointed out these special circumstances, as affording to my mind satisfactory reasons in favour of the construction put on this deed by the court below. But I do not wish to be taken as binding myself to say that even if no such specialties had existed, I should have come to a different conclusion. I doubt whether the doctrine acted on in *Garrard v. Lord Lauderdale*, and the other authorities which I have adverted to, applied to a case where the trust is to come into operation only on the death of its author, and where subject to the trust for payment of debts the lands charged are conveyed by way of bounty to a third person. I think it is at all events open to argument that in such a case the settlor must *prima facie* be understood to be dealing with his property as if he were disposing of it by will, as contemplating bounty throughout, or if it be contract, so far as the plaintiff taking the estate is concerned, I think it must still be construed as bounty in favour of the plaintiffs named as incumbrancers. This must of course be in each case a question of construction; I advert to the point only to guard against being misunderstood. It remains only that I should notice an argument pressed at the Bar by the counsel for the appellants from the proviso, late in the deed (p. 35,) authorizing

the trustees, with the consent of Francis Synge and John Synge, to sell any part of the property in question for the payment of the debts. This it was urged is inconsistent with the existence of a trust for payment of debts, for if such a trust existed there would have been a clear right on the part of the creditors to compel a sale even without the consent of Francis and John Synge. There is, however, no such inconsistency. The sale contemplated by the proviso is a sale in the lifetime of Francis Synge before the trust for the schedule creditors had arisen, and when the lands in question were by virtue of the one hundred years term subject to trusts in favour of John Synge and Isabella his intended wife. It is certain, therefore, that no sale could then take place under the prior trust in favour of the creditors, and the proviso relied on was introduced for the purpose, if Francis and John Synge desired it, of enabling the trustees to sell in spite of those prior trusts. On the whole, therefore, I think that the view taken by the court below was correct. I need not say that I have come to this conclusion with very considerable diffidence, knowing that I have not the concurrence of my noble and learned friend. I have thought it my duty to state my view of the case, that upon the whole the judgment of the court below should be affirmed.

LORD ST. LEONARDS.—My Lords, I have never been in the habit of lightly differing or raising questions when I have taken the liberty of tendering my opinion to your Lordships. Finding at the close of this argument that my noble and learned friend and myself did not agree, I at once wrote my view of the question just as I felt at that time, and I communicated it to my noble and learned friend; I now find that it did not make a very favourable impression upon him. I will, therefore, read what I wrote immediately after the argument. "A clear trust was raised by the settlement of 1818 for keeping down the interest on the debts in the schedule, subject to that trust the estate was settled (subject, under a term of 100 years, to a trust for indemnifying the estate called Glassnamullen, belonging to John, against debts, not incumbrances, of Francis,) upon Francis for life, with remainder to John absolutely. And it was provided that this estate should continue charged with the payment of all the debts and incumbrances of Francis specified in the schedule. I may just notice in passing that it is a little doubtful whether this includes all the charges or only the charges which are specified in this schedule,) which are to remain charges thereon exclusively and in exoneration of Glover's-alley and York-street property. And it was further provided that this estate may be sold in Francis's lifetime for the payment of all or any of the debts then charged on any of the estates conveyed or assigned with the consent of Francis and John, or the survivor." I will then just add an observation that that power only went to the incumbrances which were charged, and therefore that power was limited in that respect. "We find the debts in the schedule to include debts due from the late Mr. Hatch and Francis, and separate debts of each and an intended donation of £1500 to fulfil a supposed intention of Mr. Hatch, and two annuities, probably to servants, but how

granted, or to whom, does not appear." Now, the first question to be considered is, Could any of the creditors or other persons, for all, as we have seen, were not creditors, have filed a bill immediately after the execution of this deed for the payment of the interest of those debts and claim? Of course, the intended donation of £1500 could not have been enforced. But could the real creditors of Hatch and Francis, or either of them, have filed such a bill? The authorities clearly show that they could not, for they were no parties to the deed, no contract was entered into with them, no rights or remedies of theirs were prejudiced by the deed. Francis and John might at any time have revoked the trust for the creditors, for as they created so they could defeat the trust, and it did not follow that the creditors would have ever acquired a knowledge of either the trust or its revocation. This shows how wholly unaffected the creditors were by the transaction of 1818. There were two deeds executed subsequently to the deed of 1818, the operation of which I must now consider. The first was a deed of 1824, between Francis and John. Francis conveyed his life estate in part of the settled property, (including part of the property which had been made a security for the debts in the schedule to the deed of 1818,) to John and another person, to pay the annuities and interest of the sums of money and debts mentioned in the schedule, (which included all the debts mentioned in the schedule to the deed of 1818,) during Francis's life, and subject thereto for Francis for his life. Now the schedule to this deed of 1818 contains the former debts, and also other debts to the amount of £15,433, a sum exceeding the aggregate amount of the other debts. It could hardly be contended that the deed gave to the new creditors of Francis any right to sue; and, as to the old creditors of Francis, with the assent of John, it was really usurping upon their supposed rights, for, if the trust in the deed of 1818 was binding, and could not be revoked, Francis and John could not place any new debt on a par with the old, although this they assumed to do, and, in my opinion, they had power to make the additional charge. The other deed is the settlement of 1832 on John's second marriage, after the death of his father and of his first wife. This was said to be a confirmation, because it recites the settlement of 1818, but there is nothing on the face of the deed of 1832 either to confirm or to impeach the settlement of 1818. The settlement was of course operative, and John accordingly refers to it, and conveys his interest under it. If the creditors could not have maintained a suit immediately after the execution of the deed of 1818, did any such right accrue to them at a later period? It was insisted upon for the respondent that after Francis's death, at all events, the trust could not be revoked by John, and this appears to have been the opinion of the learned Lord Chancellor of Ireland; and further, even if the trust standing by itself could have been revoked, yet that the acknowledgment of it by the creditors, and the acting under it rendering the trust no longer revocable, and, therefore, it might be enforced by the creditors. It does not appear to me, my Lords, that the death of Francis varied the

case. The question is not, whether the trust can be enforced as between the parties, but whether the creditors can enforce it. It is a consequence of the trust not being binding on the parties who created it that they may revoke it. It does not at all follow where a trust is created for creditors by two persons that the survivor may, after the death of his co-owner, revoke the trust to the injury of the estate of the latter. But does this circumstance give a right to the creditors which, up to that moment, they did not possess. If the trust was originally one of which they might reap the benefit, although they could not enforce it, how can any shifting rights of the owners, as between themselves, give to the creditors a claim which, under the contract as it stood originally, the law denied to them? It is almost pedantry to go through the cases; the clear principle is, that a trust created for creditors, without bargain or communication with them, cannot be enforced by them. The case is altogether distinguishable from voluntary settlements; but as I have in former cases before me very fully stated my view of this point, I shall not repeat what is already in print. The cases of *Weylyn v. Coutts* and *Garrard v. Lord Lauderdale* show the continuing powers of the authors of such a trust as this, notwithstanding the creation of the trust, and in the latter case the Duke of York's trustees resisted the demand after the Duke's death, so that the death of the single author of such a trust does not give the creditors a right to sue. The case of *Gibbs v. Glamis*, which I have several times had occasion to refer to in deciding cases of this nature, shows that although a trust is expressly created in favour of a third person for the mutual benefit of all parties entitled to a fund, and one party is only to take the residue after the payment of costs, and the trusts have not been defeated, yet that any one of the persons creating the trusts may object to the payment of the costs to the person for whom they were provided, and the latter cannot file a bill for the execution of the trusts. This proves that, although it is the common interest of several parties that a trust created by them, all for a creditor, not a party to the arrangement, shall be duly performed, yet the creditor cannot enforce it." I may, perhaps, be excused, as it will save some trouble, for reading what I stated in the case of *Simmons v. Pallas*, although it is, no doubt, unusual to read what has fallen from oneself. Now, the observations which I made were these. They will be found in 2 Jones and La Touche, 505, 506. I say, speaking of the case of *Garrard v. Lord Lauderdale*, "It was settled before that case that if a man, without communication with his creditors, make a provision for paying them for which they have not bargained, he may, before the execution of the trusts, destroy them. The questions in that case were, whether, under the circumstances, the Duke of York had exercised that power, and whether it was competent for him to do so. Without going through the cases, I will refer to *Gibbs v. Glamis*, a remarkable case, one upon which learned persons differed, for the decree of the Vice Chancellor was reversed by the Chancellor, and I am not satisfied that some learned persons would not prefer the first decision. That

case was of this nature. A Mr. Hale claiming to be interested in a sum of £4000, filed a bill in respect of it Gibbs, the plaintiff, was, I suppose, properly a defendant in that suit. There was a contract as to who was entitled to the £4000, and the several claimants came to an agreement between themselves that they would divide the money among them in certain proportions, and that all the costs of the suit should be provided for, and, in particular, Gibbs' costs, and without any communication with him, they assigned the £4000 to trustees, in trust first to pay the costs and expenses of all parties to the deed in or about the suit of *Hele v. Fernie*, or of the deed or otherwise relating to their claims on the £4000 as between solicitor and client, and also the costs of Gibbs and other costs, and then to pay £800 to Hilbert, £1800 to Hele, and the residue to Lady Glamis, so that Lady Glamis had no right to receive anything until after payment of the costs to Gibbs. There was as express a trust to pay Gibbs his costs as to pay Lady Glamis the residue. The trustees received the money, and paid the other persons named in the deed, and were willing to pay Gibbs when Lady Glamis objected that he was not entitled to be paid out of that fund. The Vice-Chancellor held that the several parties to the deed had a common interest in the payment of Gibbs' costs out of the fund, that the agreement had only been entered into on the condition that payment of Gibbs' costs would be provided for out of the fund, and therefore that the case was not within the authorities, and he sustained the bill, but the Chancellor reversed that decree, and that reversal appears to have been submitted to. He said in his judgment that Hele was liable to pay the petitioner Gibbs his costs, and in order to protect him against the consequences of that liability, the parties provided incidentally that the plaintiff's costs should be paid out of the fund; that the question then was, whether that provision gave the party whose costs were to be so provided for, a right to institute a suit as a *cestui que trust*, he having no interest in the fund, not having been a party to the arrangement, and the arrangement having been made between the parties interested in the fund for their own benefit or convenience, and that the case was not distinguishable from *Garrard v. Lord Lauderdale*, and the other cases which had been cited, and he added that the objection was open to all the defendants, and that it was immaterial what interest the party who made the objection had." My Lords, the paper which I wrote goes on to say, "Like the case of *Worrall v. Harford*, (8 Ves. 4.) where the attorney could not recover his costs under the trusts. It was not that the trusts did not provide for them or that they were not to be paid, but simply that the attorney was not a *cestui que trust* under the trusts for payment of them. In such a case of course it is wholly immaterial that the trust cannot be revoked, or that any of the authors of the trust are dead, for the trust remains capable of execution and may be enforced, but not by the attorney. I do not place any reliance upon the cases before me in Ireland. I unwillingly followed the principle, and although I believe in one of the cases (*Browne v. Cavendish*), an appeal was lodged in this house, yet it was withdrawn. My

recollection may be inaccurate, but at all events the decisions were acquiesced in. It still remains to consider the alleged case of acknowledgment of the right of creditors by the Synges. Now, as was observed by Lord Chancellor Brady, no such case is made by the bill, and there is nothing in the answer which can be made use of against the appellant. The evidence, therefore, was not properly receivable; but this is not material, for upon examining the evidence, it proves no such case. It does not appear that the creditors ever saw the deed, and certainly no representations were made in regard to any security provided for them. It is therefore, the naked case of payment by the several persons in succession of interest on the debts, and to this they might be liable in various characters; but, however that may be, the payment of interest by the parties would not give a right to the creditors to sue the trustees, nor indeed does it appear how far the trustees acted in the trusts. The cases of *Garrard v. Lord Lauderdale* & *La Touche v. Lord Lucan*, (1 Hog. 448) show that some distinct act of dealing with the creditors must take place, in order to entitle the latter to enforce the trusts." Upon the whole, therefore, I submit to your Lordships, that this question is settled by the authorities, and that therefore the bill should be dismissed with costs, so far as it sought to have the benefit of the trusts of the deed of 1818, and remit the case to the Court of Chancery in Ireland, to do therein as shall be just and in conformity with your Lordships' judgment. I need not say, after the opinion which has been delivered by my noble and learned friend, that there will be no such consequence of this appeal, because as we are divided in opinion, the decision will, as a matter of course, be affirmed; but I thought it would be right to read what I had written, that it may be known to the profession what the effect of this decision is. I very much fear that it will entirely unsettle the law upon this subject. The law upon this subject is perfectly well known at present, and although I followed the decisions very reluctantly, yet they do proceed upon a principle which being carried out every man can understand. Now, I believe it will be found exceedingly difficult to understand in any complicated case whether the rule does apply or not. I was very glad to hear my noble and learned friend say that he did not dispute any of the cases, because that being so, this decision must be considered as standing by itself, and it must not be considered that this case has overruled the former authorities. In point of fact, but for that statement, I should have considered this decision by your Lordships' House, as overruling the case before Lord Cottenham, and clearly as overruling the case before me in Ireland of *Simmons v. Palles*, in which I followed that decision of Lord Cottenham's, because that was almost as strong a case as the case of *Lady Glamis*; but I do not know where we are to stop if we are to follow the case of *Lady Glamis*. If we are to say that that is not law, and to reverse it, which this house may certainly do, that I understand, and then it would come to this, that where there are several parties who have a common interest in a trust which they have created for the benefit of a person who is not a party to the deed, and who has no abstract

right to claim the benefit of the arrangement, yet the several parties being interested in it, any one party by whom it was created may have the benefit of it in order indirectly to give to all the parties who created the trust the benefit of the arrangement. But I understood my noble and learned friend to put this case upon two grounds, first of all, that the trust was not to come into execution until after the death of Francis Synge; next, that this was a bounty. I wish that I could concur in that view of my noble and learned friend. I confess I cannot. In the first place as to the fact, I do not apprehend that the fact is, that this trust was not to come into execution until the death of Francis Synge. The first trust was for the payment of the interest of debts due during the life of F. Synge. The trust therefore began immediately. F. Synge was then alive. Supposing the capital not to be paid until after his death, what then? both principal and interest were secured, the interest during the life, the principal after the death. If the creditors could not claim interest during the life of F. Synge, I think it is utterly impossible, in point of law, to hold that the creditors could claim the benefit of the principal after the death of F. Synge. Observe what the difficulty is, and that is the one great ground upon which these cases have proceeded. If you are providing for trustees' costs, and if you are providing for creditors incidentally, and with a view to your own arrangement, without any communication with the creditors, without even their knowledge of the instrument, the knowledge of which may never reach them, can anything be more inconvenient than that a creditor whose right you have not touched, an attorney who is employed by the trustees, and who may know nothing of the trust, should be enabled to file a bill and bring every body at once before a court of justice and claim the execution of the trust. Supposing that in this particular case the decision of the court below was right, I think it is utterly impossible to deny that the creditors might have filed a bill immediately after the execution of the deed. Could that be prevented? What was there to prevent it? Was not the trust just as operative for the payment of the interest as it was for the payment of the principal? Was not there a general charge upon the estate independently of the trust created for the payment of the interest during Francis's lifetime, viz., the corpus of the debts generally without restriction? What was the operation of that? To give to all those parties who were *cestui que* trusts an absolute lien; an equitable mortgage; the right to enforce the trusts for the payment of their capital as well as the interest. Then they might file a bill beyond all question. Is that within the authorities? I cannot persuade myself that it is. I think that in order to say that it is, you must overrule the case before Lord Cottenham, and certainly the last case before me in Ireland, to which I can have no possible objection if the law is put upon the right footing. Of course my anxiety is that the law should be perfectly settled and understood, but the effect of this decision would be, in my mind, to overrule all those cases. Then it is said by my noble and learned friend, (I wish I could concur in

that view, it would afford me very great pleasure, indeed, to agree with him upon this subject,) that this is a bounty. It is a bounty that could not be enforced. In the first place, it clearly could not be enforced, but if the parties themselves think that after they have created the trusts, as it is called, for a sum under £14,000, they can actually, by a deed without the concurrence of any of the creditors entitled to that prior charge, create out of the same property another trust for other creditors placing them *pari passu* with the first creditors for a sum exceeding the amount of the first debt, namely, between £15,000 and £16,000. It passes my conception. It was a trust they could not create. They do not make it subject to that former trust, but they make a common trust of former debts and of all the additional debts incurred by Francis, and that therefore shows what their intention was. But if it were a bounty as to any one I do not think it can be said (I do not understand my noble and learned friend to have said so,) that it was a bounty between the present settlers, because this settlement was for valuable consideration. There were a great many arrangements upon this settlement. It was of course the foundation of the marriage settlement. It was not a bounty in any respect. It was a contract, and the parties took the property beyond all doubt. The only question is, whether the creditors, who were no parties to it, suppose there were a bounty, could enforce it? Does it follow that they could enforce it? The question is, whether the creditors have the right? The question is not as to any body else, but whether the creditors could enforce it. Let us look a little at the consequences. Let any body read through that bill, and see the number of incumbrances. Francis went on making incumbrances, so did John to a very great amount indeed. Read through the bill which was filed in the Court of Chancery in Ireland, and see the number of persons who were necessary parties to that suit. Can anybody imagine that the settlement of 1818 contemplated involving the parties to that arrangement, and their descendants in the expenses which would be incurred in such a suit, bearing always in mind that it is not a question whether the trust is to be executed or not; that is not the question—but the simple and only question is, whether it is a trust which can be enforced by the creditors? That parties having adverse rights or mutual rights can enforce the trusts nobody can doubt. Take the case, before Lord Eldon, of the trustees. There was there a proviso that the trustees should pay all the costs occasioned in the execution of their trust. The attorney who was employed by the trustees filed a bill saying that he was a *cestui que* trust. His costs, no doubt, were provided for by the deed—but Lord Eldon held, and properly held, that he had no right as a *cestui que* trust, his demand was against, and the trustees' remedy was upon, their trust fund. It is a convenient decision, and, I think, a very just decision. It enables the parties to make arrangements as between themselves for paying claims upon them which may arise, and, in this particular case for example, it does not follow when the claim is to arise. The claim may arise after the death of every party to the deed, and pro-

bably would; therefore the death of the party does not seem to be so very material upon the authorities. It is quite clear that any costs occasioned after the death of every party to the said deed might and would be obtainable by the trustees under the trusts of the deed; yet the attorney, a *quasi* creditor, certainly has a right as a creditor of the trustees, which trustees are to be paid out of the fund. The creditors have no right whatever to come to a Court of Equity, and ask for the execution of that trust. I very much regret that I cannot concur with my noble and learned friend. I hope that this decision may not have the effect—which I very much fear it will have—of in a great measure unsettling that which I have, up to this time, considered to be the settled rule of law. I am very glad, as I said before, to have heard my noble and learned friend state he does not find fault with any of the decisions. That, I hope, will be considered to place this case as a decision of the House only upon the special circumstances, and the authorities, therefore, will be considered to remain, as they ought to remain, untouched and settled. The result, of course, will be, that the decision in the court below will be affirmed.

LORD CHANCELLOR.—Of course there will be no costs.*

Decree affirmed.

ROLLS COURT.

[Reported by RICHARD W. GAMBLE, Esq., Barrister-at-Law.]

HICKEY v. THE EARL OF MEATH.—Jan. 18.

Practice—Filing further affidavits—Cause set down—Costs of the motion.

Where a cause petition is set down for hearing by the petitioner, and he afterwards applies for liberty to file further affidavits in support of the petition, he must pay the costs of the motion, especially if he had any considerable time to file the affidavits during which he neglected it.

J. A. Lawson on behalf of the petitioner, applied for liberty to file further affidavits in addition to the affidavits already filed by the petitioner in the matter, and for an extension of the time for same. The time had now expired for filing affidavits, as the cause had been set down for hearing; but though it was in the list, it was not likely to be heard for some time, and so the respondent would have time to answer the affidavits when filed, and no inconvenience could arise. There is an affidavit accounting for the fact of the affidavit not being filed in time. It occurred by reason of the illness of the petitioners' solicitor, during which the time was let slip for filing the affidavits, and the cause was then hurriedly set down for hearing without their being filed.

Ormsby, for the respondent, applied for the costs of appearing on the motion, as the petitioner here

was grossly in default for not having filed his affidavit before he set down the cause for hearing. He set the cause down himself, and determined the time within which he could have filed the affidavits, and he should not, therefore, be permitted to file further affidavits as a matter of right, but as an indulgence, and this should be only upon payment of costs. By setting down the cause he precluded not only himself, but also the respondent, from filing further affidavits without the leave of the court; and thus, while he wants to file further affidavits himself, he has thrown on the respondent the expense of a motion to the court in case he should have required to file further affidavits. The court should not permit a petitioner in this way to harass a respondent who is anxious and ready to have the matter heard. The excuse which is attempted to be made here is totally insufficient, viz., the illness of the petitioner's solicitor, for it appears that this did not prevent the cause from being set down for hearing. There was a case* similar to this moved a few days since, where the respondent was given the costs of the motion. The only difference is, that there the case was actually in the Lord Chancellor's list of the day at the time the application was made; but this is also a proper case for allowing the costs of the motion when the petitioner, who now seeks the indulgence, was himself so far in fault.

MASTER OF THE ROLLS.—As I have mentioned on more than one occasion, there is very frequent inconvenience arising from the practice of permitting all parties to file affidavits up to the last moment; but, since it is the practice adopted by the Lord Chancellor, I am bound to follow it, and must therefore allow the additional affidavits to be sworn. Thus, since by the rule and practice of the court, a party is to be allowed to file additional affidavits at any time before the actual hearing of the cause, the course I have usually adopted is to make the costs of the motion costs in the cause, but where, as in this case, a petitioner sets down the cause for hearing himself, and then comes to ask for liberty to file further affidavits, it is a proper case for making him pay the respondent his costs of the motion. I will, therefore, give the respondent here £4 for the costs of the motion, and especially for this reason, that the petitioner might have filed his affidavit seven months since, and he has not sufficiently accounted for this delay. It is stated generally that the solicitor was unwell; but then he was not unwell for seven months. The petitioner may file the affidavit, with liberty to the respondent to reply in fourteen days, the petitioner to pay the respondent £4 for his costs of the motion.

Order accordingly.

* See *Martin v. Cooper*, (ante p. 123.)

* As to the costs of this appeal, see ante p. 121.

COURT OF EXCHEQUER.

MICHAELMAS TERM, 1854.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

BODKIN v. BARTON.—Nov. 8 and 9, 1854.

Consideration—"Natural love and affection"—Voluntary conveyance—Fraud—Estoppel—Parol evidence—10 Car. 1 Sess. 2, cap. 3, (27 Eliz. c. 4, Eng.)

A deed had been executed by A in the year 1833, granting to B and C an annuity of £80 a year and the only consideration set forth upon the face of the deed was "natural love and affection," but it appeared from the deed that the object of A was, that B and C should maintain and support the children of A, who was the only executing party to the deed. An arrangement had been made prior to the execution of the deed that C, (who was the wife of B,) should take charge of the children, and receive the annuity of £80 for doing so, and she accordingly did take them under her care and provided for them, and received the annuity for several years. In the year 1843, A executed another deed to an insurance company for valuable consideration, and an action having been brought, in which the validity of the deed of 1833 was brought in question, as against the deed of 1843, Held, that the deed of 1833 was not voluntary and fraudulent, because of the omission in it of a contract on the part of B and C to maintain the children of A, or because the deed was only executed by A, and not by B or C.

Held also, that the jury were not obliged to confine themselves to what appeared upon the face of the deed, but were at liberty to take into consideration the facts appearing by parol evidence, in order to establish whether the deed was executed for good consideration or not.

THIS case came before the court upon a bill of exceptions to the judge's charge. The question arose upon the admissibility of parol evidence to raise a consideration for the purpose of giving validity to a deed which had been executed in the year 1833, for the purpose of granting an annuity over certain lands. The grantor of the annuity, whose name was J. Blake, had come to Dublin with his two young children, he having lately become a widower, and a question having arisen as to the maintenance and support of these children, he wrote letters to Mrs. Bodkin, who was the grandmother of the children, and at whose house he had been previously residing, for the purpose of inducing her to take charge of his children, and after some correspondence it was arranged that she should take them under her care, and they were accordingly brought to her husband's house, where they were maintained. The agreement proved at the trial to have been made between the parties (although it was not reduced to a regular form) was, that Mrs. Bodkin should support the children for £80 a year until they should attain the age of 10 years, and for £100 a year after that period; and the deed in question was given in evidence, bearing date the 24th of

August, 1833, and granting to Mr. & Mrs. Bodkin an annuity of £80 per annum for this purpose, but it appeared to have been executed by J. Blake alone, and showed no other considerations upon the face of it than "natural love and affection," although the purpose for which it had been executed appeared from its contents, the arrangement for the education of the children having been entered into before the execution of the deed. The children had continued to live with their father until the year 1835, when they were taken to the house of John Bodkin, where they were maintained, and to whom the annuity of £80 was paid half-yearly from the year 1835 to 1847: and in the year 1851 a receiver was appointed over the lands liable to the charge. Another deed had been subsequently executed by J. Blake, (who was at present in gaol for debt) to an insurance company for valuable consideration, and it was in reference to the latter deed that the validity of the instrument of 1833 was called in question. At the close of the plaintiff's case, counsel for the defendant called upon the learned judge to tell the jury that the deed of 1833 was void as against the deed of 1843, as being made without consideration, there being no undertaking or binding agreement on the part of Mr. and Mrs. Bodkin to support the children of John Blake, and because it was executed by J. Blake alone; but his Lordship refused to do so, upon the grounds that he did not consider the omission of a contract upon the part of Mr. and Mrs. Bodkin to support and educate these children in the deed, was conclusive to show that there was no consideration to support the children, and that he was of opinion that the jury were not obliged to confine themselves to what appeared on the face of the deed, but were at liberty to take into consideration the facts appearing by parol evidence, and that if upon the evidence they believed that there had been an agreement by Mrs. Bodkin to support and educate the children upon being paid the annuity of £80 a year contained in the deed of 1833, such an agreement would be a valuable consideration from Mrs. Bodkin, or from the trustees, though not from the children, and if they believed that to be so, that they should find for the plaintiff. The jury found a verdict for the plaintiff. A bill of exceptions having been taken to his Lordship's charge, upon the grounds that the deed of 1833 was voluntary, as against the deed of 1843,

R. B. McCausland in support of the exceptions.—The only question in this case is, whether or not the deed of 1833 was voluntary and void as against the deed of 1843, which it is admitted was made for good consideration; and the incidental question, whether or not the parol evidence received at the trial was rightly admitted to prove the validity of the former deed. The deed of 1833 professed to have been made for natural love and affection, and no other consideration appearing upon the face of it, evidence to raise any other consideration is inadmissible, for the deed itself negatives such a presumption, and operates as an estoppel. Where a consideration is mentioned in a deed, such as natural love and affection, and the words, "and for other considerations," or words to that effect, are not used, evidence of any other consideration can-

not be given, although it is otherwise when no consideration at all is mentioned.—*Peacock v. Monk*, (1 Vez, 128,) per Lord Hardwicke. There are two things necessary in order to render a deed void in such cases—an appropriation of the property, and that voluntary. The statute in force in this country is 10 Chas. I, sess. 2, cap. 3, and its provisions are the same as 27 Eliz., c. 4, and under that Act it has been held, that a seller should be strictly bound to disclose the nature of the contract.—1 Sug. Ven. & Pur. 281, (9th ed.); and in the same work, p. 931, (11th ed.) the rule is thus stated:—“Any conveyance executed by a husband in favour of his wife or children after marriage, which rests wholly on the moral duty of a husband or parent to provide for his wife and issue, is voluntary, and void against purchasers by force of this Act,” (27 Eliz., c. 4); citing *Doe v. Rowe*, (4 B. N. C. 737); *Goodright v. Moses*, (2 Wm. Black. 1019); and in *Evelyn v. Templar*, (4 Bro. C. C. 148): “So many estates stand upon this rule that it cannot be shaken.”—per Lord Thurlow. *Doe v. Manning*, (9 Exch. 59,) is a leading authority upon the subject, and in it all the previous cases were discussed, and that case decides that a voluntary settlement of lands made in consideration of natural love and affection is void as against a subsequent purchaser for valuable consideration, although with notice of the prior settlement before all the purchase money was paid, or the deeds executed, and although the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and although there was no fraud in fact in the transaction—as in such cases the law will infer fraud. The natural duty of a parent to provide for his offspring is no consideration, as appears from the words of Parke, B., in *Jennings v. Brown*, (9 M. & W. 496):—“A mere moral consideration, which is nothing.” The letters that passed between Mr. Blake and Mrs. Bodkin in reference to the maintenance of the former's children cannot be treated as supplying ground for a contract, Mrs. Bodkin being married at the time, and her husband being no party to them; besides, these letters merely referred to the maintenance of the children while they remained with Mr. and Mrs. Bodkin, although the deed was for the natural lives of the children. [*Greene, B.*—This point was not made at the trial, and therefore we cannot go into it now.] The consideration appearing in the deed must be of some value. [*Greene, B.*—But the adequacy of it is immaterial.] When the father removed his children away from the house of Mr. Bodkin, the validity of the deed ceased. [*Pennefather, B.*—If the deed was good for a day, it was good for ever.] Any consideration arising out of a moral duty is invalid.—*Monkman v. Shepherdson*, (11 Ad. & Ell. 411); *Eastwood v. Kenyon*, (11 Ad. & Ell. 438.)

Charles Kelly, (with him *Blake, Q.C.*) contra.—Parol evidence may be given for the purpose of superadding a consideration to what appears in a deed, provided that it be not inconsistent with its other provisions. In *Villers v. Beaumont*, cited in *Mildmay's case*, (1 Rep. 17, b.) W. Beaumont, by indenture made between him of the one part, and one D of the other part, sold certain lands to the

latter for 30 years in consideration of £70, with remainder to himself for life, and remainder over, and a recovery was suffered to the same uses, one of which was to Richd. Beaumont, one of his sons, and to one Collet, (the daughter of D,) in tail, &c. Richard Beaumont and Collet intermarried, and it was found and averred that the deed was made, and the recovery had *tam in consideratione maritaggi prædicti inter Richd. Beaumont et Colletam habend. et celebrand.*, (to make it a jointure within the statute 11 Hen. 7,) *quam* of the said sum of £70, and it was adjudged that although there was a particular consideration mentioned in the deed, yet an averment in the same case might be made of another consideration which stood with the indenture, and was not contrary to it.” It has been decided that a fine *sur grant and render* cannot be averred by parol to be to any other uses than those mentioned in the fine, but that another consideration may be added, provided it be consistent with the one expressed.—*Lord Cromwell's case*, (2 Rep. 76. a.) In *Gale v. Williamson*, (8 M. & W. 405,) a father by deed assigned to his son, in consideration of natural love and affection, his dwelling-house and personal estate, and it was held that, in an action by the son against the sheriff for levying against part of the estate under a writ of *fi. fa.* against the father, it was competent for the plaintiff to prove that by a bond of even date with the deed of assignment he had bound himself to maintain his father's wife and children; and the jury having found that it was part of the same transaction, and made *bona fide*, the assignment was held to be not void as against creditors under 13 Eliz., c. 5. Lord Abinger in delivering judgment says: “A deed made in consideration only of natural love and affection is not necessarily void, though it may be made so by evidence, but if no fraud can be shown, and if a consideration be a fact given, the deed is good, and that consideration may be proved *aliunde*. In this case, therefore, it was competent for the plaintiff to give evidence of a valuable consideration, so as to disprove the existence of fraud, and that being so, it became a question for the jury, and there is no ground for disturbing the verdict.” Also in *Vernon's case*, (4 Rep. 3, a.) it was resolved that although the estate in the lands was given to the wife of the testator upon the express condition of performing his will, which imported a consideration for the creation of this estate, yet that it might also be averred to be for the jointure of the wife, “for the one consideration stands well with the other, and although it is not expressed in the deed, yet it may be averred;” citing *Villers v. Beaumont*. As to the deed binding the parties by estoppel, it must be remembered that estoppels are reciprocal, that is, they must bind both parties, and a stranger can neither take advantage of nor be bound by an estoppel.—Taylor on Evidence, page 96. The rule is thus laid down in Sugden's Vendor and Purchaser, p. 938, (11th ed.): “Notwithstanding the decisions as to voluntary settlements, it is seldom that a purchaser can be advised to accept a title where there is a prior settlement, for, though apparently voluntary, yet if a valuable consideration be paid or given, parol evidence might be ad-

missible of that transaction, in order to support the deed, and rebut the supposed fraud." Supposing the words in the deed had been "for natural love and affection and no other consideration," yet it is submitted that if the parties had subsequently made an arrangement that if Mr. Bodkin would undertake the education of the children, their father would act on the deed, that would raise a sufficient consideration. "Though a deed be merely voluntary or fraudulent in its creation, and voidable by a purchaser, (that is, may become void by a person purchasing the estate,) yet it may become good by matter *ex post facto*, as if a man make a feoffment by covin or without any valuable consideration, and the feoffee make a feoffment for valuable consideration, and then the first feoffor enter and make a feoffment for valuable consideration, the feoffee of the first feoffee shall hold the lands, and not the feoffee of the first feoffee; for, though the estate of the first feoffee was in its creation covenous and voluntary, and therefore voidable, yet when he enfeoffed a person for valuable consideration, such a person shall be preferred before the last."—Sugd. Vend. & Pur. 937, (11th ed.) *Prodgers v. Lougham*, (1 Sid. 133,) cited in Roberts on Conveyances, 485.) As to the adequacy of the consideration, the court will not go into the *quantum* of that, especially in family arrangements.—2 Sugd. Vend. & Pur. 935, 936. The same principle is recognised in matters of simple contract.—Chitty on Contracts, 29. It is clear that Mr. and Mrs. Bodkin intended to adopt the above arrangement, and the only apparent difficulty is, that under the Statute of Frauds a writing is necessary, and it does not appear that the agreement was ever reduced to writing; the only evidence of the consideration that can be adduced being therefore purely parol evidence. [*Pennefather, B.*—It is not necessary to argue that part of the case; for, if these letters and the parol evidence given at the trial were properly received, there was quite enough to carry the case: the only question, therefore, is, as to the admissibility of them in evidence. Is there any other case, besides *Peacock v. Monk*, upon that question?] In *Tanner v. Pyne*, (1 Sim. 160,) it was held that a grant of an annuity to the grantor's sister, although expressed to have been made for natural love and affection, might be proved to have been made in consideration of her marriage, and, therefore, entitle her to rank as specialty creditor of the grantor. The grantee under the present deed may be regarded as a stranger to the deed, and, therefore, the question of estoppel cannot arise. [They also cited *Clifford v. Torrens*, (1 You. & Col. C. C. 149.)]

Fitzgibbon, Q. C. in reply.—The statute does not mention *voluntary* conveyances, but the courts have held that voluntary deeds are fraudulent, and that a voluntary conveyance amounts to fraud. [*Greene, B.*—Perhaps it would be more correct to say, was evidence of fraud.] In *Doe v. Manning* there was no actual fraud. [*Greene, B.*—The question in this case is not whether or not this deed was voidable as against the deed of 1843, but simply whether or not it was voluntary. *Pennefather, B.* All through Lord Ellenborough's judgment in *Doe v. Manning*, he goes upon the hypothesis that the

first deed was voluntary, and therefore fraudulent.] The statute should be construed liberally, having been passed for the suppression of fraud. In *Cadogan v. Kennett*, (Cowp. 434), Lord Mansfield says, "The statute of 27 Eliz. c. 4, does not go to voluntary conveyances merely as being voluntary, but to such as are fraudulent." Suppose that this deed had been originally executed for a good and valuable consideration, as well as for natural love and affection, and that the former consideration had been suppressed upon the face of the deed, for the purpose of deceiving third parties, such would be a most mischievous practice, and not to be encouraged; besides, that this very suppression would amount to a fraud. All the cases in which a voluntary deed has been supported by matter *ex post facto* are referred to in 3 Sug. Ven. & Pur. 297, (3rd edition.) *Prodgers v. Lougham*, (1 Sid. 133,) which was the case of the sale of a property; and this is in itself a public act, and a feoffment particularly so: also *Parr v. Eliason*, (1 East. 92,) which was similarly distinguishable; and *Doe v. Martyn*, (1 N. R. 322); *Newport's case*, (Skin. 423); *Lord Burgh's case*, (Mod. 602,) which are all distinguishable upon the same principle. [*Pennefather, B.*—A case has been cited in which marriage was permitted to be given in evidence at the trial to support a deed.] That was upon the same principle, that marriage is a public and notorious act. It is admitted that in some cases parol evidence may be given in evidence; but the question in this case is whether, upon the entire evidence, the direction was right.

*PENNEFATHER, B.**—It is unquestionably a matter involving much consideration in what manner the court should deal with these exceptions; but, after having fully considered the authorities, we are of opinion that we shall not, by ruling in favour of the plaintiff, who claims under the provisions of the deed of 1833, violate any established rule of law, or adopt any new rule or principle of construction which should not, at this time, be applicable to those statutes; (for although there is, properly speaking, but one Irish statute upon this subject, yet the cases decided upon the statutes of the reign of Elizabeth are applicable, the provisions of the Act 10 Car. 1, sess. 2, c. 3, being taken from them.) Now I take it to be settled beyond all dispute, that if there be a voluntary deed, purely so, and another deed executed for valuable consideration, the former will be considered as fraudulent in the eye of the law and void, although the word "voluntary" does not occur in these statutes. The courts have put this construction upon these statutes, as being the safer course to pursue; and although, in some cases, much mischief may have resulted from this mode of construction, it is now too late for us to consider the reasons or grounds upon which this construction was adopted. These decisions do not, however, determine what is to be considered *a priori* a voluntary deed; nor do they decide that consideration and valuable consideration may not be shown by extrinsic evidence to have existed at the time of the execution of the deed, and, indeed, it could not be so decided consistently with many of the former cases.

* Pigot, C. B. was absent.

It has been argued, however, that although extrinsic evidence may be given for this purpose in certain cases, yet that you cannot give evidence of a consideration inconsistent with that appearing on the face of the deed. Now it is not easy to understand exactly what the meaning of this expression is. Every new consideration that does not appear on the face of the deed may be said to be inconsistent to a certain extent with what is set forth; but if it is possible to imagine any case in which such a consideration would not be inconsistent, I would say that it is the present one. For let us consider the deed. The consideration there expressed is love and natural affection, and, therefore, it may be consistently supposed that the object of the deed would be to provide in what manner that love and natural affection was to be carried out, and this appears to have been by making provision for these children. It appears that the father was a young man who had lately lost his wife, the mother of these children, and that he knew of no female to whom he might entrust them. Is not this a case in which a deed might naturally be executed for the payment of an annuity to some person who might be entrusted with the charge of these children? It appears to me that there was abundant proof given at the trial that this was the state of facts, both from the testimony of the witnesses and also from the letters that were produced, to which I have alluded in the argument. Now it has been admitted that parol evidence is admissible in certain cases of this nature to show what the real consideration is in a deed, and if it be so in any case for the purpose of showing that a consideration is not exactly that which appears upon the face of the instrument, I think that it may be *a fortiori* admitted in the present case, to explain in what manner the contents of the deed were intended to be carried out by the parties. I do not much feel the force of the objection that has been raised, that a fraud might be hereafter committed upon a purchaser acquiring the property in the lands twenty years or more after the execution of the deed; for he may if he look to the deed see the object of it, and he should then inquire as to the circumstance under which it was executed. If he does not see the deed at all, there is no suppression of the true consideration, and in such a case he would have no just reason to complain that the entire consideration was not all spread out on the face of the deed. If the facts connected with the execution of the deed were all set forth upon it, then it would clearly appear what the consideration was, and it is consistent with the authorities that have been cited that these facts may be shown by parol evidence. It is not necessary to detain the court further with observations upon this

part of the subject, inasmuch as by coming to this decision we are only affirming principles that have been already established in former cases, for the purpose of softening down the extreme rigour of the law, by showing that, in fact, there did exist a valuable consideration, which, in the present case, will be sufficient to support and carry out a very meritorious act done by a young widower in favour of his infant daughters. I cannot help saying that I feel much satisfaction in being thus able to give validity to this transaction.

GREENE, B.—There can be no doubt but that a voluntary conveyance is to be regarded as invalid, as against a subsequent purchaser for valuable consideration, no matter what the nature of that consideration may be; and the question, therefore, in the present case, amounts to this: whether the facts proved show that this was a voluntary deed, or whether there was evidence to show that a good consideration passed between the parties, sufficient to give this deed validity. It has been argued that we are not at liberty to go out of the provisions and contents of the deed itself in reference to any occurrence connected with it that may have happened before, or at the time of, or since, the execution of the deed, which does not appear upon the face of it: that proposition was, however, subsequently abandoned in the course of the argument. Then, if it cannot be established that no evidence is admissible for this purpose except what appears upon the face of the document itself, the next question for our consideration is; whether, or not, the facts that have been given in evidence, in reference to the transactions between these parties and the letters that have passed between them, afford sufficient proof of consideration to support this deed. It was for the jury to consider the nature of the facts, and other evidence laid before them for the purpose of deciding this matter; and I think it cannot now be said that there was no legal ground for allowing them to enter upon the consideration of these facts and circumstances. It appears to me that there is a contract which has been entered into upon the faith of this instrument, and upon the faith of which it has been expressly stated that this deed was executed; and I do not think that these exceptions could, by any possibility, be supported, unless we were ready to go so far as to say that there was no evidence at all in this case to show that there was a consideration existing between the parties.

PENNEFATHER, B.—I may add, that as to the *quantum* of the consideration, it appears to me that it was quite sufficient.

Exceptions overruled.

ROLLS COURT.

[Reported by RICHARD W. GAMBLE, Esq., Barrister-at-Law.]

IN RE MORGAN, A MINOR.—Nov. 8.

Minor—Ward of court—Guardian—Ward in England and property in Ireland—Receiver.

A being seized of large estates, all in Ireland, but being resident in England, died there, and by his will made B testamentary guardian to his daughter, a minor. B immediately applied to, and made the minor a ward of, the Court of Chancery in England, and got herself appointed guardian of the person and fortune. The minor's mother, being resident in Ireland, presented a petition to make the minor a ward of the Court of Chancery in Ireland, and to appoint a receiver over the estates. The court granted a reference to the Master to inquire whether B had been duly appointed guardian of the person and fortune, and if not, then to appoint a proper person as such with the directions usual in minor matters, B to have notice of all such proceedings; and also that the Master should have regard to the proceedings in England, and should report whether it was for the benefit of the minor that she should be made a ward of the Court of Chancery in Ireland, or that the petition should have been only for the appointment of a receiver, and reserved the question of costs.

Quære, can a minor who has been made a ward of the Court of Chancery in England be also made a ward of the Court of Chancery in Ireland?

THE petition in this case was presented by the mother of the minor. It stated that the late Hamilton Knox Grogan Morgan had intermarried with the petitioner, Sophia M. Grogan Morgan, in the year 1829; that there was issue of the marriage two children, daughters, one of whom was of age and married, the other, Jane Colclough, a minor of the age of 15 years. That under the will of the late Samuel Morgan very large real and personal estates, called the Morgan Estates, were bequeathed to certain persons as trustees, and under the limitations of the said will, and the events that happened, the two daughters of the marriage, Elizabeth Geraldine and Jane Colclough, were entitled thereto as tenants in common, share and share alike, for their respective lives, with remainder to the first and other sons of the said Elizabeth Geraldine in tail male and with remainder over. That by an indenture of settlement made on the marriage of the petitioner, the said Hamilton K. Grogan Morgan being seized of certain estates in Ireland, called the Grogan Estates, settled them to the use of himself for life, with remainder to the intent that the petitioner should have a jointure of £800 per annum thereon, and subject thereto conveyed them to trustees for a term of 500 years, to raise £10,000 for the younger children of the marriage, which was to be subject to the appointment of the petitioner. In January, 1854, the said Hamilton K. Grogan Morgan made a will, and thereby directed that all his property, after payment of his debts, should be divided equally between his two daughters, and appointed the Right Hon. John Hatchell his sole

executor. The petition further stated that the said Hamilton K. Grogan Morgan was not possessed of any real or personal estate in England, save what he had for his current expenses; that he died in London, where he was temporarily resident, having gone there in January, 1854; that petitioner was informed, while he was so temporarily resident in England, that he executed a deed in May, 1854, whereby he appointed Mrs. Jane Stratford Boyce of Westbourne Terrace, in England, guardian of the person and estate of the said Jane Colclough Grogan Morgan, but that the circumstances under which the same was executed were unknown to the petitioner; that the said Jane Stratford Boyce on the 15th of June, 1854, filed a bill in the Court of Chancery in England, describing herself as guardian and next friend of the said Jane Colclough Grogan Morgan, stating that she was resident in England and desirous to be made a ward of that court. Petitioner was not made a party to that bill, and the only defendants were John Hatchell, Robert F. Deane, and the said Eliz. Geraldine, his wife; that the entire of the said Jane Colclough's property was in Ireland, and that petitioner was advised that it was necessary that the said Jane Colclough should be made a ward of the Court of Chancery in Ireland; that the said Jane Colclough was about to be removed to Brussels under the charge of her paternal grand uncle, but petitioner was unable to say whether such was by the direction of the Court of Chancery in England. The petition prayed that the matter of the petition might be referred to one of the Masters, and that he might be directed to inquire as to the age of the said Jane C. Grogan Morgan, and whether the said Mrs. J. S. Boyce has been duly appointed by the said Hamilton K. G. Morgan to be and now is the guardian of the person and fortune of the said Jane C. G. Morgan; and in case it should appear that she was not such guardian, then that a fit and proper person or persons may be appointed to be guardian or guardians; that all the proper and necessary accounts might be taken of the real and personal estate of the said Jane C. G. Morgan, and if necessary that a proper suit or suits may be instituted for getting in and realizing the same; and that a receiver might be appointed to collect the rents and profits of the real and personal estate to which the said Jane C. G. Morgan may be entitled, and a proper sum allowed for maintenance, and the necessary directions given.

*Hayes, Q. C. (with him A. Hickey).—*The court had jurisdiction to appoint a guardian, even though the minor resided out of the jurisdiction; but then the guardian must be appointed within the jurisdiction. In *Johnston v. Beattie*, (10 Cl. & Fin. 87,) the Lord Chancellor says, "I apprehend that in all cases the court requires that there shall be a guardian appointed within the jurisdiction of the court, responsible to the court, and subject to its jurisdiction and its authority. If there be a parent residing out of the jurisdiction, the court interferes and appoints a guardian within the jurisdiction; if there be a testamentary guardian residing out of the jurisdiction, the court appoints a guardian within the jurisdiction, because it must have some person to look to, some person who is the representative

of the court, on the spot, responsible to the court, who shall have the care and management of the infant." In that case, although on a bill filed in England the Lord Chancellor had directed a reference to the Master to approve of proper persons as guardians, yet it was held that this did not decide that the minor was to be educated in England and to be maintained there. If the Court of Chancery in England had control of the person and property of the minor while most of the property was in this country, great difficulties might arise. For, if a receiver is appointed by the Court of Chancery in England over estates in Ireland, and recognizances are directed to be entered into, the Court of Chancery in Ireland will not enrol them in this country, having no jurisdiction without a bill filed. *In re the Earl of Portarlington*, (8 I. E. R. 369.) [Master of the Rolls.—I did not decide in that case that if an order was made in England, doing anything except appointing a receiver over property in this country, that it could not be enrolled in Ireland, and made effectual there.] The Act for enrolling in Ireland decrees and orders of the Court of Chancery in England made in minor and other matters to give them effect in Ireland refers only to the payment of money or accounting for it.—(41 Geo. 3, c. 90, amended by 5 Geo. 4, c. 111.)

Hickey.—It appears that in lunacy if a person is found lunatic by an inquisition in England, that though the appointment of the committee of the person may rest with the Court of Chancery in England, yet, if the property is in Ireland, the appointment of the committee of the estate rests with the Court of Chancery in Ireland. *In re Tottenham*, (2 My. & Cr. 39; s. c. 1 Jurist, 653.) The minor has real estates in this country, and they must be administered by some one, and it appears that the Court of Chancery in England cannot properly do so, and we therefore contend that we are entitled at least to have an order directing the appointment of a receiver to manage the estates in this country, and submit that we should also have a reference to appoint a guardian in this country.

Martley, Q. C. submitted that there was no necessity for making the minor a ward of court in Ireland, as she was already under the jurisdiction of the court in England, and her person and property were safe there. Even though all the property of the minor were in Ireland, the court in England had jurisdiction to appoint guardians there, which had been done. *Johnstone v. Beattie*, (10 Cl. & Fin. 42.) Both the person and property of the minor are safe under the jurisdiction of the Court of Chancery in England, and this petition is wholly unnecessary. [The following cases were also cited:—*In re Lewis*, (2 Mol. 48); *The Duke of Beaufort v. Beatty*, (1 P. W. 703); *Wellesley v. The Duke of Beaufort*, (2 Rus. 1); *Sill v. Worwicks*, (1 H. Black. 688, 677); *In re Houston*, (1 Rus. 312); *Johnstone v. Beattie*, (10 Cl. & Fin. 87); *In re McCullaghs*, (6 Ir. Eq. Rep. 323); *Roach v. Garvan*, (1 Ves. sen. 157); *Ex parte Mountford*, (15 Ves. 445); *Ex parte Myerscough*, (1 J. & W. 151); *Houlditch v. Donegal*, (8 Bligh, n. s. 302; s. c. 2 Cl. & Fin. 470); *In re Tottenham*, (2 My. & Cr. 39; s. c. 1 Jurist, 653); *In re Lord Portarlington*,

(8 Ir. Eq. Rep. 369); *Stephens v. James*, (1 My & Kee. 627); *In re Christie*, (9 Sim. 643); *Houlditch v. Donegal*, (Beat. 157.)]

MASTER OF THE ROLLS.—There is great difficulty in granting the order of reference which you seek in this case, for suppose I refer it to the Master to inquire and report whether the present guardian of the minor had been duly appointed, and what would be a suitable maintenance for the minor, proceedings may be going on in the two countries about the same matter at the same time, and with a contrary result in each country. Suppose that the Court of Chancery in England find that the guardian has been rightly appointed, and that in this country it is found that she has not been rightly appointed, and suppose that it is decided in England that £1000 a-year would be a proper maintenance, and it is decided here that £500 a-year would be a sufficient maintenance. I think the proper course would be for the Court of Chancery in England to make an order appointing a receiver, and, when it is made, that it be enrolled under the 41 Geo. 3, c. 90, and the Acts amending it, and then the order will have the same effect as the decree of the Court of Chancery in this country. But if an order of reference, as sought, is made here, and a contrary decision is come to there, the court here must carry out its own decree; and if the decree of the Court in England is enrolled in this country, it must also carry it out, and thus be in the dilemma of being obliged to carry out two decrees which are, as it were, at right angles with each other; but since the petitioner here insists upon his right to the order of reference, and there is some difficulty in the matter, I will refer it to the Master to say if it is for the benefit of the minor that the reference should be granted as sought for here, or whether it was only necessary to apply for the appointment of a receiver. As the property is large in this case, and the question is doubtful as to what course should be pursued, I think I may in this case make such an order, and will frame an order for the purpose.

Dec. 13.—The following order was made:

"Let it be referred to the Master to inquire and report whether Mrs. Jane Stratford Boyce has been duly appointed, and now is, the guardian of the person and fortune of the minor, Jane C. Grogan Morgan, and, if so, under what instrument; and if the said Mrs. Jane S. Boyce has not been duly appointed guardian of the said minor, let the said Master approve of some fit and proper person or persons to be guardian or guardians of the person and fortune of the said minor; and let the said Master inquire and report as to the nature, amount, and particulars of the minor's fortune, and what would be a proper sum to be allowed for her maintenance, and from what period same should commence, and out of what funds same should be paid, and with whom she should reside, and whether any and what proceedings should be taken in relation to her property, and whether a receiver should be appointed over same; and let the said Master report as to any other matters which he may think it for the benefit of

the minors to report in relation to; and let the said Jane S. Boyce, and the nearest relatives of the minor, have notice of the proceedings before the Master; and it appearing that proceedings are now pending in the Court of Chancery in England, where the minor is resident, to make the minor a ward of that court, let the Master be at liberty, if he shall so think fit, to have regard to the proceedings taken in the said court; and let the Master report whether he considers it to have been for the benefit of the minor, having regard to the proceedings pending in England, that the petitioner in this matter should insist on having the minor made a ward of the Court of Chancery in Ireland, and that the present order of reference should be made, or whether it would have been sufficient to have taken no proceedings except presenting a petition to appoint a receiver, with the view of the Court of Chancery in Ireland acting in aid of the proceedings in England, and the court doth reserve the question of costs of the petition, and the proceedings thereunder, and further order, until the Master shall have made his report.

AYERAL v. WADE.—Nov. 23.

Letting—Tenant to the Court—Occupation rent—Owner of life estate.

Where lands are to be let under the court, the owner in occupation of the mansion house and lands attached is not entitled as of right to be declared the tenant at an occupation rent, but this is an indulgence given by the court, and if the owner has it in his power to make a fair settlement for the creditors and does not do so, the indulgence will not be granted.

Where the owner had only a life estate, and was himself old, and his eldest son who had the first charge thereon, refused to have the owner's life insured for the benefit of another creditor on the life estate, the court refused a motion to have the owner declared tenant at an occupation rent, and with costs.

In this case the defendant, Thomas Wade, had been possessed of considerable estates, all of which were sold for the payment of incumbrances, except a portion in which he had only a life estate, viz., the lands of Fairfield, in the County of Galway. In the year 1813 the said Thos. Wade had settled this portion of the estates upon himself for life, with remainder to his eldest son, having previously charged the same with an annuity of £300 for his mother, Cath. Wade, during her life. At her death, about 1847, there was about eight years arrears of this annuity due, and she by will bequeathed said arrears to her grandson, the said son of Thomas Wade, and the greater part of these arrears, about £1,900, was still due and was now payable out of the rents and profits of the lands of Fairfield, to the said son of Thomas Wade. There were also several judgment and other creditors of the said Thomas Wade, the first of whom was John Kelly. The said lands of Fairfield had been held by the said Thomas Wade under the court at an occupation rent of £505 per

annum, which had been reduced to the sum of £314 per annum, on account of some necessary repairs, but his term of it having expired the said Thomas Wade sought to be again declared the tenant at an occupation rent. This was opposed by the creditor Kelly, on the grounds that Thomas Wade was now between 60 and 70 years of age, and he and his son might, if inclined, come to some arrangement for the payment of the creditors, and that if they refused to do so and wished to defraud the creditors, the court should not permit them the indulgence of remaining in possession of the premises.

F. Walsh for the defendant and respondent Thos. Wade, moved that William Brooke, Esq., the Master in this cause and these matters, upon having lodged in his office an undertaking signed by said defendant and his solicitor to become tenant under the court to the town and lands of Fairfield, Stonybat-ter and Gortarra, commonly called and known by the name of Fairfield, being the town and land of Carrowman, in the City of Galway, with the dwelling house and offices thereon, now in the occupation of said defendant, may fix a farm occupation rent to be paid by said defendant for the said lands and premises, and that said Master may be at liberty to execute to the said defendant a lease thereof, at such occupation rent for seven years, pending this cause and these matters, on said defendant entering into security by recognizance, as in such cases usual, or in case the court shall order said lands and premises to be let by public cant, then that the same may be let in one lot, and that it may be one of the conditions of the letting that the tenant shall be obliged to enter into security by recognizance for payment of the rent of said lands and premises.

R. M. Allen on behalf of the creditor Kelly, opposed the motion. This was only a collusion between the father and son to defeat the creditors. The annuity to Catherine Wade was let run in arrear and then the arrears were bequeathed to Thomas's son, only for the purpose of bringing them in before the debts due to the creditors of Thomas Wade. He was now between 60 and 70 years of age, and as Kelly's debt was charged only on the life estate, unless some arrangement was now made to pay him his demand, it would be altogether lost. If Thomas Wade and his son were induced to act honestly, they might insure Thomas Wade's life and pay the premium out of the profits of the lands; if they were not so inclined to act honestly, the court should not permit them by means of a collusion to retain possession of the mansion-house, demesne, and lands, and all the enjoyment of it, but they should be set up and let by the court to the highest and fairest bidder. This is a Court of Equity bound to do justice between man and man, and there is no inflexible rule for permitting the owner always to occupy the mansion-house at an occupation rent, especially when, as here, there is so large a portion of the lands attached. If this motion is refused, it may be the means of getting some settlement for my unfortunate client, who otherwise will never get a shilling.

MASTER OF THE ROLLS.—It is quite right in this case that the eldest son of Thos. Wade should make some arrangements for the payment of these

creditors. Thomas Wade should insure his life for the purpose, and then his eldest son could have the balance of the £304 a-year after payment of the premium, and his father and family will have the enjoyment of the premises. If no such arrangement is made, I must insist upon the strict rule of law being carried out, and the premises being set up and let. I believe that I was the first judge here to make the order permitting the owner to occupy the mansion house and premises under the court at an occupation rent; but then I did not, by so doing, decide that this should be always allowed in every case. I did not decide that if the owner is in possession of 500 acres of land, that he should be left in possession of it all; by no means, and if some arrangement is not made for the payment of the creditors in this case, but if the father and son insist upon their strict rights, then we must see what are their strict rights. It has never been decided that the owner has any right or is of right entitled to hold the mansion-house and land attached at an occupation rent. At present I will let this motion stand over to see if any arrangement will be made. Let the biddings take place in the meantime, but not to be confirmed until my further order.

Nov. 25.—The following order was made:—

“It having been stated to the court and admitted that the entire of said lands and premises, in the causes and matters mentioned, have been sold for the payment of debts affecting the inheritance, except the lands and premises in the notice mentioned, and it appearing that the defendant, Thomas Wade, is tenant for life of the said unsold portion of the lands, with remainder to his son, and it appearing that his said son has a charge vested in him affecting the inheritance of said lands and premises, such charge being the arrears of a certain rent-charge, which arrears amount to about £1,900, and which said arrears are payable out of the rents and profits of said unsold portion of the lands and premises, in priority to the petitioner John Kelly's demand, whose judgment is only a charge on the life estate of the said T. Wade, and it being stated that Thomas Wade is upwards of sixty years of age, and it appearing to the court that if the lands and premises in the notice mentioned were let to the said T. Wade for £314 a year, being the rent paid by him at the period of the expiration of his lease, no part of the demand of said petitioner John Kelly would probably be paid, as it would take seven or eight years to pay the prior claims of the said Thomas Wade's son out of the said rent of £314, after necessary costs and outgoings; and the court having suggested the propriety of a consent that an insurance should be effected on the life of the said Thos. Wade, to secure the said J. Kelly's demand, and that a portion of such rent should be applied to pay the premiums on said policy, and as Mr. Thos. Wade and his son will enter into no arrangement to secure said John Kelly's demand, the court doth make no rule on this motion, and doth decline to set aside the ruling of the Master of the 8th November, inst.; and let the de-

fendant Thos. Wade pay said petitioner John Kelly his costs of appearing on this motion when taxed and ascertained, and refer it to one of the Taxing Masters of the court to tax said costs.”

IN RE COATES AND THE RENEWABLE LEASEHOLD CONVERSION ACT.—*Jan. 13.*

Renewable lease—Fee farm grant—Owner out of jurisdiction—Reference.

Where one of several owners of the reversion of a renewable lease is out of the jurisdiction, it is not necessary in every case to have an order of reference to the Master.

There were six owners of the reversion, and one was out of the jurisdiction; the fee-farm grant had been executed by the other five owners. The interest in the lease was small, and the right to the renewal was not disputed. The court directed the Master to execute the fee-farm grant for the absent owners (it having been handed in at the time and endorsed by the Register) without a reference as to whether it was a proper grant, or whether the right of renewal existed; but this was done upon the responsibility of the petitioner, and to save expense.

THIS was a petition under the Renewable Leasehold Conversion Act, 12 & 13 Vic., c. 105, for the purpose of having a fee-farm grant executed by the Master for one of several lessors, who was abroad. By indenture of lease of the 17th May, 1793, Gustavus Hamilton demised to James Coates certain premises in the town of Athlone, to hold to the said James Coates, his heirs and assigns, for the three lives therein named, subject to the yearly rent of £1 15s., with a covenant for perpetual renewal upon the payment of a peppercorn renewal fine. All the interest of the said Gustavus Hamilton subsequently became vested in William Charles Mitchell by right of his wife, Jane Sophia, and in five other persons; and all the interest of the said Jas. Coates (the lessee) became vested in the petitioner, Charles A. Coates. By an indenture bearing date the 23rd November, 1852, and intended to be made between all the said parties representing the lessors' interest on the one part, and the said Charles A. Coates on the other part, in pursuance of the Renewable Leasehold Conversion Act, all the said parties representing the lessor granted to the petitioner, his heirs and assigns for ever, (by way of fee-farm grant,) all the premises comprised in the said lease of May 17, 1793, subject to the rent and covenants therein. This indenture was executed by all the parties representing the lessor except the said Wm. Chas. Mitchell, who was resident in Australia, out of the jurisdiction of the court, and there was no attorney or agent in this country competent to execute for him. The petitioner's estate had been since sold in the Incumbered Estates Court, and in order to make out title it was necessary for him to have said fee-farm grant executed by the said William Charles Mitchell, or by one of the Masters of the court for him. The petition prayed that one of the Masters of the court might be directed to execute said

deed of 23rd November, 1852, for the said Wm. Charles Mitchell so resident out of the jurisdiction of the court, or that it might be referred to one of the Masters to inquire whether the petitioner was entitled to have a fee-farm grant executed to him of the premises comprised in the lease of 1793, and whether the deed of the 23rd November, 1852, was a proper grant to be executed by the said William Charles Mitchell? and, if not, then to settle the terms of such grant; and, if necessary, to nominate a proper person to be substituted for the purposes of the Act in all proceedings under the petition, in the place of said Wm. Chas. Mitchell.

A. Hickey moved the petition pursuant to notice, and submitted that the court had jurisdiction, under the Renewable Leasehold Conversion Act, to direct the Master to execute the fee-farm grant for and in the place of the said William Charles Mitchell, who was resident out of the jurisdiction, without any reference being directed. The interest in the premises in this case was so small, and the right of the petitioner to the fee-farm grant was so clear, it having been already executed by the five other owners, this was certainly a case for the exercise of that jurisdiction. This right is given by the 17th, 22nd, and 27th sections of the Act. The 17th section first provides that when the owner of the reversion or person by whom such fee-farm grant should be made is under disability or out of the jurisdiction, that the guardian, trustee, or attorney shall be substituted in place of such owner, to do all acts which the owner might have done. Then the 22nd section provides that where the right to said fee-farm grant is disputed, or the person to grant the same is under disability, or out of the jurisdiction, "and there be no guardian, committee of estate, husband, or attorney respectively of such owner, competent to act under the provisions hereinbefore mentioned," or where the owner is not known, or there is an arrear of rent, &c. "it shall be lawful for the owner of the lease or under-lease in perpetuity (that is, the tenant,) who has required such grant or would be entitled to require the same, as the case may be, to apply to the Court of Chancery in Ireland in a summary way by petition, praying that a grant may be executed to him under this Act." The section then goes on to provide for other cases. The following sections then (that is, the 23rd, 24th, 25th, and 26th,) provide for cases where a right to renewal is disputed and reference to the Master is necessary, and direct the course to be adopted upon such reference. Then comes the 27th section, which says "that it shall be lawful for the court, upon the hearing of any such motion, made on notice as aforesaid, or upon any application made after the confirmation of the report, where it may seem fit so to do, on account of the disability, absence, or refusal of any person by whom the grant or counterpart respectively should be executed, or on account of any such person being unknown or unascertained, to order that such grant or counterpart, as the case may be, be executed by the Master or Remembrancer." This section would seem to refer to two classes of cases, one where a petition is presented on account of the owner being under disability or absent, the other the cases provided for by

the 23rd and following sections, viz. where a petition is presented on account of the right to renewal being disputed, or where a reference is necessary, and it provides that in either case the court may direct the Master or Remembrancer to execute the fee-farm grant. It would be too narrow a construction to give to this section to say, that the words "such motion" referred back only to the word "motion" in the preceding 26th section, which speaks of a motion to confirm the Master's report. Moreover, under the 23rd section, a very general jurisdiction is given, and upon the construction of the whole of the sections, we submit that court is not bound to order a reference to the Master, if there is no necessity for it, when, as here, there is a plain admitted right to the fee-farm grant.

Jan. 16.—MASTER OF THE ROLLS.—I have made the order in this case for the Master to execute the fee-farm grant under the Renewable Leasehold Conversion Act, in the place of Mr. Wm. Chas. Mitchell, who is out of the jurisdiction, but I do so upon the responsibility of the petitioner. Upon the literal construction of the 27th section, it would seem to refer only to the preceding section, and that a reference was necessary in every case; but, looking to all the sections of the Act, I am inclined to think that it was not intended that a reference is necessary to be made in such a case as this. I shall make the order to execute the fee-farm grant in this case, but I must do so upon the responsibility of the petitioner, and if I have not authority under the Act to do so, it will be a nullity.

The following order was made:—

"Let one of the Masters of this court in rotation execute the deed dated the 23rd November, 1852, now endorsed by the Register for and in the name of the said Wm. Chas. Mitchell, who is resident out of the jurisdiction of the court."

OSBORNE v. SMITH.—*Jan. 25.*

Practice—Decree—Appeal—Attachment.

The Master of the Rolls has no jurisdiction to stay the proceedings under a decree of the Lord Chancellor, pending an appeal to the House of Lords. Petitioner having moved for an attachment against a respondent for not executing a deed pursuant to a decree, pending an appeal to the House of Lords from the decree, the motion was directed to stand over, with liberty to the respondent to apply within a week to the Lord Chancellor for an order to stay the proceedings pending the appeal.

THERE had been a decree of the Court of Chancery in this case, by which the respondents, Arthur Smith and Robert Carey, had been directed to execute a conveyance to the petitioner, Osborne. The respondents had lodged an appeal to the House of Lords from this decree, and this appeal was still pending; the respondent in the meantime refused to execute the conveyance pursuant to the decree.

Gayer, Q.C. now moved for an attachment against the respondents, Arthur Smith and Robert Carey, for their contempt in not obeying the decree of the Court of Chancery by executing the conveyance to

the petitioner, as directed by the decree, and in pursuance thereof. In civil actions a writ of error generally stays proceedings, but this is because the record is supposed to be in the Superior Court, brought there by the Chief Justice for the purpose of being referred to; but this is not the case in Courts of Equity. In the case of *Huguenin v. Baseley*, (15 Ves. 182,) Lord Chancellor Eldon says, "It is settled by the highest authority, that of the House of Lords itself, that an appeal from a Court of Equity to that House does not stay execution of the decree; but it is consistent with that regulation that a special application may be made either to the House of Lords or to the court below, with this observation that it is much more expedient that the application should, if it can, be made to the House than to the court below, as the order made upon that occasion may be subject to appeal, and it is difficult to determine how far appeals may go." It is here said that the application should be made to the court superior to that in which the decree is made, but certainly the decree cannot be stayed by an order of a court of inferior jurisdiction. There has not been any order to stay the decree, and it not having been obeyed by the respondents, we submit we are entitled to an attachment against them. *McNaghten v. Boehn*, (1 J. & W. 50.)

J. E. Walsh.—I do not dispute the general doctrine contended for here, that an appeal from the Court of Chancery does not stay the proceedings; but then it is qualified with certain limitations, for any proceedings under the decree which would render the appeal from it nugatory are always stayed, and it is but reasonable they should be, for otherwise what use would be the appeal; for instance, an order will be made to stay proceedings to enforce an answer pending an appeal to the House of Lords from an order overruling a demurrer. *King of Spain v. Machado*, (4 Rus. 560.) [*Master of the Rolls*.—The Court of Chancery may suspend the execution of its decree pending the appeal, but show me that I have any authority to do so.] While the appeal is pending it would have the effect of staying the issuing of the attachment. There is a case in point in the Equity Exchequer here, where the court refused to compel a defendant to convey an estate pursuant to a decree, where there was a *bona fide* intention to prosecute an appeal against the decree, and therefore refused an attachment against him. The court will never enforce the decree as to the very subject matter that is appealed from, for this would render it nugatory. *Gwynne v. Lethbridge*, (14 Ves. 585); *Patten v. Wallace*, (5 I. E. R. 309.)

MASTER OF THE ROLLS.—I am inclined not to make any rule on this motion until an application is made to the Lord Chancellor. The case having been heard before him, the facts are in his recollection, and he can best judge whether it is right that the proceedings should be stayed pending the appeal; and it is clear that the Court of Chancery will not enforce its proceedings in such a manner as to render the appeal nugatory. The Court of Exchequer may be substantially right in the course adopted in the case of *Patten v. Wallace*; but I have no jurisdiction to stay the proceedings under

the decree of the Court of Chancery. At present let the motion stand over.

The following order was made:

Jan. 29.—"The court doth declare that it has not jurisdiction to stay the proceedings under the decree of the Lord Chancellor, pending the appeal; and it is accordingly ordered by the court that this motion do stand over to enable the said Arthur Smith and Robert Carey to apply to the Lord Chancellor to stay the proceedings, pending the appeal, with liberty to the petitioner to bring forward this motion again, if notice shall not be served within one week from the date of the order, to move before the Lord Chancellor."

COURT OF QUEEN'S BENCH.

TRINITY AND MICHAELMAS TERMS, 1854.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

GALGEY v. GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.—*June 14, Nov. 10.*

Action on the case—Diversion of subterraneous water-course by proprietor of adjacent land—Railway Company—Railway Clauses Act, (8 Vic. c. 20)—9 & 10 Vic. c. cxcvi, (local and personal.)*

In an action against a railway company for diverting the water from plaintiff's well, sunk in 1835, by reason of boring a tunnel or shaft in adjacent land, it appeared that the tunnel was constructed within the lines of deviation marked on the company's maps and plans—but 60 feet from the medium filum viæ; and that no part of the railway or tunnel passed through the plaintiff's premises. Held, without determining how far the tunnel might have been illegally constructed, in case it had been made through the lands of strangers, that it sufficiently appeared that the tunnel was made by the company in exercise of their rights of ownership over their own soil, and hence that according to the doctrine established by Acton v. Blundell, (12 M. & W. 324,) no action could lie

* 8 Vic. cap. 20, sec. 13—"When in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the same shall be marked accordingly; and where a tunnel is marked on the said plan or section, as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land in which such tunnel is intended to be made shall consent that the same shall not be so made."

Section 14—"It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, except within the following limits, and under the following conditions, (that is to say,) It shall be lawful for the company to make a tunnel not marked on the said plan or section instead of a cutting, or a viaduct instead of a solid embankment, if authorized by such certificate aforesaid from the Board of Trade."

Section 15—"It shall be lawful for the company to deviate from the line delineated on the plans so deposited, provided, that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent in passing through a town, village, or lands continuously built upon, than ten yards from the said line," &c., &c.

for the diversion of an underground water course, as the plaintiff could have no right of property in the same.

THIS was an action of trespass on the case for the diversion of a watercourse. The declaration contained three counts; the first stated that the plaintiff being seised and possessed of a freehold in certain lands near Cork, sunk a pump thereon which was supplied by certain underground streams, and that defendants on the 7th July, 1848, wrongfully and injuriously and under a false and colourable pretence of making a railway by virtue of certain Acts of Parliament sunk in another piece of ground near thereto a shaft or tunnel and thereby and by the continuing thereof diverted and carried away said springs from supplying plaintiff's pump. The second count stated that plaintiff was seised and possessed of a freehold in lands with the dwelling house and pump thereon, which said pump was supplied with water by certain underground springs, streams, and water courses, and that the defendant on the above day wrongfully sunk a shaft or tunnel in the lands, and by continuing the same and by erecting, putting down, and working certain engines and pumps, and by continuing said shaft, tunnel, engines and pumps, diverted and carried away said springs, &c., from supplying plaintiff's pump. The third count stated that the plaintiff was and is possessed of a certain close with a dwelling house thereon, in which close there was a certain spring or well of water, and that the defendants wrongfully drained, cut off, and carried away said springs and well. The defendants pleaded, not guilty. The cause was tried before Crampton, J. at the Spring Assizes, 1854, for the City of Cork, and the jury found a special verdict. The principal findings of that verdict were as follow: that the water which supplied the pump was from underground springs and streams; that the failure of the water was caused by the making of the tunnel by the defendants, who were a railway company incorporated by the 9 & 10 Vic. c. cxvi, (local and personal); that the railway was skilfully constructed, and that the drawing off of the water could not be avoided; that the tunnel was constructed within the limits of deviation marked on the company's maps and plans, but was sixty feet from the *medium filum viæ*; that the tunnel was made through land continually built on; that the tunnel was made in a direction away from the plaintiff's close; that no part of the railway or tunnel passed through the plaintiff's premises; that the water would have been cut off even if the railway had been made on the line as marked; that the pump was sunk in 1835, within twenty years before the bringing of the action.

W. Woodroffe, (with whom was *Deasy, Q. C.*) for the plaintiff, argued, first, that where a tunnel was marked out upon the railway plans, the company had no right to deviate from the line in question, without the consent of the owner of the land in which the same was intended to be made—8 Vic. c. 20, s. 13; secondly, that assuming such a right of deviation existed, such deviation could not in a case like the present be more than ten yards from the line described on the maps, inasmuch as the ground overhead was continuously built upon—8 Vic. c. 28, sec. 15; and

thirdly, that even assuming that the company had a right to deviate as they had done in the present case, the plaintiff was entitled to compensation for the injury he had sustained. The special Act for incorporating this company, 9 & 10 Vic. c. cxvi, does not give any greater powers than those contained in the Consolidation Acts. *The East and West India Docks, &c. Railway Company v. Gathe*, (3 Mac. & Gor. 163,) decides that the provisions of these Acts must be construed strictly against the company. Have the company, therefore, the power to make a tunnel not marked on these plans, in place of one so marked? There ought to be no deviation at all. The only allowance to make such, when not marked on the plans, is, when it is made in lieu of a cutting, and even then, only by permission of the Board of Trade—sec. 14. The 13th and 14th sections taken together, clearly prohibit any deviation. This question has been closed by authority. *Little v. Newport, Abergavenny v. Hereford Railway Company*, (22 L. J., C. B. 39; s. c. 12 Q. B. 752.) However, whether in the construction of a tunnel a railway company have or has not a right to deviate, that deviation ought not to exceed ten feet under present circumstances. This sufficiently appears by section 15, as it is found by the special verdict that the lands above the tunnel were continuously built upon. Lastly, assuming that *Acton v. Blundell*, (12 M. & W. 324,) is law, no right of action would accrue as between neighbouring proprietors for the subtraction of subsoil water, but we deny that the defendants here are neighbouring landowners within the meaning of that case. [*Lefroy, C. J.*—The plaintiff here can only recover by the strength of his own title.] Possession is a sufficient title against a wrong doer. [*Moore, J.*—Had the plaintiff ever possession of the subsoil water?] The verdict finds that he had it. [*Moore, J.*—As soon as it came into his well he might have had possession.] [He also cited the following authorities: *Beardmer v. The London and North Western Railway*, (1 Hall & Twells, 175); *Rowden v. Manchester, &c. Railway Company*, (1 Exch. 721); *Davis v. Meyers*, (17 Law Times, 304); *Gray v. The Liverpool and Bury Railway Company*, (4 Railway Cases, 241); *Mouchet v. The Great Western Railway Company*, (1 Railway Cases, 575); *Mason v. Hill*, (5 B. and Ad. 19.)]

W. H. Hartigan and *R. Longfield, Q. C.*, for the defendants.—The defendants are clearly entitled to have judgment upon this special verdict, both with reference to their rights under the statute and their rights at Common Law. The special verdict finds that this tunnel was constructed within the limits of deviation. The 13th section was intended merely to limit the company to the execution of the particular description of work specified upon the plans or sections, and did not mean to take away the power of making lateral deviations. At all events there is nothing upon the face of this special verdict to show that the company did not obtain the consent of the owners of the land through which the tunnel was made, and the burthen of the proof of that fact did not lie with the company. *Abraham v. The Great Northern Railway Company*, (20 L. J., Q. B., 322.) The company were not bound not to deviate beyond

ten feet in this case, as the tunnel did not pass through lands continuously built upon, but *under*, which word is used in every other section which refers to a tunnel. The deviation being rather beneficial than otherwise, there is no right to complain. It was for the protection of the owners of the adjoining lands, who do not complain, that these clauses were passed. Walford on Railways, 77. *Lee v. Milner*, (2 Y. & C. 620); *Doe v. Bristol and Exeter Railway Company*, (6 M. & W. 320-43.) The 16th sec. authorized the company to divert streams and watercourses in the execution of the works, and provides that the damage sustained by parties interested in the execution of the powers of the Act shall be compensated in the manner provided by that Act and the special Act. The plaintiff should, therefore, have applied for compensation in this case if he had suffered any injury under the Railways' and Lands' Clauses Act.—*London and North Western Company v. Bradley*, (6 Rail. Cas., 551.) However, at common law no action would have lain for the alleged injury. The exhausting of underground springs by means of operations carried on in their own lands, and so preventing same supplying the pump of another neighbouring proprietor, gives no right of action to the latter.—*Acton v. Blundell*, (12 M. & W. 324); there it was held, that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land in the usual manner, draws away the water, and makes his well dry. In this case the plaintiff had acquired no prescriptive right to his well, for the verdict finds that it was sunk in 1835, within twenty years before the bringing of the action. Now, this company are proprietors, or at least are entitled to the same protection; for it must be presumed, upon the facts stated on the special verdict, that the company are proprietors, and made the tunnel on their own ground, or that they made it with the consent of the owners of the soil. We are not driven to prove our title. *Abraham v. Great Northern Railway Company*. A title may be acquired by acquiescence. *East India Co. v. Vincent*, (2 Atk. 81); *Greenhalgh v. Manchester and Birmingham Railway Company*, (7 M. and S. 785.) Possession of the company was a sufficient proof of title. *Dyson v. Collick*, (5 B. & Ald. 600.) [They also cited *Smith v. Kenrick*, (7 C. B. 546); *Dickenson v. Grand Junction Railway Company*, (7 Exch. 282); *Williams v. East India Company*, (3 East. 192); *Watkins v. Great Northern Railway Company*, (15 Jur. 1027; s. c. 20 L. J. Q. B. 391.) *Deasy, Q.C.*, in reply.—The plaintiff is placed in this difficulty—suppose that he sought compensa-

tion under the statutes, he would be told that the deviation in the making of the tunnel had been contrary to the terms of the Act, and thus far that the provisions of the statutes for the purpose of obtaining compensation did not apply. The entire argument in favour of the deviation here must depend upon the 15th section, which refers to lateral deviations, as the 11th section does to vertical deviations. If the 15th section does not apply to a tunnel, there is no power in such a case to deviate at all; if it do, such powers must be confined to the strictest limits, and which limits have been exceeded. It has not been shown in the present case that at common law the defendants were clothed with any proprietary right. Independently of the Act of Parliament they had no power to purchase land, and it cannot be presumed that they did the acts in question in the exercise of their Parliamentary powers. *Acton v. Blundell* does not, therefore, protect them. If they rely on their proprietary rights, they have exceeded their right to acquire property; if, on the other hand, they rely on the protection of the Act of Parliament, they have exceeded its terms.

Cur. adv. vult.

Nov. 10.—LEFROY, C. J. now delivered the judgment of the court.—This case must be decided irrespective of the Acts of Parliament authorizing the making of this railway. By these authority has been given to the company to purchase land of the owners, but this right of purchase is conferred only with reference to the lands immediately adjoining the proposed line of railway. Therefore, inasmuch as the cause of action here does not relate to what was done to the lands immediately adjoining, those provisions of the Act of Parliament cannot be brought to bear upon this case. Secondly, if authority be given to a railway company to run a railway tunnel through the lands of another, that authority must be strictly construed and exercised according to the strict interpretation of the provisions of the Act. But what has taken place here is unaffected by that portion of the Act, for the excavation was not made through the lands of others under the authority of the Act, but in their own lands by virtue of their individual ownership. The action, therefore, being one for the diversion of a subterraneous watercourse, the principle of the case of *Acton v. Blundell* applies to the present, and the action accordingly cannot be sustained, as the act of the company, by which the subterraneous water was diverted, was done in the exercise of their right of ownership over their own property. Judgment must accordingly be given for the company.

Judgment for defendants.

ROLLS COURT.

[Reported by RICHARD W. GAMBLE, Esq., Barrister-at-Law.]

IRVINE v. DE RYTHER.—Jan. 29.

Practice—Cause Petition—Amendment—Setting down cause—Costs.

A cause petition filed in 1854 was allowed to be amended by stating the death of A, a respondent, in 1850 intestate, and that B as his heir-at-law was heir-at-law of the mortgagee, and as such claimed to be entitled to part of the fund in court, and by naming him as a respondent. The time being about to expire within which the cause could be set down, the notice of motion asked that it should be retained for a longer time. This was refused with costs.

A PETITION, in the nature of a petition of revivor, had been filed in this case, on the 7th of July, 1854, whereby it appeared that there had been a bill filed in 1811 to raise the amount of two mortgages, and the petitioner prayed that he might be entitled to have the benefit of the final decree made in the cause in the year 1815, and that he might be declared entitled to the amount now standing to the credit of the cause, and that the lands might be sold for payment of the petitioner's demand on foot of the said two mortgages and of five judgments, and that the receiver might be directed in the meantime to pay the rents of the lands to the petitioner. This petition had been filed in pursuance of an order of the 8th of May, 1854, directing the petitioner to revive the original suit within one month. It appeared from the respondent's affidavit that the receiver, who had been appointed over the lands at the commencement of the suit, had never passed any account until he was forced to do so in November, 1853, nearly thirty years, and that he had in the meantime paid large sums of money to the petitioner without any order of the court. The receiver had also been directed forthwith to vouch his account, and proceed to pass the same. The petitioner claimed to be entitled to set all the sums paid to him by the receiver against the interests due on foot of his securities.

Hickey moved that the petition in this matter be retained for one month after the passing of the receiver's account in the cause of *Irving v. Walker*, now pending in the Master's office, and that the petitioner may be at liberty to amend the petition in this matter by stating as follows: "Petitioner, by way of amendment, sheweth, that William Henry Brazier Walker departed this life in or about the year 1850 intestate, leaving W. H. Walker, his eldest son and heir-at-law, who is accordingly heir-at-law of the said Richard Walker, the mortgagee, and as such claims to be interested in the sum of £218 1s. 7d., and your petitioner names the said W. H. Walker as respondent thereto." As the petitioner had now revived the suit pursuant to the order, he should not be forced to proceed with it until the receiver's account had been inquired into. The receiver had been guilty of gross neglect in not passing his account for 33 years, but that is not the fault of the petitioner. The two Terms, within

which the petition should be set down for hearing, had not yet elapsed, but we make the application beforehand, to retain it, that it may not be dismissed. As to the amendment which we seek, we are entitled to it.

Deasy, Q. C. (with him *Beytagh*).—The course taken by the petitioner here is only for the purpose of delay. The order of the 8th day of May was an order to revive the old suit within one month. It was not filed within a month, and we moved to dismiss it, and it was then filed before the motion came on. Petitioner should not now get a further delay, by being permitted to retain the petition. We raise the question of the Statute of Limitations as a bar to the petitioner's claim. Moreover, there is no rule or order giving the court power to retain a petition before it has been actually dismissed, the authority given is to *reinstate* a petition which had been dismissed for want of prosecution. The fault of the receiver not having been made to account is altogether that of the petitioner.

MASTER OF THE ROLLS.—I will permit the petitioner to amend his petition as required by the notice, but cannot allow any further time for setting down the cause. The receiver has not accounted for 33 years, and if this matter is not brought to a hearing, it would be impossible to say how many more years he might be without accounting. Since the petitioner has asked by his notice for more than he is entitled to, he must pay the respondent the costs of the motion.

The following order was made:—

"Let the petitioner be at liberty to amend the petition in this matter without in any manner altering, erasing, or interlining the said petition as now verified by stating by way of amendment at foot of said petition, and after the affidavit to verify, or by endorsing thereon the said recited amendment, and let the date of such amendment be stated at the heading thereof, and let the Deputy Keeper of the Rolls place in the margin of such amendment a new title to the cause petition in accordance with said amendment; this order not to authorise the petitioner to omit to set down the cause on or before the last day of this Term, according to the general orders of the court, and let the petitioner pay the respondent the costs of the motion, when taxed and ascertained, and refer it to one of the Taxing Masters of this court to tax the said costs."

COURT OF QUEEN'S BENCH.

EASTER AND MICHAELMAS TERMS, 1854.

[Reported by SAMUEL V. PRET, Esq., Barrister-at-Law.]

KELLY v. MOLONY.—April 24, Nov. 7.

Office—Butter Taster—4 Anne, c. 14, Ir.—52 G. 3, c. 134—Special case.

The 52 Geo. 3, cap. 134, sec. 2, does not create or regulate two distinct and independent offices of weighmaster and taster of butter, but the latter is merely a function of the former office.

Quere, whether the office of weighmaster of butter under the last mentioned Act, is distinct from that

Z

of public weighmaster created by the 4th Anne, cap. 14, Ir.

The Court will refuse to entertain a merely speculative question referred to them by way of special case.

THIS was an action on the case for usurping the office of taster of butter in the borough of Sligo. The defendant pleaded the general issue, and the following special case was then stated by the parties for the opinion of the court: By the 52nd Geo. 3, chap. 104, sec. 2, it was enacted that before the 1st March, 1813, in every city and town corporate in Ireland, the chief magistrate and aldermen or the chief magistrate and burgesses, when there are no aldermen, should, under the seals of their respective corporations, where there should not be a public weighmaster appointed under any Act or Acts, or where any vacancy should happen before the said 1st day of March, 1813, nominate and appoint some one or more discreet and skilful person or persons to be a public weighmaster or joint public weighmaster and taster or tasters of butter in and for each city and town corporate. The borough of Sligo was then and is a town corporate, but at the time of the said Act of the 52nd Geo. 3, c. 104, Owen Wynne was acting as weighmaster of butter for said town. Before and up to and at the time of the passing of the Act of Parliament passed in the session of the Parliament of Ireland holden in the 4th year of the reign of Queen Anne, and entitled "An Act for regulating the weight used in this kingdom, and that salt and meal shall be sold by weight," the tolls and customs of the borough of Sligo and of the fairs and markets thereof, were the property of and belonged to the ancestors of the said Owen Wynne, and had devolved upon and were the property of Owen Wynne, the father of the said Owen Wynne, and so continued until the period of his death, when the same devolved on the said Owen Wynne, and so continued to the period of his death, when the same devolved upon John Wynne, and have since been and still are the properties of the said John Wynne, the said Owen Wynne so being the owner of said tolls and customs before and at the time of the passing of said Act of 52 G. 3, filled the office of weighmaster of said borough of Sligo under the said Statute of Anne, and in addition, the following entry appears in the books of said corporation, authenticated by their common seal: "Borough of Sligo, to wit, (seal.) James Soden having resigned the situation as weighmaster of Sligo, we do appoint and elect Owen Wynne, Esq., as weighmaster in the said town of Sligo. Given under our hands and seal the 30th day of June, 1808. James Soden, Provost. O. Wynne, Robert Manly, James Bulteel, William C. Armstrong, Thomas Holmes, Alexander M'Creery, Edward B. Ayres." He continued to fill the office of weighmaster and perform the duties thereof without intermission until his death, which took place in the month of December, 1841. In the books of the corporation of Sligo the following entry occurs, authenticated with the corporate seal. "Borough of Sligo, to wit, (seal.) At a meeting held on the 27th day of February, 1813, pursuant to notice, a letter hereto annexed, of which the follow-

ing is a copy, was read 'Being unable to attend at a meeting of the corporation of Sligo to-morrow on account of illness, I hereby depute O. Wynne, Esq., one of the burgesses of said borough, to act as provost during my confinement. Feb. 25, 1813, T. Soden, Provost.' Owen Wynne, Esq., having accordingly taken the chair, Mr. James Davidson was proposed to be appointed taster of butter for this borough, pursuant to the Act of the 52nd Geo. 3, for the better regulation of the butter trade. Resolved—That the said James Davidson be and he is hereby appointed taster of butter for the said borough. Witness our hands, February 27, 1813. Owen Wynne, Deputy-Provost. Thomas Holmes, W. C. Armstrong, Samuel Bulteel, Alexander M'Creery." Mr. Davidson being so appointed acted as butter taster for the borough of Sligo until the year 1842, when he resigned said office. On the 26th of February, the following entry occurs in the corporation book, and is authenticated by the corporate seal. "Borough of Sligo, to wit, (seal.) We, the provost and free burgesses of said borough, being duly summoned and this day assembled at the town of office in the said borough, do hereby unanimously appoint William Thomas butter taster for this borough, pursuant to the Act of the 52nd G. 3, for the better regulation of the butter trade. Given under our hands and the seals of the corporation this 26th September, 1842. W. Faussett, Provost. J. Wynne, C. Hamilton, H. Faussett, W. W. Wynne, H. H. Slade, O. Wynne, B. Carter." Mr. Thomas, being so appointed, acted as butter taster for the Borough of Sligo until the year 1850, when he resigned said office. On the 27th of May, 1850, the present plaintiff was appointed by the present corporation to the office of butter taster by an appointment by the present corporation in the following words: "Sligo, Town Council, May 27, 1850, We, the Mayor, Aldermen, and Councillors of the Borough of Sligo in council assembled, for the purpose of electing and appointing a person or persons to be taster of butter in the said borough, having been first for that purpose duly summoned, do hereby nominate, constitute, and appoint Thos. Kelly, Esq., of Sligo, taster of butter in and for said Borough of Sligo, in pursuance and execution of the powers vested in us, under and by virtue of the several statutes in such case made and provided. Given under our hands and the seal of the corporation this 27th day of May, 1850. Andrew Walker, sen., Alderman, Chairman; Isaac Cordukes, Alderman; T. H. Williams, Alderman; Henry Gorman, T. C.; James Harpur, T. C.; Moses Mands, T. C.; Michael Connolly, T. C.; Thomas Hudson, T. C.; E. H. Verdon, T. C.; Edmund Rochford, Town Clerk; (seal)." The defendant claims to act as butter taster of the Borough of Sligo, under an appointment from Mr. John Wynne, made *after* the resignation of Thomas and before the plaintiff's said appointment, and he denies the right of the corporation to appoint the plaintiff to the office he holds. It is admitted that he was so appointed by Mr. John Wynne, and that he is entitled to the office if Mr. John Wynne had power to make such appointment, or if the corporation had no legal right to appoint the plaintiff to the office of butter taster. Said Mr

John Wynne, under whom the defendant claimed, is the owner of the tolls and markets of the Borough of Sligo, and is also and has been, since the death of said Owen Wynne, the weighmaster of the borough under the statute 4 Anne, c. 14. He is also acting weighmaster of butter for said borough, under an appointment made by the old or former corporation, on the 18th day of April, 1842, and which was made under the following circumstances. After the death of Owen Wynne aforesaid, in the year 1841, Mr. John Wynne as weighmaster of the borough under the statute 4 Anne, cap. 14, acted as weighmaster of butter. He appears by the books of the old corporation of said borough to have been afterwards appointed weighmaster of butter by the following writing or minute, which is duly authenticated by the corporate seal of the said borough: "Borough of Sligo, to wit. We, the Provost and free burgesses of this borough, being duly summoned, and this day assembled at the Town Office in said borough, do unanimously nominate, constitute, and elect John A. Wynne, Esq., to be the public weighmaster and inspector in and for the town, port, and markets of Sligo for the weighing of grain, butter, hides, tallow, and all other commodities, in the room of the late Owen Wynne, Esq., deceased. As witness our hands and the seal of the corporation this 18th day of April, 1842. Wm. Faussett, Provost; B. Carter, R. B. Wynne, Owen Wynne, John Ormsby, W. W. Wynne, H. H. Slade, Henry Faussett." The defendant contends that the corporation have no right to the office of butter taster at all, and that the plaintiff has no right to that office under their appointment; that the said John Wynne, in right either of his office of weighmaster under the statute of 4 Anne, c. 14, or of weighmaster of butter under the appointment of the 18th day of April, 1842, is the taster of butter, and entitled either to perform the duties of that office in person, or to appoint another person to perform those duties of that office in person, or to appoint another person to perform those duties, or, at all events, that even if the offices of weighmaster of butter and taster of butter are distinct offices, yet that the right of appointing the taster either does not exist anywhere or is in the weighmaster for the time being, and consequently was in said John Wynne when he so appointed the defendant. It hath been consented to and agreed upon that the fact of the defendant acting as butter taster for the borough of Sligo, after the appointment of the plaintiff by the corporation, shall be admitted, and that no question shall be raised in this case except as to the respective rights of the corporation of Sligo, and Mr. John Wynne, to appoint the butter taster of the borough of Sligo. The question arising out of the said facts, and humbly submitted for the opinion of the court, is, whether, under the aforesaid circumstances, the corporation of Sligo had a right to appoint to the office of taster of butter for the borough of Sligo, at the time they so appointed the plaintiff to that office. If the court shall be opinion that the corporation were so entitled to appoint said plaintiff, and that, under the circumstances aforesaid, the plaintiff is entitled to maintain this action that there shall be a verdict entered for the plaintiff for six

pence damages and six pence costs, and that if the court shall be of opinion either that at the date of the plaintiff's appointment to the office of butter taster was legally full, or that the right of appointment thereto belonged to said Mr. John Wynne, or that no such right existed in the corporation, or that, under the circumstances aforesaid, the plaintiff is not entitled to maintain this action, then there shall be a verdict entered for the defendant with 6d. costs.

A special case had likewise been agreed upon in the cause of *Kelly v. Wynne*, in which the point raised was respecting the question, whether the appointment of weighmaster of butter for the borough of Sligo was a distinct and separate office from that of weighmaster of Sligo under the 4th Anne, c. 14, or was included in the latter, and whether, assuming the former to be a distinct office, the patronage of that office was vested in the corporation of Sligo. The latter case was argued before *Kelly v. Moloney*, and stood for judgment until that case should have been heard. During its argument, however, the court were incidentally apprised that by an arrangement between the parties, in *Kelly v. Wynne*, it had been agreed that, whatever might be the event of the suit, no disturbance of the present holder should take place during his tenure, but that it should only bind the future disposal of the office. The court, therefore, strongly animadverted upon the parties having thus called upon them to decide upon a merely speculative question, not affecting immediate rights, and they refused to pronounce judgment in that case. In *Kelly v. Moloney*, on the other hand, the existing tenure of the office was in dispute. The following points were noted for argument: first, that the office of taster of butter is an office distinct and separate in corporate towns from the office of weighmaster or weighmaster of butter under 52 Geo. 3, c. 134; secondly, that in Sligo the appointment of taster of butter belongs to the corporation and not to Mr. John Wynne; thirdly, that the plaintiff was duly appointed and was the legal taster of butter for the Borough of Sligo.

Lawson, (with whom was *Sir Colman O'Loughlen, Q. C.*) for the plaintiff.—The question which arises in this case is as to the respective rights of the Corporation of Sligo or Mr. John Wynne to appoint to the office of taster of butter for that borough, under the 52 Geo. 3, c. 134, s. 2. If at the time of the appointment of the plaintiff the office was in fact full, and that Mr. Wynne was the rightful holder, the defendant must have judgment. This question lies in a narrower compass than that recently argued concerning the office of weighmaster, admitting for the purpose of the present argument that Wynne is both general weighmaster and public weighmaster of butter under the 52 Geo. 3, c. 134, sec. 2; by virtue of the former office he can appoint no deputy, and of the latter, though he may appoint a deputy weighmaster, he cannot appoint a taster of butter, and the latter could appoint no deputy to the sale of butter. The prior Acts relating to the butter trade, the 19 & 20 Geo. 3, c. 36, and 21 & 22 Geo. 3, c. 22, Ir., whereby tasters are to be appointed, relate only to the City of Dublin. The 52 Geo. 3, c. 134, is the first general Act respect-

ing such appointments. It is clear that that Act contemplates two *separate* and distinct offices of weighmaster and taster, although both may happen to be vested in the same individual. By section 2 of that Act the chief magistrate and aldermen, where there are aldermen, of any city and corporate town in Ireland (save Cork) before the 1st of March, 1813, where there shall not be a public weighmaster or joint public weighmasters appointed under any former Act or Acts, or where any vacancy shall happen before that day, "shall nominate and appoint some one or more discreet and skilful person or persons to be a public weighmaster or joint public weighmasters and taster or tasters of butter in and for such respective city," &c. A paragraph of section 3 clearly shows the intention of the Legislature that the officers should be several. It provides that the public weighmaster "shall provide or cause, &c. a sufficient and convenient weigh-house or weigh-houses in each city, or the suburbs thereof, &c., together with weights, beams and scales, branding irons, and other necessaries, &c., &c., and then and there weigh, brand, and mark all such butter and casks as by this Act they are required, such butter being first tasted and approved of by such taster or tasters, which they are hereby required to do." This shows that the duties of the respective offices are different. The 4th and 5th sections are conversant with the subject of the removal of these officers, and show that they are distinct. These sections also negative the point which may be made at the other side that the corporation had only a right to nominate for once to the office, and were then *functi officio*. If the corporation have a power to remove one officer, it shows that they have the power of fresh appointment, and the fact of their being required to appoint before a certain day did not derogate from the continuing right. The form of the oath prescribed by section 6 is conclusive to show that the offices are distinct. "I, A B, do swear (or affirm) that I will diligently and faithfully execute the office of public weighmaster or taster of butter, as the case may be." Wynne's appointment was not made under the 52 Geo. 3, c. 134, but only under the statute of 4 Anne; he had, therefore, at all events, no right to appoint a deputy as butter taster, which appointment was only vested in the corporation. The 99th section of the Municipal Corporation Act, (3rd and 4th Vic, cap. 108,) not only recognizes the severalty of the offices of weighmaster and taster, but also the right of the corporation to appoint to the same, subject to the removal of the officers by the Lord Lieutenant.

Dir and Fitzgibbon, Q. C., contra.—The plaintiff must recover upon the strength of his own title, and he must therefore satisfy the court that the corporation has a right to make this separate appointment. The facts in this case are wholly different from the former, where, so far as the record stood, it appeared that Mr. John Wynne was only the weighmaster under the Statute of Anne; but here he is admitted to have been such under the 52nd G. 3, c. 134. [*Lefroy, C. J.*—It is an abuse of the Act of Parliament to come to the court with a special case under these circumstances. You appear

to have called upon the court to decide upon a speculative question, which does not in fact arise.] *Moore, J.*—It is an abuse of the jurisdiction of the court to send in such a case, seeing that you now admit that Mr. Wynne is the appointee of the corporation to the office of weighmaster. That is a merely speculative question, which you could have argued upon the mooted question of the appointment of butter taster. [*Lefroy, C. J.*—The Act of Parliament which enables the parties to send to the court a special case, was passed for the purpose of enabling them to take a short cut towards the disposal of the case, but certainly not to enable them to call on the court to act as their advising counsel, and if this course be permitted to be taken, the court will be diverted from their proper business and will be called upon to act as counsel to the parties in deciding speculative cases. What I find fault with the parties here is, their having thus occupied the time of the court with a question which perhaps may never arise.] The independent office of "taster" is not to be found in any of the previous local Butter Acts. [*Perrin, J.*—I call attention to a provision in the Act which does not appear to have been noticed. It says that the Act shall commence and take effect from the 1st of April, except where any other time shall be expressly mentioned. The 3rd section specifies no particular time; hence, that takes effect from the 1st of April, 1813. This section enacts that every public weighmaster already nominated and appointed, or hereafter to be nominated and appointed, shall do the duties specified in the Act. It therefore appears to contemplate the vesting of those powers in the *then* weighmaster after the 1st of April.] It is to be observed that in no part of the Act the word "successor" follows that of taster of butter. The 2nd section evidently puts the weighmaster in the same category as a deputy. The form of the oath in the 6th section, which has been argued as applicable to a special office of butter taster, can readily be explained. The separate portion of the oath relating to the taster was that which was to be taken exclusively by an existing weighmaster, who had already been sworn. Both offices must be filled by the same person. The 4th section, which relates to the removal of the officer for misbehaviour, empowers the mayor, &c., to remove the taster for the misbehaviour of the weighmaster, thus showing that only one person was intended. Section 11, which speaks of the alienation of his office by the weighmaster, is silent with respect to the taster—Sec. 21. The fact is, that the office of taster is only one particular function of that of weighmaster of butter. The 19, G. 4, c. 41, does not conflict with this construction.

Sir C. O'Loghlen in reply.—It is not necessary to hold that these places must be held by two different persons; it is sufficient to hold that they are, in themselves, two distinct offices. There was no such office as that of taster of butter until 1780. It is clear from the wording of the 21 and 22 G. 3, c. 22, and the previous Acts relating to Dublin, that at the time of the passing of 52 G. 3, c. 134, there were in Dublin two separate offices. We contend that that which was found to be advantageous in Dublin, was by the general Act meant to be extended

to the whole of Ireland. In the 6th section, relating to the oath, there occurs these words "together with the taster." It must be conceded that this clause is very inaccurately worded, but it will be necessary to mould the oath differently from how it stands in the Act, in order to meet any case at all. [*Lefroy, C. J.*—Might not the officer be at liberty to appoint a deputy to execute, not the entire, but a portion of the duties of the office?] The 17th section treats of fees to be paid to the person so tasting. [*Perin, J.*—I think that section goes to establish the distinction taken by my Lord Chief Justice between the entire office and one of its functions.] The 7 and 8 G. 4, c. 62, shows the distinction of the offices, when it provides for the abolition of the duties of butter taster in certain inland towns, repealing the former Act with reference to them. [*Moore, J.*—That is only convenient with the particular functions of the larger office. There is nothing in that Act which prevents this construction.] The 99th section of the 3 & 4 Vic. c. 108, likewise leads to this distinction between the offices. It is true that the 52nd G. 3, cap. 134, is badly framed; but the intention of the Legislature is sufficiently apparent. The present is not a freehold office, being only held at the pleasure of the Lord Lieutenant, as the appointment bears date the 18th April, 1842, which was after the passing of the Municipal Act.

Curr. adv. vult.

Nov. 7.—The judgment of the court was now delivered by

LAWSON, C. J.—These special cases came before the court for our opinion with respect to the relative titles of the parties claiming to be weighmasters and butter tasters of Sligo. With respect to the question reserved relative to the right to the office of weighmaster of butter, it turns out upon the argument of the second case that the former one was a merely speculative case, got up for the purpose of getting the opinion of the court where no real controversy was at present depending between the parties, and therefore that the occasion on which alone the Legislature has authorised the parties to call for the summary opinion of the court does not exist. This is, as has already been observed in England, the same thing as making the court advising counsel to the parties, and as was done in the case where that remark was made, so we shall here decline to pronounce an opinion upon that question in order to prevent a manifest abuse and a contravention of the intention of the Legislature. The fact was this, that when counsel came to argue the case of the butter taster, it became necessary to admit a particular fact, which was suppressed in the other case, and which, when once disclosed, showed that there was nothing to argue about therein, namely, that the office of weighmaster of butter was filled since 1842. There is no impeachment of the claim of the present holder, but the parties appear to desire merely to know with reference to a future day with whom the power of appointment will rest. We, however, do not sit here to give prospective opinions, and so we refuse to give an opinion upon that case. The case which I have adverted to as having occurred in England was *Doe d. Duntre v. Duntre*, (6 C. B. 100.) The court there during

the argument began to suspect that it was a case to get their opinion, and required affidavits to be made with reference to that. *Wilde, C. J.* said, "If the court were to entertain this question, every petty doubt that might arise upon a will or a marriage settlement might be made the subject of discussion before the court." However, with regard to this case of the office of butter taster, to which we are indebted for the discovery of the other case, we are prepared to state our opinion with reference to the construction of the 52 Geo. 3, c. 184. It appears to us that what is called "taster of butter" is in fact a mere function of the other office of weighmaster of butter, and that no such thing as an office of butter taster exists *per se*. Mr. Wynne, having been in possession of the office of weighmaster of butter since 1842, is therefore in truth *de facto* the taster of butter. That is, in other words, he discharges the functions of taster of butter, which by the 52 Geo. 3, cap. 134, were given to the weighmaster. By the words of that Act the Legislature only intended to appoint *one* officer to discharge all the duties which it prescribes. It contemplated that the person who was *de facto* the weighmaster of butter should become taster of butter, and it prescribes for the person who should thereafter become the weighmaster of butter one general oath to take, and for another who had antecedently been weighmaster, and as such had taken an oath, but had taken no such oath, as *taster*, another form of oath. [His Lordship referred to the 2nd section of the Act.] According to the import of these words they may appoint either a single person to be weighmaster or several, but there must be either a single weighmaster *and* taster, or several weighmasters and tasters; two duties in a single person, or two duties in several persons. If there were an existing weighmaster, he was to and would become *de facto* taster of butter, in addition to weighmaster of the same. This second duty is but a function of the first office. We are accordingly of opinion that there is no ground for disturbing the present taster, as there is in fact no such independent office in existence.

Judgment for the defendant.

COURT OF ADMIRALTY.—1854.

[Reported by W. G. CHANNY, Esq., Barrister-at-Law.]

"THE WILLIAM."

Collision—Full amount of damage awarded.

In a suit to recover the value of a vessel and her cargo, which was lost in a collision, the promoved ship being at the time at anchor in harbour, and the impugnant ship under weigh coming to her moorings, this court will award the full amount of the damage sustained, if it appear that there was a want of nautical skill exhibited by the crew of the latter vessel.

The full amount of damage will be given, even although it may appear that the promoved vessel did not take up a proper position in the harbour, or exhibit a light, if the court is of opinion that the collision was not in any degree caused or promoted by these circumstances.

THIS was a suit instituted by William Raymond, late master of the schooner "Victoria," of Cardigan, 62 tons register, on behalf of himself and crew, and various other parties as owners, against the brig "William," of Youghal, 200 tons register, (John Richardson, master,) to recover compensation for the loss of the schooner and her cargo in Kingstown Harbour, upon the morning of the 19th December, 1853, owing to a collision which took place between those two vessels on the previous evening. The schooner was stated to be worth £600, and her cargo £750, in addition to which, the captain and crew estimated their loss at £50. The case was heard, by consent, *viva voce*; and Captain Daniel, R. N., presided with the learned judge as his nautical assessor.

The petition which was filed by the promovents on the 15th of January, 1854, stated, that the schooner was, at the time of the collision, a well-built, sound, and well-found vessel, and that on the 16th of December, 1853, two days previously, she sailed from Gloucester, in England, with a cargo of bark and iron on board, bound on a voyage for Dublin, which cargo was the property of some of the petitioners; that on the 18th of the same month, whilst prosecuting her voyage she encountered a gale "S.S.E.," and ran for the port of Kingstown, which being at that time much crowded with other vessels, she was anchored a little inside the piers at 9 P.M. She was safely brought up in a proper and seamanlike manner in a clear berth without interfering with or endangering any other vessel, and held on accordingly, and there were two other vessels anchored a-head of her and one other vessel anchored a-stern of her when she was so brought up; that at 8 P.M., on the same evening, the wind still blowing freshly from S.S.E., a brig came into Kingstown Harbour from sea, and in coming in got foul of one of the vessels a-head of the schooner, "The Sally," of Youghal, and having carried away the jib boom of "The Sally," got clear of her, but in so doing the brig's topsails were taken aback, and she lost way and began to drift; that the brig's anchor was then let go by the crew, and that she drifted across the schooner's bows, and gradually swinging round fell alongside the schooner at the starboard side, and in so doing carried away the schooner's foreyard. The master and crew of the schooner used all the means in their power, by shouting and hailing, to warn the brig's crew to keep clear of the schooner, but to no purpose; and having fallen alongside of the schooner she began to chaff, strike, and tear to pieces the schooner's starboard side, and so continued to injure her, it being in the meanwhile impossible for the schooner to escape or avoid her. The petition then stated, that the brig might easily have avoided the other vessels in the harbour, and kept out of the way of accident, and even after it took place might have diminished the effect by veering away chain and dropping a-stern of the schooner; but her crew did not give chain to their vessel, though repeatedly called on so to do by the crew of the schooner. The brig lay alongside the schooner chaffing and injuring her throughout the entire night of the 18th December, until 8 A.M. on the morning of the 19th,

when, in consequence of the injuries so received, the schooner sunk with all her cargo on board, and the captain and his crew lost all their clothes and effects. In conclusion, the petition alleged that the loss of the schooner was wholly owing to the want of prudence and precaution and bad seamanship of the master and crew of the brig, in not bringing up in a proper manner with relation to the schooner, and that all proper means and precaution to avoid collision and diminish its effect, were used on board the schooner.

A matter contrary and defensive was filed on behalf of the owners of "The William," which stated that she left Whitehaven Dec. 17, 1853, bound for Dublin, with a cargo of coal, being then well and sufficiently found and manned with everything requisite for such a voyage; that she proceeded on her voyage and having encountered very severe gales arrived in Dublin Bay on the 18th of December, and at about 5 o'clock P.M. made for Kingstown Harbour, the wind being then S.E. and blowing a very hard gale; that at about 6 o'clock P.M. she was steering S.W. with double reefed top sails, and having stood for the Eastern pier of Kingstown Harbour, got her anchors over her bows and the cables all arranged on deck to let go, and hoisted a bright light over her starboard bow, keeping a good look out, the night being very thick and hazy with a high sea running; that at about half-past 6 o'clock on the same evening she rounded the Eastern pier, it being the intention of her captain to pass to windward of the vessels then anchored in the harbour, but the wind suddenly drawing more from the Southward, the party on the look out gave notice that a schooner without any light up was close under the lee bow of the brig, and the crew of the brig hailed the schooner to pay out their cable, but receiving no answer the schooner's jib-boom got foul of the brig's foretop mast stay, which brought the brig up, when the schooner's jib-boom was carried away, upon which the brig's two bower anchors were let go, and after paying out some of each cable the brig went a stern and got clear of the schooner; that the brig was brought up by her anchors, with about thirty five fathoms of each of her cables, which caused her to come alongside the schooner "Victoria," which had not any light up at the time; that the schooner was riding to single anchor, with about thirty fathoms of cable out, but had a second anchor on her starboard bow; that soon after the brig had so taken up her birth, the schooner sheered about, and struck the brig several times on her larboard side with considerable violence, and carried away her bow rails and three staunchions on one side of the brig, and the cross jack yard of the schooner getting foul of the brig's top gallant back stay, the brig's top gallant mast was carried away, and the schooner still continuing to strike against the brig, they were eventually stove in and the brig most seriously damaged; that from the time of the schooner first striking the brig, the crew of the brig shouted and hailed to the people of the schooner to pay out chain and go a-stern, and by hoisting their fore-stay sail clear the brig, and go to leeward, but this they wholly neglected and refused to do so, and truly stated that they had no chain to pay out;

that immediately a-stern of the brig a large brigantine lay at anchor, with her jib-boom over the toprail of the brig, and with all her chain out, so that it was utterly impossible that the brig could adopt measures to prevent the schooner coming into collision with her, but that the schooner could have avoided the brig and have taken up a safe birth had her crew followed the directions of the crew of the brig, not a single vessel being on the larboard side of the schooner; that instead of endeavouring to avoid coming into collision with the brig, the schooner about 9 o'clock P. M. of the 18th December, let go her second anchor right across the brig's larboard bower chain, and then fell alongside the brig, and so situated, the two vessels beat and chafed against each other during the night; that during the entire of the night the crew of the brig were employed in placing fenders alongside their vessel to prevent the chaffing of the schooner against the brig, but owing to the violence of the gale several of the fastenings of the fenders were carried away, and the crew of the brig were obliged to cut in pieces a new cable rope which was value for £10 in order to construct fenders to prevent the sides of their vessel from being staved in, and that the master and crew of the schooner did not adopt any measures whatever to avoid the collision or to decrease its violence; that about 5 o'clock on the morning of the 19th day of December, the larboard cable of the brig parted, owing to the chaffing of the schooner's chain; but the wind coming more from the eastward, and the gale having in some degree abated, and the brig having run out a six inch cable to a mooring buoy, she did not drag her anchor; that the collision was owing to the want of prudence and precaution of the master and crew of the schooner, and in their not adhering to "The regulations for anchoring, and directions for ships and vessels frequenting Kingstown Harbour," authorised by the Commissioners of Kingstown Harbour, and also that the schooner should when she came to anchor, and which was in day-light, have taken up a position in a less exposed part of the harbour and more out of the way of vessels coming to later in the day or in the night, and that she should, as soon as night came in, have exhibited a light and been anchored with her second bower anchor, and had her cables ready to veer out to make way for other vessels driven into harbour at night by stress of weather, and in such a gale of wind as prevailed, and that no proper precautions were adopted by the party of the schooner either to avoid the collision, to diminish the effects, or to obviate the sinking of the schooner.

Doctors *Townsend* and *Chatterton*, for the promovents, contended that the impugnant brig was liable to the owners of "The Victoria" and her cargo, and also to her crew, for the full amount of the losses they had sustained by the collision, which were altogether caused by the gross negligence of the captain and crew of "The William." They cited the following cases: "*The Girolamo*," (3 Hag. 169); "*The Batavier*," (10 Jur. 19); 4 Notes of Cases, 856; "*The Panther*," (1 Ecc. and Ad. Rep. 81); *Davies v. Mann*, (10 Mee. & Wels. 546); *Morrison v. General Steam Nav. Co.*, (1 C. L. R. 66); "*The Volcano*," (3 Notes of Cases, 212.)

Doctors *Gibben* and *Hayes*, Q. C. contra, submitted that the promovents were to blame in not showing a light, and in taking up a wrong position, and that the case, at the worst, should be treated as one of inevitable accident. They also cited *Morrison v. The General Steam Nav. Co.*, (1 C. L. R. 66.)

DOCTOR STOCK, (addressing Captain Daniel, his assessor,) said.—Before I request your assistance in guiding my judgment in this case, I think it right to preface the questions which I shall have to submit to your decision, by adverting a little to the legal bearings of the propositions which I think ought to govern our decision; and, previous to so doing, I may advert shortly to the state of facts in the case, because, as my assessor, possessing peculiar skill in those matters, you will have to judge, from the whole evidence, what is the decision upon the issues that we ought to arrive at. It appears that "The Victoria," which has been lost by this casualty, came into Kingstown Harbour on the afternoon of Sunday, the 18th of December, and took up her moorings a little within the harbour, in a place which has been particularly described by the witnesses. By the regulations of the harbour, under the controul of the skilful and attentive officer in charge, an arrangement had been made that a certain space, described particularly by him by means of lines drawn from the two watch towers on the piers, should be left free—the ground within these two lines, or the triangle formed by these two lines intersecting within the harbours, is a space which is called the prohibited ground, and that means that it is an open space left for vessels coming from sea, and wishing to enter the harbour. This ground is meted off by competent men for the purpose intended, but I need not observe to a person of your experience and good sense that, although they had meted off a portion of the harbour in that way, it by no means follows that it is in the natural and strict definition of an harbour an unsafe place for vessels to anchor in. There may be too much space allotted or too little, but, at all events, the triangle exactly corresponds at both sides, so as not to obstruct vessels coming from sea. It does appear that a little outside of those lines, marking out the prohibited space, "The Victoria," and a schooner called "The Sally" had placed themselves within the prohibited ground, I know not how much within it, but it appears they were very near this line of demarkation, and, if outside of it at all, but a short space. Under these circumstances a storm, blowing strong from the S.E., a collier from Whitehaven, about 7½ o'clock, P. M., the night being extremely hazy and dark, made her way directly for the entrance of Kingstown Harbour, and, having turned the east pier, with the intention of keeping as close to the east pier as the safety of the ship would permit, and sailing close hauled on the wind, and the intention being not to get leeward but windward, enters the harbour, and, striving to attain this object, but encountering a change of wind just at the moment, which altered two points, failed, and was unable to keep windward of the group of ships in the harbour, and, in consequence, ran foul of "The Sally," a ship which she alleges had no light, and which was placed within the prohibited ground

along with "The Victoria." She ran foul of "The Sally," and, in consequence of that collision in the manner which has been described, she goes, stern foremost, from "The Sally" to "The Victoria," which was close adjoining, not more than 14 or 15 fathoms distant, and she gets entangled with "The Victoria," and the result, unfortunately, is, that "The Victoria," after a long time, sinks, and is there since. I shall not attempt to analyse the evidence, because I confess myself unable to grapple with the nautical details of a case such as the present, so as to present it in a proper way to your mind, but I have not the smallest doubt you have followed the minutest details of the evidence, and weighed in your own mind all the probabilities and bearings of the case, and that you will be able justly to explain the weight of that testimony and the value of the evidence on both sides, so that my duty will be confined entirely to asking you two questions upon the whole of the evidence in the case. In the first place, suppose you are of opinion that "The Victoria" had taken up a position for her moorings which was not a proper position, which was a dangerous and improper position, not in reference to the arbitrary line fixed on by the regulations of the Harbour Commissioners, but with reference to the nature of the approach, as raising a difficulty in the way of ingress of ships, already sufficiently embarrassed by the natural difficulties of the haven, if in your opinion, the position taken up by this ship was a proper or improper position, and did create an unnatural, unnecessary, and additional obstruction and difficulty to the entrance of the harbour to ships coming from seaward, then the question would arise, whether, assuming such a state of facts, this would not be a general violation of the laws of navigation such as would render the vessel holding such conduct, on the whole, or in part, liable to the consequences of the accident? That would be one question, and secondly, whether, if she was not to be rendered entirely liable, she would not be compelled by any rule of law to share the burthen with the defaulting vessel, by whose foolish manœuvring she was foundered? The first issue upon which I shall request your advice will be, whether the position taken up by "The Victoria" was an improper, bad, and dangerous position, obstructing generally the ingress of ships to the harbour? With respect to that, I will call attention to what was stated by Captain Hutchinson, who may be presumed to know extremely well all the localities of the harbour. He says that there is a rule by which vessels are prohibited from anchoring within two cables length of either of the piers, to enable ships coming in to go to windward; he says there is, according to rule a clear, open space, and ample room to be left under ordinary circumstances. His evidence was most clear and distinct as to that, and I have further to observe that he states in this case that he is not able to conceive under the circumstances how the impugnant ship here coming in could have been deprived of the means of keeping sufficiently to windward to avoid the accident. He was not able to say how that could have existed so as to prevent the efforts of the captain of the collier in keeping clear of the schooner and "The Victo-

ria." Under these circumstances she makes her appearance round the pier, and declines from the outset the alternative course of going to leeward. She never attempted to adopt that course, for they all along contemplated going to windward, and, therefore, it does not strike me that there was not a fault in not altering the course and going to leeward. Having adopted the course which, according to Captain Hutchinson, was practicable, namely, that of going to windward, I think it lies entirely upon the impugnant ship in this case—the collier—to satisfy the court that she was in no manner of default, I think she is bound to satisfy the court that she used due skill, care, and caution in entering the harbour so as to avoid any fatal accident by collision or otherwise; and I am further of opinion that ordinary skill, care, and caution, means, under circumstances of peculiar difficulty, the necessity, when a ship undertakes an operation requiring peculiar care, diligence, and energy, an exhibition of great nautical skill, I apprehend, under such circumstances, the law means by ordinary skill a most perfect nautical skill, and the greatest care and attention not to fall into an accident, I apprehend that that is the law, and, therefore, if it appears on rounding the pier, and coming into the harbour the collier made a mistake which may be attributed to the circumstance of her not keeping to windward, and falling foul of "The Sally," I apprehend in that case the promovents here would be entitled to recover damages. These are matters much more within your province than mine; but it does strike me the entire question here relates altogether to the moment of time at which "The William" came in contact with "The Sally;" that is the moment of time to which we are to refer the important questions for decision. If "The William" is in fault at all, I think her fault was consummated at that moment, for it strikes me that from that moment, according to the view I take of the evidence that it was really impossible to have avoided the ulterior consequences. An entanglement ensued, in which three vessels were involved—"The Sally," "The Robert & Henry," and "The Victoria," and I cannot say if any of them were to blame after the actual collision with "The Sally," I am very much at a loss to see how that proposition can be maintained, supposing "The Victoria" was not in a culpable and dangerous position. What strikes me is this, that when lying at her moorings if she is suddenly approached by another ship, and that ship comes in contact with her, and that a bad collision ensues, and she is run down and sunk, it does strike me that, under these circumstances, this court is not to inquire into what she did or did not do to extricate herself from this position. If there was a plain and simple course by which she might have escaped, one would attach blame to the negligence of her crew; if, for instance, by slipping her anchors she could have run away entirely from this ship without danger to herself, it would have been absurd not to have adopted that expedient; on the other hand, if by putting out cable she could have made way, I think she should have done so; but a vessel suddenly assailed in this way is not to be held very strictly as to her course of conduct; she alleges that the "Robert and Henry" shifted, and

that that vessel was sometimes over her stern, and that, under these circumstances, she could not safely pay out chain. I, of course, leave it to you to judge of the credibility of the evidence, and to form your own opinion upon that part of the case; but it strikes me that, taking all the evidence into consideration, it is not for a ship brought into this position to be sifted too minutely as to her conduct; on the contrary, it lies on the part of those who have caused the peril to exculpate themselves from all blame in the transaction. These are the general views which I thought it advisable for you to take into your consideration, and I shall now request you to answer these questions: first, whether in your opinion the position taken up by "The Victoria" was, in a nautical point of view, a dangerous and improper position, and an obstruction to the free entrance of vessels coming from seaward? and secondly, whether you consider that there was or was not, in the management of the collier in coming into the harbour that night, any such default of skill or negligence as in your opinion caused the collision with the schooner; or whether, by the adoption of a manœuvre on the part of the collier, she might have gone to the windward in such a way as to avoid the collision? The question of lights is very material, undoubtedly, also in considering the case. There was light on "The Commerce" to seaward, and, of course, near "The William" coming into harbour. That light was visible, and I should say ought to have been a warning as to the locality that they were in, and that there were several other vessels about them, or that there was a probability there would be on such a night, and, therefore, that they should know it was not safe for them to go there. I should say clearly that, previous to considering the question whether or not there was a fault on the part of the schooner in not having a light on board, there is this previous question to be considered, namely, whether the collier might not have kept more to windward, and in that manner have avoided the accident? Counsel cited authorities from the Admiralty and Common Law Reports which show what the principle of law is on this subject. Even where the conduct of the party suffering is subject to blame, and is not in terms an imputation of wilful default, yet where a violent injury or trespass is inflicted by another, that person is, notwithstanding the conduct of his opponent, bound to justify his conduct by showing that his conduct was free from imputation of negligence or violence. You will be good enough then to tell me, whether the position of the schooner was improper and dangerous, and an obstruction to the ingress of ships to the harbour? and secondly, whether by the adoption of any other measures by the collier it was in their power to have avoided the collision with "The Sally?"

CAPTAIN DANIEL.—I am of opinion that "The Victoria" did not take up a proper position in the harbour; but, nevertheless, if there was any impediment offered to "The William" in entering the harbour it was offered by the vessels outside "The Victoria". She might naturally suppose that she was right in taking up her berth there, as there were vessels outside of her. She was ignorant of the

locality, and, therefore, if there was any fault it was with them and not with her. Captain Hutchinson said that there was plenty of space for all vessels if properly handled, and if "The William" went clear of "The Commerce" and "Sally" she would have gone clear of "The Victoria." I think there was not proper skill used on board "The William." I think she should have been under sail so as to give her captain full command over the ship. She had no after sail; she entered the harbour under double reefed top-sail, and fore-top-sail, and the after sail was furled, although it was an invaluable aid in handling the vessel properly. On entering the harbour she was becalmed for a moment, and they were unable to control her, and I am of opinion that the first collision, which led to the second, was entirely caused by the want of an after sail on board "The William," which prevented her weathering, which she might have done and avoided the collision. It was possible for "The William" to have gone to leeward, and gone down the west pier, which she does not appear to have thought of. She was, it appears, a ship conversant with the harbour, and ought to have been in a situation to have availed herself of her knowledge of the harbour, which she did not do. As your Lordship has said, the second collision was the consequence of the first. There is no doubt of that. The people on board "The William" appear to have thought it was the duty of the people on board "The Victoria" to have set her head sails to sheer her off. Now she had her sails set, and she should have sheered out of the way if it could be done; but I do not think it could have been done, and, therefore, I do not think there is any blame to be attached to "The Victoria" for not doing what "The William" did not do. They also say that "The Victoria" might have given cable, and have thus avoided the consequences of the collision; but it appears plain, by the evidence of both parties, that they were close to "The Robert and Henry," and could not do so, I think. Suppose, for a moment, that she could have cleared "The Robert and Henry" she would have only placed herself in the same position that she was to "The William," and, of course, would have been blameable for anything that occurred between those ships. I do not see how "The Victoria" could have in any way prevented the injury by veering her cable, because Captain Hutchinson's evidence went to show, that "The Robert and Henry" was in the way of both vessels. The collision with "The Victoria" was the consequence of the previous one, and from what I have said it is evident to me, that the first collision was owing to "The William," and in consequence of her not coming in with proper sail able to make her perform what she had to do. I think there was very great want of skill shown in bringing the vessel into Kingstown under such sail, and that the whole accident occurred in consequence of it.

DOCTOR STOCK.—That being your opinion the duty is imposed on me to pronounce the decision of the court, and, of course, there is but one rule applicable, that I must condemn the impugnant ship, the collier, in the damages which have been

proved in the case as the result of the foundering of "The Victoria." They must be satisfied by the impugnant ship as far as she and her cargo will go, and, of course, I must direct a sale to take place forthwith to the extent of the sums proved. To that extent the property must be subject, and with respect to the costs I have some doubts, for I do not think that the position of "The Victoria" was the best position that she could have been placed in. I am inclined to think the parties should bear their own costs.

Dr. Townsend insisted that the costs should follow the decree, as of course.

Dr. Hayes said it was altogether a matter in the discretion of the court.

His Lordship reserved his judgment on this point, and ultimately decided that each party should bear their own costs.*

ROLLS COURT.

[Reported by RICHARD W. GAMBLE, Esq., Barrister-at-Law.]

TAAFE v. FRENCH.—Feb. 1855.

Practice—Cause petition—Amendment—Striking out respondent—Side-bar order—Costs.

A cause petition was allowed to be amended by stating that one of the respondents was in insolvent circumstances, and had taken possession of a part of the assets which were necessary for payment of the petitioner's demand.

Leave was also given to enter a side-bar order to strike a respondent out of the petition, on payment to him of his costs up to the time of the notice, but without prejudice to the petitioner having his costs at the hearing, if the court should think fit.

Form of side-bar order entered in the office without motion.

Kelly moved that petitioner may be at liberty to enter a side bar order to strike out the names of John Richard French and Mary his wife as respondents in the petition in this matter, upon payment to them of the costs incurred by them in this matter up to the date of this notice, without prejudice, nevertheless, to petitioner being repaid such costs at the hearing of this matter, in case the court shall think fit to order such payment, and that petitioner may be at liberty to amend the said petition by stating by way of amendment at foot of said petition, and after the affidavit to verify same, or by indorsement thereon, the following amendment, "Your petitioner, by way of amendment, further sheweth that the respondent, the Rev. John French, is in insolvent circumstances, and is colluding with the other respondents, the said Louisa Kelly, John Darcy and Jane his wife, and the Hon. Charles Handcock and Eliza his wife, Robert Lloyd and Frances his wife, Anne Kelly and Helena Kelly, and has wrongfully permitted the said respondent to take possession of portions of the personal estate of the said testator's property applicable to the payment of your

petitioner's demand, and your petitioner believes that there will be a deficiency for payment of your petitioner's demand, unless the assets so taken possession of by the said respondents be resorted to." And also moved that the cause petition in the matter may be reinstated and retained, notwithstanding the General Order of the court bearing date the 31st of July, 1851, No. 27.

The MASTER OF THE ROLLS made the following order:—

"Be it so on notice to retain petition, and be it so on notice to enter side-bar order,* and to amend petition."

The respondents, John Richard French and Mary his wife, were struck out of petition by entering a statement to that effect at foot of the petition after the affidavit to verify. The following is the copy of the side bar order entered:—

"Upon motion of Mr. ———, solicitor for the petitioner, it is ordered by the court, that the petitioner be at liberty to strike the respondents, John Richard French and Mary his wife, out of the cause petition in this matter upon payment of their costs; and it is further ordered, that the said cause petition do stand dismissed with costs as against the said respondents."

IN RE COOTES, MINORS, EX PARTE BOYD.—Feb. 20.

Renewal—Fines—Minor—11 Geo. 4, and 1 W. 4, c. 65, s. 16†—5 & 6 W. 4, c. 17.

Where there is a covenant to renew during forty years, upon nominating a new life within six months after the fall of each life, this does not come within the Tenantry Act, and unless the landlord is shown to have been in default, there is no equitable right to renew; but if the value of the premises be small, and it would appear for the benefit of the minor to grant a renewal, the court may, notwithstanding, direct the Master to execute a renewal on behalf of the minor under the 11 Geo. 4, and 1 Wm. 4, cap. 65, nominating for each life that had dropped, a life that was in being within six months after. The principle of calculation for renewal fines was: "One fine due at the end of six months after the fall of each life, and a septennial fine due at the end of every seven years, with interest on each from the time when it became due at 5 per cent." The guardian of the minors was declared entitled to the costs of appearing.

This was a cause petition filed by John Boyd for the purpose of obtaining a renewal of a lease bearing date the 2nd of May, 1825, whereby Charles Coote, the grandfather of the minors in this matter, did demise, grant, set, and to farm let, release, and confirm unto the said John Boyd, in his actual possession as therein mentioned, and to his heirs and assigns, all that and those certain premises in Cootehill therein mentioned, to hold the same unto

* This case was subsequently brought, by appeal, before the Court of Delegates, and the judgment of the court below was reversed. A report of the hearing on appeal will appear in a future number of "The Irish Jurist."

* It is the practice in the office to enter the side-bar order to strike out a respondent, without any order of the court for that purpose.

† See vol. 8, p. 1001.

the said John Boyd, his heirs and assigns, from the 1st of May then last, "for and during the natural lives of them their Royal Highnesses Adolphus Frederick, Duke of Cambridge, William Frederick, Duke of Gloucester, and Princess Mary, Duchess of Gloucester, and for and during the natural life of the longest liver of them, and for and during the natural lives of such other person and persons as shall from time to time, successively during the space of forty years from the date thereof, be added to this demise pursuant to the covenant for that purpose herein-after contained;" he, the said John Boyd, paying the yearly rent as therein; and the said demise contained a covenant for renewal as follows: "And the said Charles Coote, for himself, his heirs and assigns, doth covenant, promise, grant, and agree to and with the said John Boyd, his heirs and assigns, that in case any of the original lives herein-before mentioned shall fall or die within the space of forty years from the date hereof, and if the said John Boyd, his heirs or assigns, shall then be minded on the fall or death of any of the said lives, to add another life in lieu thereof, and shall, within six calendar months after such fall or death of the said life or lives, apply and pay half a year's rent by way of fine for renewal to the said Charles Coote, his heirs and assigns, over and above all arrears of the aforesaid rent that shall then be due out of the said premises, then he, the said C. Coote, his heirs and assigns, shall and will in such case supply such falling of any of the aforesaid lives by adding another person of the Royal Family of Great Britain and Ireland, at the nomination of the said John Boyd, his heirs, executors, administrators, and assigns, when and as often as it shall so happen, and application be thereupon made, and fine given and paid within the said term of forty years, but not afterwards." Then followed the usual covenant for title. It appeared from the affidavit that the said Chas. Coote died in 1842 intestate, leaving Richard Coote, the father of the present minors, his eldest son and heir-at-law him surviving, who thereupon became entitled to the reversion. That the said Richd. Coote died in 1852, having first duly made and published his last will and testament duly attested for passing real estate, and thereby bequeathed the reversion in said lease, (subject to his debts as therein,) to his eldest son R. Coote in tail male, with remainders over. In 1852 the minors were made wards of court, and their mother, Mary Ellen Coote, was appointed guardian of their persons and fortunes, and Wm. Murray was appointed receiver in the matter. The Duke of Gloucester, one of the lives, died on the 30th of November, 1834, and the Duke of Cambridge, another of the lives, died on the 8th July, 1850, and the petitioner claimed to be entitled to a renewal for the new lives on payment of the renewal and septennial fines and interest thereon, which amounted to £26 13s., and was made up as follows:—

First life dropped 30th Nov. 1834, one fine due 30th May, 1835.....	£	s.	d.
Interest thereon from the 30th May, 1835 to the 30th of January, 1855.....	4	8	7½
Septennial Fine accrued 30th May, 1842.....	4	4	5½
	4	8	7½

Interest thereon from said day to the 30th Jan. 1855, being 12 years and 8 months.....	2	13	6½
Septennial Fine accrued 30th May, 1849.....	4	8	7½
Interest thereon from said day to 30th January, 1855, 5 years and 8 months.....	1	2	7½
Second life dropped 8th July, 1850, Renewal Fine due 8th January, 1851.....	4	8	7½
Interest thereon from said day to 30th January, 1855, being 4 years and 22 days.....	0	17	11½
Total amount of Renewal and Septennial Fines with Interest.....	£26	13	0

The prayer of the petition was as follows: "May it therefore please your Lordship to declare your petitioner entitled to a renewal of the lease of the 2nd day of May, 1825, and that the said Mary Ellen Coote, the mother and guardian of the minors, or such other person as your Lordship shall direct, do, on payment by your petitioner of the sum of £26 13s. being for all renewal and septennial fines with interest now due thereon, execute such renewal to your petitioner for the lives of his Royal Highness the Prince of Wales, and her Royal Highness the Princess Helena Augusta Victoria, and in case the parties should differ as to the form of such renewal, that it be referred to William Brooke, Esq., the Master in this matter, to settle same, or that it be referred to the said Master to enquire and report whether your petitioner is entitled to a renewal of said lease of the 2nd day of May, 1825, for two new lives, or any other and what renewal and in what terms. And in case the Master should be of opinion that your petitioner is entitled to a renewal, then that he do take an account of the renewal fines payable by your petitioner on obtaining such renewal, and do also, if necessary, settle a draft thereof."

Hughes, Q. C., moved the prayer of the petition, and submitted that the petitioner was entitled to a renewal, and that the case came within the 11 Geo. 4, and 1 W. 4, c. 65, s. 16, (see ante Vol. vi. p. 109,) as there was a clear right of renewal here, one life was still in being. *Ferinam v. Lord Ormond*, (Beatty, 347.)

Owen, for the guardian of the minor, submitted that there was not here an absolute right to a renewal, as was required by the Act of Geo. 4, but only a limited right of renewal, and that, therefore, the court did not appear to have authority to grant it; but the guardian of the minor was not disposed to give any opposition if the court thought right to grant it. *Sheehy v. Bradshaw*, (6 Ir. E. Rep. 397); *In re Hayes*, (Sau. & Sc. 208, n.); *In re Cootes, minors*, *Ex parte McGahan*, (6 Ir. Jur. 107.)

MASTER OF THE ROLLS.—There is a difficulty in granting the renewal sought for in this case, and there are reasons for not granting it which are supported by authority; and indeed if the property was of large value, I would not make the order. But I think I may make it in this case, because it is for the benefit of the minor, and the guardian does not offer any serious opposition, leaving it to the discretion of the court. The right to renew is here only a limited right of renewal, the right is to renew upon nominating a new life within six months after the fall of each life, within 40 years. I concur in the rule as laid down by Mr. Furlong in his book on Landlord and Tenant, p. 292, he says: "If a lease merely contains a covenant for one or more renewals,

or to renew from time to time during a limited period, it is incumbent on the tenant to observe with strictness the terms of the covenant, as a Court of Equity will not relieve against the legal consequences of his negligence, unless a strict performance be prevented by the default or misconduct of the landlord, or by ignorance, not wilful, or by unavoidable accident." Now, here there is only a limited right of renewal, and one of the lives has not been in being for several years, and the other dropped five years ago, and then the tenant comes forward and says: "I will now get a renewal, or bring the minor into court." Such a renewal is not within the Tenantry Act, and were it not that the premises here are of small value, only about £9 a year, I would require a cause petition to be filed by the tenant, and it would fail unless it was shown that the landlord was in default; but as I think this would not be for the benefit of the minor here, I will, in this case, direct the renewal to be granted, upon payment of the renewal and septennial fines and interest, and I will require a life to be named which was in being during the six months after the fall of each life for which it is to be substituted.

The following order was made:

"Let the petitioner, John Boyd, be at liberty to lodge in the Bank of Ireland, to the credit of this matter, with the privity of the Accountant General of this court, the said sum of £26 13s. being for renewal and septennial fines, with interest, and thereupon let the said Mary Ellen Coote, the mother and guardian of the minor, execute a renewal of the lease, in the petition mentioned, to the said petitioner, John Boyd, for the lives of her Royal Highness the Duchess of Gloucester and her Royal Highness the Princess Helena Augusta Victoria and her Royal Highness Mary Adelaide, daughter of the late Duke of Cambridge, and in the event of any difference as to the form of renewal, refer it to William Brooke, Esq. the Master in this matter, to settle same."

COURT OF QUEEN'S BENCH.

HILARY AND EASTER TERMS, 1854.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PERT, Esq., Barristers-at-Law.]

ECCLIESIASTICAL COMMISSIONERS v. HOLMES.

January 30, April 20.

Tithe rent charge—Evidence—Estate of inheritance—Presumption of re-assignment—
1 & 2 Vic. c. 109.

The defendant was sued for tithe rent charge, and the writ of summons and plaint alleged, in the terms of the 1 & 2 Vic. c. 109, that the defendant was seized or possessed of an estate of inheritance, or one equivalent thereto, in the lands. In order to prove this a former petition, presented in 1839, to recover tithe rent charge in respect of these lands, was given in evidence, with an order made upon consent with respect thereto. The petition contained an allegation similar to the summons and plaint, relative to the defendant's interest. Acts of ownership and payment of head-rent by the defendant were also proved. To rebut the effect of this evi-

dence, it was proved by the defendant that in 1834, he was discharged by the Insolvent Court, and his estate vested in the provisional assignee, who did not, however, interfere. It was contended on the part of the defendant that this latter evidence was conclusive to displace the effect of the evidence adduced on the part of the plaintiff, even though that should per se suffice to establish a prima facie case. Held, (Crampton, J., dissentiente,) that notwithstanding the fact of payment of head-rent, there was prima facie evidence of the defendant's having been seized or possessed of a sufficient estate to render him liable in the present action; and secondly, that the effect of the Insolvent proceedings was not conclusive to show that the estate had passed from and continued out of the defendant, inasmuch as it was consistent with the defendant's evidence that the estate might have been re-assigned to the defendant since 1834.

THIS was an action for the recovery of certain tithe rent-charge. The summons and plaint stated the title of the plaintiffs to the Rectory of Ardkeagh, Parish of Cloyne, and County of Cork, and liability of the lands of Ardglemore in said parish to the rent-charge of £9 5s. 6½d., and that four and a half years of same, prior to the 1st of November, 1850, were in arrear, and it also averred that the estate of the defendant was of the quantity required by the Act of Parliament. The entire amount claimed by the particulars of demand was £41 14s. 11½d. The defendant pleaded that he had not, on the 1st of November, 1850, or for four years and a half then next preceding, in the said parcel of land any estate of inheritance or any other estate or interest equivalent to a perpetual estate or interest, as defined by the Act of Parliament, by reason whereof the money in question was payable by the defendant. There was another plea, to which the plaintiffs successfully demurred, and the sole issue of *Nisi Prius* was joined upon the plea above abstracted. The cause was tried at the sittings after last Michaelmas Term before the Lord Chief Justice. The plaintiffs on that occasion, in order to show the liability of the defendant to the tithe rent, gave in evidence a petition presented in 1839, at the suit of the present plaintiffs, to the Court of Equity Exchequer for a receiver over said lands, in which the present defendant was named respondent. This petition contained a distinct allegation of the seizure of the defendant of an estate sufficient to satisfy the Act of Parliament in the lands in question, and of his liability to satisfy the then arrears; also of the non-interference of the provisional assignee of the Insolvent Court, in the matter of the defendant's insolvency, with the rents and profits of the said estate. They also proved a conditional order of the 17th of January, 1840, and an absolute order of the 27th of January, 1841, for the appointment of a receiver, and also a consent dated the 19th of June, 1845, on the part of the respondent, admitting the amount due, and consenting that the petitioners should be entitled to draw certain moneys paid by the receiver into court, and that the receiver should pay the balance, after certain deductions, to the petitioners. Evidence was given of acts of ownership by the defendant over said lands by re-

ceipt of rents up to the 25th of March, 1850, when the lands were evicted. It appeared that one of the tenants, by arrangement, paid the head-rent for which he was allowed by the defendant's credit. Counsel for defendant submitted that the plaintiffs should be nonsuited, inasmuch as there was evidence that a head rent was payable for said lands, which displaced the presumption of a seisin in fee arising from possession and receipt of rent by the defendant, and that there was no evidence of the estate or interest which the defendant had so as to render him liable as the party having the responsible estate within the meaning of the statute. The Lord Chief Justice having refused to nonsuit, but having saved the point, the petition and order made by the Insolvent Court in 1834, and the assignment to the provisional assignee made the 12th of November of that year, together with the final adjudication and discharge of the defendant, were all given in evidence. The defendant's counsel then called upon the judge to direct a verdict for the defendant, inasmuch as all the estate whatever which the defendant had in said lands was, by said assignment, vested in the provisional assignee, but his Lordship directed a verdict for the plaintiffs, with liberty to apply that it should be turned into a verdict for defendant, if, upon the whole case, the court should be of opinion that the insolvency proceedings showed conclusively that the estate was out of the defendant, and were, therefore, an answer to the action.

W. Fetherstone H. and *J. Clarke* showed cause on behalf of the plaintiffs, and argued that the evidence of acts of ownership subsequent to the insolvency proceedings, together with the proceedings in the Equity Exchequer, showed that there had been a re-vesting of the estate, and that the defendant accordingly became liable.

James Greene and *Lynch, Q. C.* contra, for the defendant, argued that the assignment to the provisional assignee displaced whatever *prima facie* presumption existed against the defendant; that it lay upon the plaintiffs to establish their title affirmatively, and that it could not be inferred that the defendant was tenant in fee in consequence of the payment of head rent, and no particular estate could be inferred from acts of ownership.

LEFNOX, C. J.—The court are of opinion that, upon the question reserved, the verdict must be upheld. The defendant here did not require to have the question left to the jury, for they probably would have felt no doubt with respect thereto; but, on the other hand, he has narrowed the whole matter in dispute to this point, namely, whether the proceedings in insolvency were conclusive evidence in his favour. Let us examine into the nature of that piece of evidence, to see whether it was conclusive. An assignment was made in 1834 to the provisional assignee; but no possession from that time to the present went along with that transfer. What was the value of that, unless some possession went along with it? The presumption would else be adverse. What would be its value if the opposite party were to counteract the previous assignment by circumstantial evidence, showing that there had been a re-assignment? It is the every-day practice to make a party liable as assignee by evidence show-

ing that he is in possession and has acted as owner, without being forced to produce the deed of assignment. Now, if, by that sort of evidence you can prove a party to be assignee, why ought you not to be able to prove a re-assignment by the same description of evidence? Here the evidence is that the party alleged to be the re-assignee was in possession for nearly twenty years, doing every description of acts of ownership, such as receiving rents, &c., and he admits liabilities which he would not unless he were the re-assignee; for, if not, he would have incurred no liability under the Tithe Rent-charge Act, and yet we find him allowing a receiver to be appointed on consent, which is stronger than the mere fact of an adverse judgment. Otherwise, and but for this fact, he would have been enabled to say that he was not so liable, but that such liability properly devolved on other persons. All this takes place, and then when by a subsequent proceeding by the Commissioners the defendant has been treated as liable, he sets up these proceedings in 1834 as being *conclusive* against any species of evidence. I really do not understand why a party should be charged as assignee and not as re-assignee upon the very same species of evidence. I am, therefore, of opinion that the verdict for the plaintiffs should stand and the cause shown be allowed.

CRAMPTON, J.—I feel some little difficulty in consequence of the manner in which the case has been reserved; but I own that I cannot consider the plaintiffs to have shown a title to recover in this case, and I do not think that the principle of law which governs it ought to be trenchanted on. If there had been a re-assignment, the plaintiffs would undoubtedly have a title; but if not, the reverse. Now, did they or did they not prove their title? That is the question. Had that question been left to the jury, there might have been a verdict one way or the other. That question was never left to the jury. If there had been such a thing as a re-assignment, it would have been a matter of record, and consequently as much in the power of one of the parties to produce as the other. The only title of the plaintiffs is based upon the supposition that the jury would have found that there was such a thing as a re-assignment, which cannot be executed without the order of the court. In this case, in which it is contended that a re-assignment is to be presumed, the plaintiff has averred the existence of a particular estate in the defendant, which has made him liable to the payment of tithe rent charge. Such is the case made by the plaintiffs, and although the plaintiff here is general, it will not differ at all from the case of a plaintiff stating a case of a lease for the lives of so and so. The burthen of proof is cast upon the plaintiffs. They proved that the defendant once was seized of a lease for lives renewable for ever, and the payment and receipt of rent, and the petition proceedings instituted by the present proceedings against him, and there the plaintiffs' case rested. Those were the very facts which

were afterwards more fully proved by the defendant; namely, that in 1834, the defendant became an insolvent, and that his estate vested in the assignee, and notwithstanding that the estate so vested in the assignee, no more was done than the discharge of the receiver and the payment of the balance to the respondent. It falls upon the plaintiffs to make out a case for the jury to raise a presumption upon these facts. Here, in 1834, the estate was vested in the provisional assignee, but the defendant still remained in possession and received the rents, which circumstance might have induced the Commissioners to consider him still as a proprietor; but how is that to warrant the court to infer the fact of a re-assignment? The question which we are now inquiring into is this: whether the plaintiff is to be considered, by reason of his prior acts, done up to 1840, as having had vested in him an estate for lives renewable for ever. The case put by counsel is, that it is quite enough to charge a man as assignee, to show him, as you have done here, to be in possession, and that such is *prima facie* evidence; but if a previous assignment was made by himself to others before action brought, how does his character become changed? How does he become invested with freehold estate? No direct evidence has been given of this. It was said that there was a possession of 18 or 19 years. I do not think that we can presume that the averments in the plaint would be satisfied by this length of possession. What does the petition state? It states the insolvency, and the existence of the estate in the provisional assignee, it also states the continuance in possession of the property by the defendant after that petition had been presented, which was the act of the plaintiffs. The defendant agrees to the appointment of a receiver. It is admitted by the defendant that being in possession, he is bound to pay head-rent. But that is only done as representing the assignee of the court. The possession of nineteen years and the receipt of rent might furnish some ground to a jury to *infer* the existence of a fee, but no ground whatsoever whence to infer a particular estate, in order to satisfy the enactment of the statute. Are we to presume that there has been a re-assignment of the particular estate? There is a great difference between the case of an assignment and the case of a re-assignment. Take it that in this case a primary presumption existed. The evidence shows that the estate was at one period divested. Nothing can change the course of devolution but a re-assignment by the order of the Insolvent Court. The plaintiff was bound to show a re-assignment, which, if it ever existed, it was in his power to prove by matter of record. If this primary evidence were in the power of the defendant exclusively, there would have been some better ground for the omission; but it is not so, because it was a record of the Insolvent Court, and it was equally competent for either party to produce it. Perhaps there may have been a miscarriage in this case, but, if there were no re-assignment, it would clearly be a good defence, and I own that I entertain a strong feeling in favour of granting a new trial.

MOORE, J.—I concur with the view taken by my

Lord Chief Justice, and were it not for the strong view expressed by my brother Crampton on the other side, I would entertain no doubt. This case comes before the court upon a conditional order to enter a nonsuit or verdict for the defendant, and the question is, whether that order should be made absolute or not. That cannot be made absolute except upon either or both of the two following grounds: first, that no evidence was given upon the part of the plaintiff to go to the jury with regard to the liability of the defendant; or secondly, that though there were such, yet the defendant was entitled to a verdict. I think that there was abundant evidence to maintain the affirmative of the issue, that the defendant was assignee of the estate of which he was assignee. What was, in fact, the evidence upon the subject of that affirmative? That the defendant had for years paid head rent and received rent for these lands; that a petition had been presented charging him with this very rent charge, and that in the Court of Chancery he consented that a receiver should be appointed. The plaintiffs would have had no right to have had that receiver appointed unless the defendant had that estate, but he evidently conceived that they had a right to have a receiver appointed. But this is not all the evidence to go to the jury that he was clothed with the character of owner contemplated by the Act of Parliament, but after the appointment of the receiver he entered into a covenant that out of the monies paid to the receiver the arrears of rent charge should be paid, and the balance to be paid to the respondent. Is it possible that they would have been so had not the respondent conceived himself liable under the Act of Parliament? I cannot understand upon what principle that can be deemed not to be evidence to go to the jury that he was liable to this charge. If the case merely rested upon the evidence given by the plaintiffs I should be of opinion that there was abundant evidence in support of the defendant's liability. But he went into a case and contended that the insolvency proceedings, namely the petition and appointment of assignee in 1834, were conclusive against the right of the plaintiffs. But though this is *evidence*, it is not conclusive evidence, because it may be rebutted by subsequent circumstances, and I agree that if it were not acted on for twenty years, and the party who presented it has acted inconsistently therewith, these proceedings would appear to have been collusive or, at least, put an end to. That is shown by some circumstances in this case, and which, while they show that the defendant is clothed with the character of owner, show likewise that he cannot rely upon the assignment in 1834. Therefore I concur with the judgment pronounced by my Lord Chief Justice. I would concur with the view taken by my brother Crampton, as to the granting of a new trial, if any injustice would be likely to be done by the present course; but I entertain no such apprehension, inasmuch as no claim is likely to be made by the former creditors of the defendant.

LEFROY, C. J.—I would just wish to observe that some misapprehension has occurred on the part of my brother Crampton as to what I said relative

to the receipt of rent being proof of a particular estate; that is not what I intended to convey, but this, that in case the particular estate were proved *aliunde* to have existed, which it was in this case by the insolvent proceedings, the receipt of rent might then become proof of the assignment of that estate though no proof of its original creation. In other words, receipt of rent may be proof of the assignment of a particular estate where its existence may have been proved *aliunde*.

Cause shown allowed, and judgment for plaintiffs.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

JOHNSON v. GARDE.—April 17, 1855.

Practice—Costs—Ejectment—16 and 17 Vic. c. 113, ss. 201, 227.*

Where but one defendant takes defence in an ejectment for non-payment of rent, and upon the motion of the plaintiff that defence is set aside, and leave is obtained to mark judgment as for want of a defence, the plaintiff cannot recover the costs of the action against that defendant without bringing an action for mesne rates.

EJECTMENT for nonpayment of rent. The defendant had taken defence alleging a payment, but without giving the necessary particulars of it. The plaintiff had, upon motion, obtained an order with costs to set aside the defence and mark judgment. Upon the taxation of costs between party and party, the Taxing Officer allowed only the costs of the motion, disallowing all costs incurred both before and after the motion.

J. S. Armstrong now moved for an order that the Taxing Master should re-consider the taxation and allow full costs against the defendant, as he had taken defence. He contended that section 201 of the Common Law Procedure Act did not apply to this case; and that therefore, under section 227, the case should be governed by the same rule as personal actions.

PER CURIAM.—You can get your costs by bringing an action for mesne rates, but you cannot get them now against a party who has not taken defence. This person did take defence, but it was set aside, and you should get all the costs incurred by his taking that defence, but no more. If there were any special circumstances in the case, the court would have set the defence aside, with costs, if they thought fit.

No rule.

* Section 201.—In case no defence be filed within the time appointed, or if the defence filed be limited to part only, the plaintiff shall, on filing an affidavit of the service of the summons and plaint, be at liberty to sign a judgment that the plaintiff shall recover possession of the land, or of the part thereof to which the defence does not apply; and such judgment, if for all, may be in the form No. 18, contained in the Schedule B, to this Act annexed, or to the like effect, without any award of costs, but without prejudice to the plaintiff's right to have the costs taxed by the proper officer, and to proceed by action for recovery of mesne rates and costs, or either of them; &c. &c.

COURT OF EXCHEQUER.

EASTER TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

[*Coram* RICHARDS and GREENE, B. B.*]

DIXON v. FRANKS.—April 16.

Common Law Procedure Act—Pleading double matter—Oral slander.

In an action for oral slander, a defence stating that the words in the summons and plaint mentioned, were spoken of the plaintiff by the defendant in good faith and without malice, will be set aside as being framed in a way calculated to prejudice, embarrass, and delay the fair trial of the action. Semble, where a defendant obtains liberty to plead several matters, the defence pleaded in pursuance thereof must strictly follow the terms of the order.

THE summons and plaint stated eight causes of action, to each of which the defendant had pleaded double matter. The first count or paragraph stated that the plaintiff and his wife, at the time of the committing of the grievance by the defendant next herein-after mentioned, were lying in prison, to wit, in the gaol of M., under a certain false charge of conspiring to murder one T. B.; and that the defendant being then a stipendiary magistrate, had imprisoned the plaintiff's child, one F. E. D., and had taken an alleged information from the said F. E. D. in reference to the said false charge of conspiracy to murder, and that the defendant, to wit, on the 6th day of March, in the year of our Lord, 1854, and before the trial of the plaintiff and his wife on said false charge, falsely and maliciously spoke and published of and concerning the plaintiff, the words following, that is to say: "It is one of the great discoveries of the present age that children's evidence was the best of all, and I have hanged people on it, (insinuating thereby, and intending to convey that the plaintiff was guilty of the crime of conspiracy to murder T. B.) and further insinuating and tending to convey that the plaintiff would be hanged on the evidence of his child F. E. D." The 2nd, 3rd, 4th, and 5th counts varied the words alleged to have been spoken, stating them to be: "We will hang the wife, but the man himself will get off on the plea of insanity; it is one of the great discoveries of the present day that children's evidence is the best of all; I have hanged people on a child's evidence, I will hang the Dixons on the evidence of the (or their) child F. E. D." The 6th count averred the slanderous words to have been spoken in a conversation with one M. P., and to have been these: "You (meaning thereby the said M. P., the servant of the plaintiff,) will never see your master or mistress again, you will never see your master or mistress alive again, you need not be crying, you may be quite sure the master and mistress will never see Castlewood again." The 7th count averred that the plaintiff was, at the Assizes of M. duly acquitted in the course of law, of a certain false charge of conspiracy to murder the said T. B., and of all other

* Pigot, C. B., and Pennefather, B., were absent.

charges then preferred against him, and that the said defendant had, after the said assizes and after the said trial and acquittal, falsely and maliciously spoken and published of and concerning the plaintiff, the following words, that is to say: "The Dixons got off by the breaking down of the child. I will bring them to trial again and take care that they do not get off. I will try him for the attempt to murder. I will try him for firing with intent to kill. I will ruin every tenant you (meaning the landlord of the plaintiff,) have in Castlewood, and leave it a desert and a ruin." The 8th count varied the terms of the words averred in the 7th.

The defence pleaded, as to the 1st, 4th, 5th, 6th, 7th and 8th causes of action, three distinct defences, viz.: first, as to the alleged speaking of the words in the first, &c. cause of action set forth, the defendant saith that he did not speak or publish of or concerning the plaintiff the words in the said first cause of action set forth. And for a further defence to the said first, &c., cause of action, the said defendant by the leave of the court saith, *that the words therein set forth were spoken by the defendant in good faith and without malice*, and for a further defence, &c., that the said words were not spoken of the said plaintiff by the said defendant in the defamatory sense thereby imputed to the defendant; and to the 2nd, 3rd, and 7th causes of action, the 1st and 2nd of the above mentioned three defences were pleaded, and the third was omitted.

The Solicitor General, (with whom was *Denis C. Heron*,) of counsel for the plaintiff, moved "that the several defences filed by the defendant, which stated that the words in the summons and plaint mentioned were spoken of the plaintiff by the defendant in 'good faith,' and without malice, might be set aside or struck out, upon the grounds that they are so framed as to prejudice, embarrass, and delay the fair trial of the action, and on the ground that whatever special circumstances the defendant alleges may justify the speaking of the words should have been so specially pleaded, and upon the further grounds that the said defences were not authorised by the order of Crampton, J. for liberty to plead double matter, or the affidavit upon which said order was grounded." Counsel in the course of the argument stated that neither the first or third set of pleas was objected to, but the second defence was embarrassing. No certain issue can be taken on it, and it is bad in law. [*Greene, B.*—Then why not demur?] Because only points of general demurrer are now open, and, if the plaintiff demurred, it would be urged, on the part of the defendant, that, the truth of the defence being admitted, it was admitted on the record that the defendant neither entertained malice in fact, nor exhibited malice in law, against the plaintiff, when he spoke the words. The plaint was that the defendant spoke the words maliciously, but this meant malice in law. Although malice is the gist of the action for slander, there are of malice two sorts, malice in fact and malice in law, the former denoting an act done from ill-will towards an individual, the latter a wrongful act, intentionally done, and without just cause or excuse. *Bromage and another v. Prosser*, (4 B. & C. 247; s. c. 6 D. & R. 296; s. c. 1 C. & P. 475.) It

is impossible for the plaintiff to know whether the defendant relies upon a privileged communication or not. If he do so, it ought to be pleaded specially. The 56th section of the Common Law Procedure Act, (16 & 17 Vic. c. 113,) enacts that "the defence, and replication, and subsequent pleadings, if any, shall state all the facts which constitute the ground of defence or reply in ordinary language, and without repetition." Here there is no justifiable occasion for speaking the words shown, and the good faith or intention of the defendant is immaterial. *Toogood v. Spyring*, (1 C. M. & R. 181); *Somerville v. Hawkins*, (10 M. G. & S. 583.) Secondly, the plea of "good faith" is not warranted by the order made for liberty to plead several pleas. The order of Crampton, J. is for liberty to plead several defences mentioned in the affidavit upon which the motion was grounded. The affidavit merely states that "the defendant was advised and believed it to be necessary not only to traverse the speaking of the words, but also to traverse that the words were spoken in a defamatory sense or maliciously." Where liberty to plead several pleas is given, the order must be strictly followed. *Gabardi v. Harmer*, (3 Ex. Rep. 239); *Will v. Robinson*, (5 W. H. & G. 302.) [*Richards, B.*—That is but reasonable; for, if there be any necessity for the order of the judge, it must be followed in its terms.]

Hayes, Q.C. (with whom was *J. Clarke*,) contra. The plea, as now framed, cannot embarrass the plaintiff. It is a correct way of putting forward privileged communication. How can this be done otherwise than it is in the present pleading? The party at the other side should be left to his demurrer. The question of this being an embarrassing or a good plea is too important a matter to be decided on a mere motion, but should be reserved for a more solemn and formal argument. Can it be said that we are to set out in the pleading all the circumstances and transactions connected with the speaking of the alleged slanderous words? That would be to set out evidence.

GREENE, B.—The word "maliciously" in the plaint means malice in law, according to the cases cited; and if the defendant relies on the circumstance of their being no malice in fact, he should state in his plea the matters whence the jury might draw that inference. I must say that I tried a case recently in which the pleading was very similar to that in the present action, and I was much at a loss to know what I should leave to the jury. I think this is an embarrassing plea, framed in direct violation of the policy of the Act, and should be set aside.

RICHARDS, B.—You should show facts sufficient to ground the defence, and show it to be a valid one, although you need not go into all the minutiae of the circumstances connected therewith. The plea cannot be sustained.

Rule accordingly—Pleas set aside with costs.

Hayes, Q. C. applied for liberty to amend.

RICHARDS, B.—You must make a distinct motion for that purpose.

JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL.—1855.

[Reported by RICHARD W. GAMBLE, Esq., Barrister-at-Law.]

WYSE AND OTHERS v. GORE.

*Charge on lands—Trustee and cestui que trust—
S & 4 Wm. 4, cap. 27, sec. 40.*

By an indenture of 1799 A and B, in order to make provision for C and her issue, granted certain lands to D as trustee for 500 years, in trust among others to raise £6000 to pay off incumbrances, then for A, his executors and administrators, for his own use. Part of the £6000 was applied to pay off certain mortgages, and the residue, amounting to £1846 3s. 1d., became the property of A, who died in 1835. Held, that the legal personal representatives of A were entitled to interest on the £1846 3s. 1d. from 1835, notwithstanding the Statute of Limitations.

THE petition of appeal in this case stated that by indenture bearing date the 25th day of October, 1799, made by and between Thomas Wyse, and Frances Maria Wyse, otherwise Bagge, his wife, of the first part; Benjamin Thomas, of the second part; Edward Shiel, of the third part; and Benjamin Burton Johnson, of the fourth part; after reciting that Frances Maria Wyse, and Thomas Wyse in her right, were seised of the lands of Dromore, (being the lands sold in this matter,) held under a lease for lives renewable for ever; and that it was their intention to raise by demise, sale, or mortgage thereof, the sum of £6000 to be applied so far as should be necessary in payment of the incumbrances in the schedule mentioned, and the remainder to be for the purposes thereafter expressed. The said Thomas Wyse and Frances Maria Wyse did, for that purpose, and to make a provision for said Frances Maria Wyse and for their issue, in exercise of sufficient powers then vested in them, appoint, grant and convey and assure the said lands of Dromore to Edward Shiel, and his heirs, for the terms of the present and future contingencies to the use of the said Benjamin Burton Johnson for 500 years, and subject thereto to said Thomas Wyse and Frances Maria his wife, successively, for their lives, with remainder to the younger children of the marriage, in such shares as said Thomas Wyse and Frances Maria Wyse, or the survivor, should appoint, and in default of appointment, equally. And it was thereby declared that the said term of 500 years was vested in said Benjamin Burton Johnson, upon trust, to raise with the express consent in writing of Thomas Wyse and Frances Maria Wyse, or the survivor of them, out of the rents or profits, or by demise sale or mortgage, any sum not exceeding in the whole £6000, for paying off and discharging the incumbrances in the schedule mentioned; and after payment thereof, upon further trust to Thomas Wyse, his executors and administrators, all residue and remainder of the £6000, for his and their own use and benefit, and subject thereto, it was declared that the said term was to be in trust, to raise upon

the written request of Thomas Wyse and his said wife, or the survivor of them, any sum not exceeding £10,000, for the advancement and portions for the younger children of said Thomas and Frances Maria Wyse, as by said indenture will appear. That by indenture dated the 29th day of December, 1801, made by said Thomas Wyse and Frances Maria his wife, of the first part; and Mark Patrick Fitzmaurice, of the second part, the said Thomas Wyse assigned to Fitzmaurice, in trust for said Benjamin Burton Johnson, £2000 of the said principal sum of £6000. That £33 6s. 8d. of said sum having been paid off, leaving due the principal sum of £2166 13s. 4d., said sum was after mesue assignments vested in the petitioner, Elizabeth Margaret Gore; that interest was regularly paid thereupon, and the principal money paid off in this matter. That one other portion of said £6000 late currency was applied in this matter to paying off a certain mortgage for the principal sum of £1833 6s. 8d., which was an incumbrance mentioned in the schedule to said indenture of the 25th day of October, 1799. That the residue of the sum of £6000 late currency, not required for the payment of any of the incumbrances in the said indenture referred to, and amounting to £2000 late currency, equivalent to £1846 3s. 1d. sterling, became the property of said Thomas Wyse; and appellant, as the legal personal representative of said Thomas Wyse, has, by an order of the Commissioners bearing date the 7th day of March, 1855, affirming the ruling of Mr. Commissioner Hargreave, been declared entitled thereto, with interest at 5 per cent. for six years, previous to the filing of the petition in said court on the 27th day of April, 1850. That said Thomas Wyse died on the 10th day of October, 1835; and appellant submitted that under the circumstances hereinbefore stated and by reason of the trust created by said indenture of the 25th day of October, 1799, he is, as such personal representative of Thomas Wyse, entitled to interest upon said principal sum of £1846 3s. 1d. from the date of the death of said Thomas Wyse; and that this right is not barred or affected by any Statutes of Limitations. The petition prayed that the appellant might be declared entitled to interest upon the aforesaid sum of £1846 3s. 1d. from the day of the death of said Thomas Wyse, notwithstanding the Statute of Limitations, subject to any credits that should appear upon the account directed by the order of Mr. Commissioner Hargreave; and that the said order of the Commissioners bearing date the 7th day of March, 1855, limiting the arrears of interest to six years, previous to the filing of the said petition, might be set aside, or varied accordingly.

B. Stephens, (with whom was Lawless,) for the appellant, moved the petition.—The only question in this case is as to the amount of interest to be allowed upon the sum of £1846 3s. 1d. The Incumbered Estates Court had allowed interest only for six years prior to the date of filing the petition, whereas the appellant was entitled to interest on that sum from the day of the death of Thos. Wyse in October, 1835. The question is entirely concluded by the authority of cases in England, and this was admitted by the Commissioners, though

they did not coincide with their decisions. The case of *Young v. Lord Waterpark*, (13 Sim. 204,) was exactly in point; it decided that when the relation of trustee and *cestui que trust* existed between the parties, the Statute of Limitations did not apply. The marginal note at page 104 was this: "Under a marriage settlement a term was vested in trustees for raising £10000 for the younger children of the marriage, and subject thereto the estates were limited to the first and other sons in tail male. Much more than six years after the £10000 ought to have been raised and paid, the younger children filed a bill to have that sum raised; Held, that the relation of trustee and *cestui que trust* existed between the parties, and therefore the Statute of Limitations, which enacts that money to be raised out of land shall not be recoverable but within twenty years next after a right to receive the same shall have accrued to some person capable of giving a receipt for the same, did not apply." In the report of the case in *The Jurist*, vol. 10, p. 1, it did not appear whether there was a subsisting trust term, but it was ascertained that there was, as reported in 13 Sim. This case was followed by *Cox v. Dolman*, (2 De Gex M. & G. 392.) What created the doubt in this case was, the decision in the case of *Hunter v. Nockolds*, (1 Mac. & G. 640); but when the case came before Lord St. Leonards and the Lords Justices they were of opinion that the case of *Hunter v. Nockolds* could not be quoted against the case of *Young v. Lord Waterpark*, and held that where there was a subsisting term on which the trustees might obtain possession, the case was within the saving of the 25th section of the 3 & 4 W. 4, c. 27, and that the annuitant in that case was not barred by the operation of the 42nd section of that Act from recovering the entire arrears. There was no case before the Commissioners on which they overruled these authorities, and they must be held to be quite conclusive.

Kernan, contra, cited *Knox v. Kelly*, (6 I. E. R. 279.)

The LORD CHANCELLOR delivered the unanimous opinion of the court.—As long as these cases remain without being overruled by the House of Lords, we must follow them, and must therefore declare the appellant entitled to interest on the £1846 3s. 1d. from the date of the death of Thomas Wyse in 1855. We only regret that the parties should have been put to the expense of this appeal.

ROLLS COURT.

[Reported by R. W. GAMBLE, Esq. Barrister-at Law.]

BAGGE v. BARRON.

Practice—Allocation—Transfer of money from Court of Chancery to Incumbered Estates Court—Certificate.

On motion to transfer funds from the Court of Chancery to the Incumbered Estates Court it is necessary to produce on the motion at the Rolls Court a certificate of the Commissioners of the Incumbered Estates Court, showing that there is a fund in that court to be distributed to which the

funds in Chancery can be transferred; otherwise such motion will be refused.

Richard Allen, for plaintiff, moved, on notice, that Arthur Usher Roberts, the receiver in this cause, may lodge in the Bank of Ireland to the account of the Commissioners for Sale of Incumbered Estates in Ireland, and to the credit of the matter of the estate of "Catherine Jane Barron, and others, owners, *ex parte* the Rev. James Bagge, petitioner," the sum of £126 12s. 7d. sterling, being the balance (after payment of the cost of accounting,) and £5 10s. for the costs of this motion and of such lodgment, out of the money remaining in said receiver's hands on foot of his account, filed in this cause on the 14th of December last, and that said plaintiff may recover from said receiver the sum of £5 10s. for the costs of that motion and of said lodgment, and that the receiver may have credit for such payments on passing his next account.

MASTER OF THE ROLLS.—I have often before remarked upon the inconvenience of making motions of this kind without procuring the necessary certificates. I will never make an order transferring money to the Incumbered Estates Court without a certificate being procured from the Commissioners of that court, showing that there is a fund in the cause in that court to be distributed, so that the Commissioners will distribute the money when transferred; for I have, upon the application and statement of counsel, transferred sums from that court to the Incumbered Estates Court when there was no fund to distribute there, and consequently have put that court to very great inconvenience. I have therefore determined that I will not in future make any such transfer without a certificate from the Incumbered Estates Court being handed in to me such as has been done in this case, showing that there is a fund in that court to be distributed, to which I can transfer the money.

[The order in this case was made in the terms of the notice.]

NOTE.—As his Honor has frequently refused motions, or been obliged to let them stand over for want of the necessary certificates, we beg to call attention to the following orders heretofore made by his Honor.

GENERAL ORDERS, 22ND MAY, 1848.

"It is ordered by the Right Hon. the Master of the Rolls that in all cases when a motion is made at the Rolls to make a consent a rule of court, purporting to be made between all the parties in the cause, there shall be a certificate at foot of or indorsed on the consent, signed by the solicitor for the party on whose behalf the motion is made, to the following effect, or as near thereto as the circumstances of each case will admit.

"I hereby certify that I have carefully compared the title of this consent with the Rolls' certificate (or certificates), and that it corresponds therewith; and I further certify that this consent has been signed by or on behalf of all the parties in the causes and matters in the title hereof mentioned, save and except (here name the persons, if any, who have not signed.)

And if there shall have been a decree to account in any of such causes, and any person shall have proved a demand thereunder, and such consent shall seek to transfer or pay over any stock or cash, add after the words 'all the parties' the words 'and all persons who have proved under the decree.'

"It is further ordered by the Right Honourable the Mas-

ter of the Rolls, that when a motion shall be made at the Rolls for the transfer of any stock, or the payment of any money out of court or by the receiver, and the motion shall be grounded on a report of the Master, or a decree, or on both, whereby the priorities of the several parties and creditors or incumbrancers are ascertained, there shall be a certificate at foot of or indorsed on the notice of motion, signed by the solicitor for the party on whose behalf the motion shall be made, to the following effect, or as near thereto as the circumstances of the case will admit.

"I hereby certify that I have compared this notice with the Master's report, (or decree, or both, as the case may be); and I further certify that the stock sought to be transferred (or the money sought to be paid out of court, or by the receiver, as the case may be,) is sought to be transferred (or paid, as the case may be,) in exact accordance with the rights and priorities of the several parties as ascertained by the said report, (or decree, or both, as the case may be.)

And if the notice is not framed in exact conformity with such report or decree, add these words 'save in the following particulars,' and then describe with perfect accuracy wherein the notice varies from such report or decree."

"T. B. C. SMITH, M. R."

GENERAL ORDER, ROLLS' COURT, JUNE 18, 1846.

"The Master of the Rolls is pleased to direct that from and after Saturday, the 20th instant, when it is intended as a motion of course to make a consent a rule of court, the solicitor shall lodge such consent and the documents necessary to support the same (if any) with the Registrar, on the day previous to making such application.

"YELVERTON O'KEEFE, Registrar."

COURT OF QUEEN'S BENCH.

EASTER TERM, 1855.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

FLOOD v. O'GORMAN.—April 24.

Landlord and tenant—Use and occupation—Executory contract for lease—Beneficial enjoyment of premises.

In an action for use and occupation the defendant pleaded that before his occupation of the premises commenced, the plaintiff agreed in writing to demise the premises to him for 999 years, at a certain rent, which was to commence from the gale day next ensuing the date and execution of the lease; that, after making said agreement, he was let into possession, but that the lease had never been executed, although he requested the plaintiff to do so; that he had laid out considerable sums of money on the premises, but had never beneficially occupied or received any profits whatever from the same. Held, on demurrer, that this defence was no answer to the action.

This was an action for use and occupation of premises at Temple-bar, in the City of Dublin. The defendant pleaded, first, a defence, alleging an agreement that the defendant should hold the premises rent free, which was not revoked at the time of action brought; and secondly, that before the commencement of the six years in question, the plaintiff agreed in writing with the defendant to grant him at his request a lease of the said premises for a term of 999 years at the yearly rent of £3 13s. 10d., to commence from the gale day following the date and execution of such lease; that defendant was put in

by the plaintiff to occupy said premises until such lease should be granted; that defendant subsequently, with plaintiff's consent, expended a considerable sum of money upon the premises; that the lease had not as yet been granted by the plaintiff to the defendant, although the plaintiff was frequently applied to by the defendant, and requested to grant same; and that, although the defendant had been in possession of the said premises during the said period of six years he had not beneficially occupied or received any profits whatever from the same. Demurrer to the second defence; that the alleged breach of contract by the plaintiff, in not executing the lease, would be only ground of action against the plaintiff or of relief in a Court of Equity, but does not give any valid answer in a Court of Law; and that the absence of benefit or of the receipt of profits by the defendant out of said premises was not any answer to plaintiff's claim for use and occupation by him.

Hilliard (with whom was *Coates*,) in support of the demurrer.—The averment as to the non-beneficial occupation is no answer to the action.—*Harrison's Woodfall's Landlord and Tenant*, 307. [*Moore, J.* There is a case of *Smith v. Eldridge*, (15 C. B. 236,) where a point of somewhat similar kind to this arose. There was an agreement for a lease, and, until the lease was executed, no rent was to be paid, and yet the court held that the judge was justified in leaving it to the jury to say whether there was not an implied agreement between the parties to pay in the meantime the reasonable value of the premises. Here there is no such allegation.]

Chatterton and Otway, Q. C. contra.—The contract between the parties in this case excludes the inference of rent being payable antecedently to the execution of the lease. The rent was to commence to run from the first gale day.—*Addison on Contracts*; *Rumball v. Wright*, (1 C. & P. 589); *Henry v. Vance*, (8 Ir. L. R. 205); *Howard v. Shaw*, (8 M. & W. 118.) The absence of beneficial enjoyment is a good defence. [*Crampton, J.*—Suppose that it was found by the jury not to be beneficial, how would that decide the question? That might have been the result of bad farming or bad seasons. *Perrin, J.*—How far do you mean to push the question of beneficial enjoyment? Do you think it necessary for the purpose of maintaining an action of use and occupation? Not if there be an express contract, and the party exclude the owner from occupation; but, if you come to the question of implied contract, then it is most essential to see whether the occupation is beneficial. [*Perrin, J.* Suppose he become bankrupt. *Moore, J.*—Or put a crop into the ground which failed. *Crampton, J.* The thing demised is a house. Now, if he lives in that house, he has a beneficial occupation; if he do not live in it, it is his own fault; he might give it up; it is hard to say that he should have it for six years, and yet derive no benefit. If he stopped a night in it, or let a friend or servant do so, he had some beneficial enjoyment.]

Coates was not called on to reply.

LEFROY, C.J.—I take it for granted that we have heard all that can be urged with respect to the present case. The second defence is unnecessary, at

all events, for every thing which it contains to the purpose is included in the first, to which alone the cases which have been cited apply, but are wholly inapplicable to the second defence. In the case of *Runball v. Wright*, (1 C. & P. 589,) the judge was of opinion that the contract amounted to what is here alleged in the first defence. In *Henry v. Vance*, (8 Ir. L. R. 205,) Burton, J. considered that where a party went into possession upon the faith of a lease being made to him, without any stipulation as to terms, he would be a mere tenant at will till the lease was executed. These cases are good law, but here is a case where the party has entered into an agreement for the making of a lease at a given rent, the rent not to commence under the lease till it should be executed, and then upon the gale day following the date and execution of the lease. The defence contains averments that after the making of that agreement the plaintiff put the defendant in possession of the premises till such lease should be executed. The premises consisted of a house at Temple-bar, in the City of Dublin. It is stated that the party demanding the lease laid out a great deal of money on the house; and under these circumstances, coupled with the allegation that the defendant had no beneficial occupation, and had received no profit from the premises, he defends the action. If this be an attempt to set off to an action of use and occupation a cross cause of action for the non-performance of contract, the law has not yet arrived at that species of defence whereby unliquidated damages can be set off against actual damage. But it is said that there has been no actual enjoyment of this house, in which he has resided six years. How can that hold good, which is literally a contradiction in terms, namely, that a man should enter into a dwelling-house, and live in it for six years, and should say notwithstanding that he had no beneficial enjoyment? The other ground of defence is bad enough, but this is worse, and is justified neither by principle or authority.

CRAMPTON, J.—This case has been argued with extreme plausibility. It was an action for use and occupation. The tenant occupied for six years, and is admittedly a tenant at will. He paid no rent whatsoever. The tenancy and occupation by him of the premises were by consent, and the principle which we are now called on to decide is this, namely, that where the tenancy and occupation are by consent, the tenant can avoid the payment of rent upon the grounds stated on the face of the defence. The second defence is quite unnecessary, for the defendant has the benefit of every thing it contains substantially under the issue to be taken upon the first defence. The second defence, however, omits to state that which was stated in the first defence, namely, that till the execution of the lease the defendant should pay no rent. There is no allegation of that sort. It is true that the rent stipulated for by the agreement was not to commence until after the execution of the lease. No express provision was made for the time which should elapse between possession given and taken and the execution of the lease. But the law, in the absence of an express contract, implies the existence of the relation of landlord and tenant, as the necessary

implication resulting from that occupation. The case which my brother Moore has spoken of was one in which that was spoken of as a ground of action. That follows as a necessary inference, unless there is something to counteract it. There is no such allegation here, and such an implication arises in this case, unless we hold that the fact of the outlay of the money which the defendant alleges that he has expended upon the repairs of the premises, and that he asked for and was refused the lease, and did not get it, amount to an answer. But these are matters to be inquired into elsewhere, and the mere fact of the refusal to grant a lease does not furnish in a Court of Law ground for a tenant refusing to pay rent. Besides, the rent which the tenant was to have paid pursuant to the express agreement was to accrue *after* the execution of the lease, and not before it. Whether the occupation was beneficial or not, there was a contract, either expressed or implied to pay rent. Here I am of opinion that there was an implied contract. It does not lie in the defendant's mouth to say that after he has occupied the place for six years, he has derived no benefit from it. That is even contradictory of other portions of the defence. There is no authority to satisfy us with respect to any of the grounds taken by the defendant. The necessary implication is that there was something to be paid in the way of rent, unless that implication be rebutted by something else not to be found in this defence.

PERRIN and MOORE, J. J. concurred.

Judgment for plaintiff.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

CASEY v. LAWLOR.—Nov. 17, 18, April 24.

Will—Construction—"Property."

By a will executed before 7 Wm. 4, & 1 Vic. c. 26, a testator devised certain freehold leases without words of limitation, and in the same sentence added "with the stock and property of every denomination that I may be possessed of at the time of my decease." Held, (Ball, J. dissentiente,) that the whole interest in the lands passed under the general word "property."

EJECTMENT on title. By indenture bearing date the 1st of May, 1807, James Casey became lessee of part of the lands of Moone in the Co. Kildare for the lives of three persons therein named, and the life of the survivor, and for a term thus described; "and in case the said three lives shall become extinct or dead before the expiration of thirty-one years to commence from the 1st day of May instant, then," &c. for the portion of the thirty one years which shall be unexpired after the death of the surviving *cestui que vie*. James Casey made his will dated the 12th of April, 1828, and thereby devised in these words, "To my brother Michael Casey, and my sister Margaret Casey conjointly, and to the survivor of either of them, the lands I hold under the following denominations, viz. the farms I hold from Captain Taylor, Mr. Yeates, Mr. Power, and Mr.

Patrick Whelan, of the City of Dublin, the said lands being and lying in the townlands of Moone, Birdtown, and Battlemorant, with the stock and property of every denomination that I may be possessed of at the time of my decease." The ejectment was brought to recover the lands mentioned in the lease of 1st of May, 1807. The plaintiffs claimed as heirs-at-law of the testator James Casey. The defendants held as representatives of the devisees, alleging that the entire interest of the testator in the lease of the 1st of May, 1807, passed by his will to the devisees and not merely a life estate. The cause was tried at the Kildare Summer Assizes of 1854, before Mr. Justice Torrens, who directed the jury to find for the defendants, reserving leave for the plaintiffs to change the verdict into one for the plaintiffs, if the court should be of opinion that they were entitled to recover. A conditional order having been obtained, cause was shown by the defendants in the following Michaelmas Term.

Macdonagh, Q. C. (with him *Hayes, Q. C.*) for the defendants.—The question in this case is whether, under the will of the late James Casey, the devisees therein named took only life estates or the whole interest of the testator. The plaintiffs claim as heirs-at-law of the testator, and the defendants as entitled to all the interest of the devisees. The will being made in the year 1828, the Wills Act (1 Vic. c. 26,) does not apply. By the word "property" in the second clause the whole estate of the testator passes. In *Nicholls v. Butcher*, (18 Ves. 193,) the Master of the Rolls decided, in the absence of any express authority, that the entire interest passed under the word "property." [*Monahan, C. J.*—There is a difference in this case, for here the testator treats land as different from property. *Ball, J.* In that case the word "stock" was not coupled with "property," as in the present case, so that here the rule *ejusdem generis* may apply.] The cases show that the effect of the word "property" is not to be restricted on account of its being joined with other words. *Wilce v. Wilce*, (7 Bingh. 664); *Roe d. Penwarden v. Gilbert*, (3 Brod. & Bing. 85.) The rule *noscitur a sociis* is always excluded where there is an intention to devise the whole by the words used, and such an intention may be inferred from the will. In this will the intention was clear to devise the whole, and there are only the two devisees and no other residuary devisees in whose favour the court might, perhaps, wish to restrict the significance of the word "property." In the first clause the words "farms I hold" are descriptive of locality, and there are cases in which it was held that the fee would pass under words of locality. Still I admit that upon the first clause a doubt may arise whether the words there used were strong enough to pass the entire interest, even if the intention was clear, and for that reason I began with the second clause, which contains words that are strong enough, if an intention can be shown.

Ball, Q. C. and *R. Osborne* for the plaintiffs.—There are two clauses in this will. By the first there was a special devise, and whatever was not given by it would go to the heir, unless it could be included in the second clause. There was a joint tenancy for life and for the life of the survivor, the

reversionary interest then continued in the testator. The words "farms I hold" in the first clause do not enlarge that devise. Farm means that which is held by a tenant—*Lane v. Stanhope*, (6 T. R. 345,) and it has no secondary meaning implying the quantity of interest. It means what is held, not as it is held. All the words ever held to pass realty are collected in Jarman on Wills, c. 33. There are cases where the entire interest passed, but they are not at all like the present. *Smith v. Tindal*, (11 Mod. 90); *Doe dem. Child v. Wright*, (8 T. R. 64); *Doe dem. Crutchfield v. Pearce*, (1 Price, 353); *Burton v. White*, (7 Exch. 720.) In the last case the words "farm or estate" were used, but the judgment was founded on the word "estate." The second clause is but a part of one single devise. There are not two devises, first of land and then of something else, but one single devise consisting of land with the stock and property. The residue of the first part of the devise will not pass under the general words used in the same sentence. There are no introductory words showing an intention to bequeath everything, and the word "property" will not carry the real estate, where it is coupled with a particular description of personalty, and the other words are not a full description of the personal estate. *Wilkinson v. Merryland*, (Cro. Car. 447); *Tilley v. Simpson*, (2 T. R., 659, n.); *Jongsma v. Jongsma*, (1 Cox. 362); *Timewell v. Parkins*, (2 Atk. 102); *Roe d. Halling v. Yeud*, (2 Bos. & P. N. R. 214); *Doe d. Bunny v. Rout*, (7 Taunt. 79); *Lamphier v. Despard*, (2 Dru. & War. 59); *Doe d. Winder v. Lucas*, (7 Ad. & El. 195); *Doe d. Lean v. Lean*, (1 Q. B. 229); *Fisher v. Hepburne*, (14 Beav. 626.)

Hayes, Q. C. in reply.—No argument can be founded on the circumstance of there being no introductory words in the will, for the fact of making a will implies an intention of disposing of the testator's property of every kind. *Doe d. Wall v. Langlands*, (14 East. 370.) The word "lands" by itself would not be sufficient to pass the entire interest, and that was all that was ruled in *Payne v. Plyor*, (14 Q. B. 512); but the words "lands I hold" imply tenure. The word "farms" also is important. By "farms" leases for years pass—*Brook. Abridg. "Grant,"* pl. 155; hence the word shows the quantity of estate. This is also shown by the meaning of the word. "Farm" is a collective word, and includes the idea of a thing demised, in which sense it was used in the Statute of Marlbridge. *Wrotlesley v. Adams*, (Plowden, 195); 1 Steph. Blackst. 490. The idea of tenure is also implied in the words "I hold."—*Bailes v. Gale*, (2 Ves. sen. 48); *Burton v. White*, (7 Exch. 720.) The rule *noscitur a sociis* is now much restricted in its application, so that the word "property" has been held to pass realty, even when joined with words signifying personalty. *Doe d. Morgan v. Morgan*, (6 Bar. & Cres. 512); *Noel v. Hoy*, (5 Mad. 38); *Morrisson v. Hopps*, (15 Jur. 787); *Footner v. Cooper*, (2 Drewry, 7.)

Cur. adv. vult.

April 24.—This day the judges delivered their respective judgments in this case.

JACKSON, J.—The question in this case arises on the will of James Casey. [The learned judge then

read the will, the particulars of which are already given.] There are no words of inheritance in connexion with the devise. Then, by this devise, does the reversionary interest pass, or did the testator die intestate as to that part of his estate? No case has been cited on the words "the farms I hold," to show that they pass the inheritance. With respect to the word "property," the plaintiffs, the heirs-at-law, would confine it to the personality, upon the principle of the rule *noscitur a sociis*, inasmuch as it is here associated with "stock." But this rule has latterly been much restricted in its operation, as may be seen by the cases on the subject collected in Jarman on Wills, c. 22. No clear intention of the testator to devise the reversionary interest can be gathered from this will, yet I am of opinion that the word "property" includes here realty as well as personality. The last case on the subject is *O'Toole v. Brown*, (3 Ell. & Blackburn, 517,) where subsequently purchased real estate passed under a residuary clause. The testator there could not have had any intention of devising realty, as he had no real property at the time when he made his will. Since the passing of the late Wills Act there has been less reason than before for extending the rule *noscitur a sociis*. The word "property" must in this case, I think, have its legal effect, which is to pass the entire interest of the testator to the devisees.

BALL, J.—Although there are no words of limitation in this devise it is argued that the subsequent words pass the whole interest. It is true that the words "estate" and "property," by themselves, import both realty and personality, unless a manifest intention to the contrary can be shown. Is there then a sufficient intention shown that the whole of the real estate should not pass here? In considering this question I do not attach much weight to certain matters that have been relied on in some of the cases—the absence of any words importing realty, except the word "property," or the use of the word "possessed," although these points once had weight. The language of Bayley, J. in *Doe d. Morgan v. Morgan*, (6 Bar. & Cres. 512), and of Lord Cottenham in *Saumarez v. Saumarez*, (4 My. & Cr. 331,) show that the inclination of the courts is to take words to mean what falls within their usual sense, "unless there is something like a declaration plain to the contrary." Now in this case I do not advert to the rule, that the heir-at-law must not be disinherited without express words. But I think the intention of the testator may be inferred from the circumstance that he has associated the word "property" with words signifying personality. General rules are not to be used in every case, but when they are at all applicable they should be applied. This principle is established by the Vice Chancellor in *Stokes v. Salomons*, (9 Hare, 84.) Without going through all the cases on the rule *noscitur a sociis* I may mention a few of them. *Hopland v. Ackland*, (1 Salk. 239,) is the first case to which I shall refer; there the rule was held to apply by Trevor, C. J. The language of Lord Hardwicke in *Tilly v. Simpson*, (2 T. R. 659, n.) is also in point. Some of the other cases are:—*Wilkinson v. Merryland*, (Cro. Car. 447;) *Cliffe v. Gibbons*, (2 Lord Raymond, 1324); *Marham v. Twisden*, (Gilb. Eq. R. 30;) *Jongsma v. Jongs-*

ma, (1 Cox. 362); *Doe d. Evans v. Evans*, (9 Ad. & Ell. 719); *D'Almaine v. Mosely*, (1 Drew. 629); *Woollam v. Kenworthy*, (9 Ves. 137); *Bebb v. Pennoyre*, (11 East. 160.) Recent cases in which realty has been held to pass under general words, as "property," may appear to conflict with the rule; but on examination it will be found otherwise. I am of opinion that the reversion did not pass by this will.

TORRENS, J.—I agree with my brother Jackson that the reversionary interest does pass to the devisees. The cases do not afford any sufficient guide for the judicial mind in construing this will and those like it. But the old rules have been modified, and an extension has been given to general words by the later cases, so that although there is no specific bequest of the reversion it may be held to pass under the general word "property."

MONAHAN, C. J.—The rule *noscitur a sociis* has been got rid of in the construing of wills to a certain extent. The proper rule now established is, that general words must have their general effect unless there be something to prevent them from having it. This principle seems to be established by the cases cited in Jarman on Wills, 664. The case of *Scott v. Alberry*, (Comyns' Rep. 337,) cited by my brother Torrens, but not mentioned at the bar, is also in point, although it is certainly different in some points. In that case it was held that everything passed under the will, both realty and personality, and the only distinction between it and the present case is, that in it there were the introductory words, "As touching the worldly estate it hath pleased God to bestow upon me," &c. Without going through all the cases I think that the rule may be established as I have stated it, but as we go in this case a little further than any case yet decided I shall mention the cases of *The Mayor of Hamilton v. Hodsdon*, (6 Moore, P. C. C. 76;) *Saumarez v. Saumarez*, (4 My. & Cr. 331;) and the last case on the subject, which is, *O'Toole v. Browne*, (3 Ell. & Bl. 572;) also the case of *Sanderson v. Dobson*, (7 C. B. 81.) From these I infer that general words must have their effect unless there is a clear intention to the contrary, and as I cannot find that clear intention here, I think that the verdict should be for the defendants. As this was a proper subject for the opinion of the court we shall give no costs.

Cause allowed without costs.

DOYLE v. RAINSFORD.—Nov. 20.

Practice—Costs—16 & 17 Vic. c. 113, s. 126.

In an action for assault and battery the plea only covered the assault, and upon the issue raised thereby a verdict of one farthing damages was given, and no application was made to the judge for a certificate. No judgment had been marked in respect of the portion of the plaint left uncovered. A motion that the full costs should be taxed, on the ground that the battery was not denied in the plea, refused with costs.

W. J. Sidney moved that the plaintiff's costs in this action should be taxed to the full amount by the officer. The action was brought for an assault and bat-

tery, and the defence extended only to the assault; and therefore, according to sec. 68 of the Common Law Procedure Act, the battery must be taken to have been admitted, and the plaintiff in that case would be entitled to the costs without any certificate. *Brenan v. Mahony*, (2 Ir. Law Rec., N. S. 14.)

Whiteside, Q. C. and *Armstrong, Q. C.* for the defendant.—It is clear from the last section of the Common Law Procedure Act that at all events the plaintiff can recover but half costs. [*Monahan, C. J.*—Although he can get only half costs the whole costs must first be taxed, if we grant this motion.] The 68th section refers to the action itself and not to the subject of costs, and is, therefore, inapplicable here; so that no admission of the battery is made on the pleadings. No application has been made for a certificate, and by the 126th section without a certificate the plaintiff cannot get more costs than damages. That section is a mere transcript of the old law, and thus the old cases are applicable here. *Mears v. Greenaway*, (1 H. Bl. 296); *Page v. Creed*, (3 T. R. 391); *Smith v. Edge*, (6 T. R. 562); *Johnson v. Northwood*, (7 Taunt. 689); *Pursell v. Horn and wife*, (8 Ad. & El. 602.)

Sidney, in reply, argued that the battery was admitted in the plea, and that if it were not the plea was bad.

PER CURIAM.—If there was no admission of the battery with matter in avoidance, and if there was no denial of it in the defence, the plaintiff should have marked judgment for the part of the cause of action uncovered by the defence. The new statute does not alter the rule on that point. The plaintiff did not do that, but he has now entered judgment upon the verdict found by the jury, and he has no certificate from the judge. As judgment by default was not marked for the battery, and the jury did not find any damages for it, and as the battery is not admitted on the pleadings, for the defence does not extend to it at all, this motion must be refused with costs.

Motion refused with costs.

COURT OF EXCHEQUER.

EASTER TERM, 1855.

[Reported by BECHER L. FLEMING, Esq., Barrister-at-Law.]

CONDON v. THE EARL OF KINGSTON AND OTHERS.

April 24, 25, 27.

Ejectment—Estoppel—Civil Bill—Variance—Amendment—14 & 15 Vic. c. 57.

A civil bill ejectment for nonpayment of rent had been brought to recover the possession of certain premises held by the tenant under a lease for lives, one of which was subsisting at the time of the bringing of the civil bill; but the tenant was erroneously described in the process as being a tenant from year to year. The defendant was regularly served, but did not appear at the trial, and the civil bill having been verified in the ordinary way, a decree was pronounced for the plaintiff. The tenant having brought a cross ejectment in the Superior Courts, upon the ground

that the proceedings below were erroneous, Held, that the error in the civil bill being of such a nature as that the Assistant Barrister might have amended the pleading, and there appearing upon the face of the proceedings below sufficient to give the Assistant Barrister jurisdiction, the decree below was a bar to the present action.

The court will intend that errors of this nature have been regarded as merely technical by the court below.

Semble, an Assistant Barrister may amend a civil bill ejectment, where the error consists in a misdescription of the tenancy.

Quære, whether a cross ejectment will now lie in the Superior Courts in cases where the prior ejectment (being a civil bill,) was coram non judice.

THIS was an action of ejectment on the title, tried before Mr. Sergeant Howley at the Cork Summer Assizes of 1854; and the jury returned a special verdict finding the following facts: "That by indenture of lease bearing date the 22nd of August, 1804, Caroline Countess Dowager of Kingston being seised in fee, demised to William Condon the premises which were the subject of this ejectment, to hold to him and his heirs and assigns for the lives of three persons therein named, and the survivor of them, at the yearly rent of 19s. per acre, payable half-yearly, and amounting in the whole to the sum of £36 16s. 8d., and that by another indenture bearing date the 24th December, 1828, the lessee in the lease of 1804, assigned his interest in the lands to Thomas Condon, the plaintiff in this cause, by virtue of which the latter entered into possession and paid the rent reserved in the lease of 1804 to the persons from time to time entitled to it, and amongst others to the Earl of Kingston, one of the defendants in this suit. That in the year 1845, the reversion in the premises in question, expectant on the lease of 1804, and the right to recover the rent payable under that lease, became and still is duly vested in the defendant Thomas J. Eyre, in trust for the defendants the Earl of Kingston and others. That in the year 1852, a sum equal to more than one year's rent, reserved under the lease of 1804, having accrued due, a civil bill ejectment had been brought by the said Thomas J. Eyre against the plaintiff Thomas Condon and others, which was set out at length in the special verdict, in which it was alleged that some or one of the defendants held all that and those the lands in question as tenant or tenants to the plaintiffs or some or one of them "from year to year," at the yearly rent of £36 16s. 8d. sterling, payable, &c.; and that a year's rent was due out of the premises: and summoning the defendants in that suit to appear before the Assistant Barrister at Middleton, in the County of Cork, upon a day therein named. That the above civil bill was endorsed with the particulars of rent due, as required by the statute, and had been duly served upon the defendants therein, but that Thomas Condon (the plaintiff in the present suit) did not appear at the trial of the civil bill, or take any defence to it, and that on the 24th of March, 1853, the civil bill came on for trial at Middleton, being in the division and riding of the County of Cork in

which the lands were situate, before Walter Berwick, the Assistant Barrister, when due service of the civil bill having been proved, and the truth of the contents of the civil bill having been verified by the receiver agent of the plaintiffs in the civil bill, pursuant to the provisions of the Act, it having been also proved that the premises in question were held by Thomas Condon from the plaintiff therein named at the yearly rent of £36 16s. 8d., and that more than one year's rent was in arrear, the Assistant Barrister pronounced a decree for the plaintiff therein; by which, after reciting the bringing of the civil bill for the premises in question, on the ground that one year's rent was in arrear, and after stating that it appeared to the court that the civil bill process had been duly served, requiring the defendant and all others having or claiming to have an interest in the premises, to appear and answer the civil bill; and upon proof thereof, and that the premises were held by the defendant from the plaintiff at the yearly rent of £36 16s. 8d., and that the defendant was indebted to the plaintiff in the sum of £181 8s. 4d., being for one whole year's rent and arrears of rent, after all just and fair allowance, it was ordered that the plaintiff should be put in possession of the said premises, with a further order as to the costs of the civil bill. That the above decree having been duly signed by the Assistant Barrister was duly executed, and that the plaintiff therein was put into possession of the lands in question on the 10th of April, 1853. That the defendant therein did not at any time previously or subsequently thereto, pay or tender to the plaintiff the amount of the rent due by him, or any part thereof, or the costs of the ejectment, nor did he bring any civil bill for redemption, nor file any bill or petition in equity for redemption, nor appeal against the above decree within the time allowed by the law for that purpose. That at the time of the service of the civil bill ejectment, and of the obtaining of the decree for the possession of the lands in question, one of the lives named in the above lease was and still is alive, but resident in the United States of America, to which he had emigrated several years before the bringing of the civil bill ejectment; and that at the time of the bringing of the civil bill ejectment more than one year's rent of the rent reserved by the lease, was due to the plaintiff therein out of the premises. That a petition for the sale of the lands in question had been presented to the Commissioners for the sale of Incumbered Estates in Ireland, wherein the Earl of Kingston and others were described as owners. That in the month of April, 1853, a notice, according to the practice of that court, was served on the plaintiff in the present case, in which he was described as holding the lands in question under the lease of 1804, for three lives, one of which was still in existence; and the special verdict concluded by praying the opinion of the court as to whether or not Thomas Condon was entitled to the possession of the lands in question.

J. Greene for the plaintiff.—The judgment of an inferior court is not conclusive. *Thompson v. Blackhurst*, (1 Nev. & Mann. 266); and it has been held that a civil bill ejectment must accurately describe the nature of the tenancy, otherwise there will be

no eviction. In *Coffey v. Rahilly*, (1 Jones, 274,) the tenancy had been erroneously described in the civil bill, and a cross ejectment having been brought after a lapse of fifteen years, the Court of Exchequer gave judgment for the defendant below. It will be contended that there are provisions in the Civil Bill Act (14 & 15 Vic. c. 57, s. 73,) by which the defendant in the civil bill shall be barred from all relief in law or equity, unless he bring a civil bill for redemption within the time allowed by the statute; but that section treats only of the redemption of the same interest that was evicted, and the estoppel contended for only relates to such, whereas in the present case the cross ejectment has been brought for a different interest from that described in the civil bill. [*Greene, B.*—The absence of the certificate of the justices appears to have formed an important element in that decision.] That was only matter of evidence in the court below, and need not have been set out upon the record. The only fact necessary to give jurisdiction was the desertion, and that was proved. In the present case there can be no doubt of the existence of the lease, the language of the special verdict treating it as being a subsisting instrument. [*Greene, B.*—There is, at any rate, sufficient in the special verdict to rebut a presumption to the contrary.]

Deasy, Q.C. contra. [*Greene, B.*—Is it not the practice that a junior should appear in a case of this nature? I find the name of Mr. J. Murphy as junior counsel upon the copy of the special verdict furnished to us, and it is a very gross neglect in the attorney if he has not received instructions *Richards, B.*—If the attorney will undertake to have a junior counsel instructed in sufficient time to-morrow, we will hear Mr. Deasy's argument first.] In this case there was a subsisting tenancy, and all the requisites necessary to give the Assistant Barrister jurisdiction are set forth in the civil bill; and if the tenant quarrelled with the decree, there were three or four courses open to him, none of which he has adopted. It has been lately held in this court that a judgment in ejectment is conclusive, and cannot be overturned by a cross ejectment. *O'Donnell v. Ryan*, (7 Ir. Jur. 126,) and the only objection in this case is, that there has been an informality in the process. Even supposing that there had been a substantial misstatement, yet there being sufficient in the process to give the Assistant Barrister jurisdiction, and the facts stated having been proved, this court will not interfere with the decree below. [*Greene, B.*—Would not the same argument apply to the case in Jones' Reports?] It is submitted that under the present Civil Bill Statute such could not now be a defence, for the Assistant Barrister is empowered to disregard or amend such variances, by ss. 105, 106, and to decide what is a technical error—a power which did not exist when the case alluded to was decided. [*Richards, B.*—Those sections declare what is a technical error, namely, whatever has not a tendency to mislead the opposite party. Now can it be said that such a description of his tenure may not tend to mislead the tenant, for it informs him that all the lives in his lease have expired, and that he is merely a tenant from year to year; and under such circumstances he may

say, "I will not take defence for a yearly tenancy," although he might do so for a freehold estate.] Such an objection could be removed by amendment under section 106, which might have been effected if the tenant had appeared and produced his lease. [*Richards, B.*—I am certainly of opinion that it should be the policy of the law to disappoint proceedings of this kind. *Greene, B.*—It is not necessary that the Assistant Barrister should in his decree state the nature of the tenancy evicted; and a decree having once been made, the court should intend to support it.] Supposing the tenant had a power of setting up this defence in the court below, will the court permit him now, having lapsed his opportunity, to raise such an objection, this not being a case of title arising since the making of the decree below? Is the court prepared to hold that the taking of possession under that decree was an act of trespass? [*Greene, B.*—If a conviction of an inferior court omits to allege a fact necessary to give jurisdiction, the conviction is nevertheless valid until reversed.] To allow this decree to be reviewed by a cross-ejectment in this court would be constituting this court a court of appeal, contrary to the provisions of the statute, which gives a right of appeal to another court, and in default of such appeal debars the party decreed from all relief at law or in equity—sec. 73. The decision in Jones' Reports must be regarded as treating of the eviction of a certain interest, and not affecting another interest subsequently created. [*Greene, B.*—There is another distinction which appears to have existed in that case, namely, that the interest evicted was misdescribed in the decree, as well as in the process, although it may not have been necessary to describe the tenure in the decree, and Baron Pennefather adverts to that fact: therefore it will remain to say whether such a state of things is distinguishable from a decree not misstating the interest, but founded upon a civil bill in which that interest was incorrectly stated.] The chief distinction in that case is, the want of the justice's certificate.

J. Murphy, (with him *Deasy, Q.C.*)—The judgment below must be regarded as an estoppel. In *Trevivan v. Laurence*, (Salk. 276,) a judgment in an action of *scire facias* had been obtained, reciting the judgment recovered as of a wrong Term, it being, therefore, a revival of a non-existing judgment, and an action of ejectment having been brought, it was held that the defendant was estopped from taking advantage of the variance, and therefore that the plaintiff in the *scire facias* was entitled to possession under the *elegit*, although no such judgment existed. Such a judgment, if pleaded, used to be held an estoppel; if not pleaded, in evidence conclusive. The rule was so laid down by Chief Justice De Grey in *The Duchess of Kingston's case*, (2 Sm. Lead. Cas. 425,) but a distinction was subsequently engrafted upon that doctrine—viz., that it shall be conclusive as a plea when there is an opportunity of pleading it, and when there is no such opportunity, that it shall be conclusive as evidence. *Vooght v. Winch*, (2 B. & Ad. 662); *Doe v. Huddart*, (2 C. M. & R. 316.) In the present case the defendant could not have pleaded the decree be-

low, there being but one form of defence given by the statute—*O'Donnell v. Ryan*, (7 Ir. Jur. 181,) [per Pennefather, B.]—and therefore the decree was conclusive as evidence. Besides, both in the Civil Bill Court, and now in the Superior Courts, there are no nominal parties in the action of ejectment, and therefore *O'Donnell v. Ryan* is applicable in the present case. It has been held in England that a judgment in ejectment has now the same effect as a judgment in any other action.—*Wilkinson v. Kirby*, (2 E. C. L. R. 1395.) [*Greene, B.*—The only case that presents any difficulty is *Coffey v. Rahilly*, and the only question is, whether or not we should give to civil bill ejectments the same effect that is given to ejectments in the Superior Courts?] The court should presume that everything which should have been done has been done by the court below to authorize its proceedings.

Sergeant O'Brien in reply.—In *Coffey v. Rahilly* the objections, as stated in the report, were twofold: that there had been a defect in the evidence as to the magistrate's certificate, and that the tenancy was misdescribed in the civil bill. [*Greene, B.*—In the decree.] A decree founded on an erroneous civil bill would have been equally objectionable. As to the first objection, it could have no force, the presumption being, *omnia rite acta*, therefore that case must have rested upon the second objection. The provisions of the Procedure Act do not apply in this case, for the civil bill decree was obtained before that Act was passed; and the case in this court merely decided that an ejectment in the Superior Courts brought since the passing of that Act differed from one brought before it; and it cannot be contended that the civil bill ejectment should have a greater effect than an action of ejectment in the Superior Courts brought before the passing of this Act, viz. that it should amount to an estoppel. As to the objection that the decree was defective in the case in Jones's Reports, it may be observed that the language of Joy, C. B. is that the civil bill decree was *conversant about* an interest which did not exist; and that is the case here also, although the tenancy is not set forth in the decree. [*Greene, B.*—As to a civil bill ejectment having merely the effect of an action of ejectment under the old practice, I conceive that the reason why it was formerly held that a cross ejectment would lie was, that the parties were not the same.] The Civil Bill Act requires the nature of the tenancy to be stated, and that being so, the decree must be regarded as conversant about such an interest as is described in the process. The doctrine of estoppel only applies where both proceedings are conversant about the same subject-matter, which is not so in the present case. [*Greene, B.*—Suppose there had been a civil bill brought to redeem, I conceive it would only have put the tenant in *status quo*, namely, as tenant from year to year. The first question, therefore, is, whether the civil bill ejectment is conclusive at all; and secondly, how far.] If the tenant had brought a civil bill for redemption, and obtained a decree, he would have been reinstated as tenant from year to year, and if the argument of the other side, that the decree below operates as an estoppel, is tenable, the landlord

might then have evicted the tenant on six months' notice to quit, as the tenant would be estopped from setting up his lease.

Cur. adv. vult.

*April 27.**—RICHARDS, B.—The Assistant Barrister has jurisdiction under the provisions of 14 & 15 Vic. c. 57, to entertain an ejectment for nonpayment of rent in all cases where the rent reserved does not exceed £50 per annum. With respect to tenancies from year to year, it is enacted by the same section that a civil bill ejectment for nonpayment of rent may be maintained against tenants holding under that tenure, in the absence of a written agreement. This was a most beneficial alteration in the law as it previously existed upon the subject, and it is only to be regretted that these provisions are confined to the proceedings in the civil bill courts. According to the facts found by the special verdict, it would appear that the defendants in this action, conceiving, as I presume, that T. Condon, the plaintiff in this ejectment, held the premises in question, as tenant from year to year, and a sum exceeding one year's rent having become due, had brought the former ejectment in the civil bill court against Condon and others, founded upon the 73rd section of the Civil Bill Act, averring in the civil bill process that he held as tenant from year to year. It seemed that Condon did not appear at the hearing of the civil bill, and consequently a decree for possession pursuant to the provisions of the 73rd section of the Act, passed against him. It would appear, however, that in point of fact he did not hold as tenant from year to year, as alleged in the civil bill, but that he held under an old lease for lives, and that one of the *cestui que vies* was at the time of the bringing of the civil bill ejectment and still is in being; and accordingly Condon, after the recovery against him in the civil bill court, and after the execution of the decree of the Assistant Barrister, brings his ejectment in this court upon the title, and insists that he is not bound by the proceedings in the civil bill court on account of the misdescription of his tenure in the process. In point of fact, I believe the alleged mistake did occur in the process of the Inferior Court, and indeed the fact would so appear upon the special verdict; but the defendants contend that this error in the process, if any such did exist, is not carried into the civil bill decree, and that the decree of the Assistant Barrister as it stands would be just as applicable to proceedings founded upon the lease of 1804, as to a tenancy from year to year, and that this court should not go behind the civil bill decree, insisting that all persons duly made parties to the proceedings should be held to be bound thereby. This is a question of very great nicety and considerable importance. If the case was not affected by authority, I should feel disposed to rule in favour of the defendant. The language of section 73 is as follows. [His Lordship read the section.] These are strong expressions, and I think that the policy of the law should be against allowing a party to re-try in a new action, what has been, or what in contemplation of law might have been in issue, and

adjudicated upon in a previous proceeding. Suppose a civil bill ejectment brought to evict a lease, and that the lease was misdescribed by reason of some clerical error as to the date, could it be contended, especially when such error did not appear in the decree, that upon a new ejectment by a defendant below the latter would be admitted to recover possession by showing such an error as that in the process? Unless bound by authority, I should say not. Suppose there had been a controversy below as to the amount of rent due, could the defendant re-try the decision of the Assistant Barrister, if against law, in a new action? Independently of authority upon that subject, I should say not. I think however, that it should be always open to the defendant to show that the case was not within the jurisdiction of the Assistant Barrister, or not within the provisions of the section of the statute upon which the decree was founded, and therefore that the whole proceeding was *coram non judice*. But, beyond that, I do not think he ought to be allowed to go. Now in the present case, *quâcunque viâ*, the matter was within the jurisdiction of the Assistant Barrister, and also fell within the provisions of the 73rd section of the statute. It was within his jurisdiction whether Condon held under the lease or as tenant from year to year, and therefore, it would be impossible to contend that the proceedings below were *coram non judice*. Now, in looking into the 105th section of the Act, I find that errors not calculated to mislead, are not to be regarded by the Assistant Barrister, and that he, when there is no appeal, is made the exclusive judge as to what error is, and what is not, calculated to mislead. The error in the present case might, no doubt, have misled the defendant; but by the 106th section of the Civil Bill Act, it was competent for the Assistant Barrister to have permitted an amendment, and in a case which was clearly within his jurisdiction. In whatever way it is to be viewed, I confess I would rather intend that such an amendment had been made by the Assistant Barrister, than hold that all the proceedings were void, and I think I would be borne out in such a view by the observations of Baron Pennefather in *Lessee Coffey v. Rahilly*, in Jones' Reports. That case however, and particularly the judgment of Chief Baron Joy, have been strongly pressed upon us in the argument of the counsel on behalf of the plaintiff. I am, however, disposed to think that in that case the court considered the decree as well as the process, erroneous on the face of it; and besides, there were no provisions in the Civil Bill Act under which that decree was pronounced analogous to those contained in sections 105 and 106 of the present Act, 14 & 15 Vic. c. 57. I am, therefore, rather disposed to think that we are not altogether concluded by that case. As to the case of *Long d. Connor v. Disney*, (2 Hud. & Bro. 113,) the decree was in favour of the party who had succeeded in the previous ejectment, and I agree entirely with the early portion of the judgment of the court in that case as to the unreasonableness of requiring a party who has succeeded in a trial below, to be upon any future occasion ready to produce the evidence upon which he has already succeeded. The court in delivering judgment says:

* Pigot, C. B., and Pennefather, B., were absent.

"It is very true that under the statutes in the action of ejectment for non-payment of rent, the remedy is not available, unless there be a lease or an article, minute, or contract in writing, whereby the rent payable is ascertained. But it does not follow that a landlord who has succeeded in such an ejectment, is bound to show in every subsequent proceeding brought to disturb his possession, that his former ejectment was in all points sustainable." There is certainly an observation in the judgment in that case to the effect that if a landlord were to obtain judgment in an action of ejectment brought where only half-a-year's rent was due, and in which he could only succeed by showing that there was no sufficient distress on the premises to countervail the amount of rent due, it might be open to the original defendant to re-try the question in a new action of ejectment. Now, I am not aware of any decision to that effect in respect of an ejectment for nonpayment of rent, founded on the Ejectment Statutes; although, as regards the action of ejectment upon the title at common law, founded upon a clause of re-entry for nonpayment of rent, the case might be different. I have looked into several authorities that have been referred to by Baron Greene—*Doe d. Hitchins v. Lewis*, (1 Burr. 619); *Black v. Davis*, (Batty, 87); *Kenmare v. Supple*, (Ver. & Scri. 1); and, upon the whole, taking all these decisions together, I do not conceive that they sustain the position laid down in the case in Hudson and Brooke's Reports, that the tenant can bring a counter ejectment, upon the ground that there was a sufficient distress upon the premises; and I am disposed to think that we should hold, in the present case, that the plaintiff is concluded and estopped by the civil bill decree. The case below appears in every point of view to have been within the jurisdiction of the Assistant Barrister. Suppose there had in reality been a controversy in the court below between the parties as to the nature of the tenure under which these premises were held, and that the Assistant Barrister, upon the evidence, had ruled that they were held not under the lease of 1804, but as a tenancy from year to year, I should scarcely think that it would be competent for any of the parties to the civil bill to review the decision of the Assistant Barrister in this manner, and yet, if the principle contended for by the plaintiff were admitted, I scarcely know how he could be prevented from doing so. I must say that I consider this case to be one of considerable difficulty, but, upon the whole, I think that there should be judgment for the defendant.

GREENE, B.—This case is one of considerable nicety, as well as involving questions of much importance, and it is not without difficulty that I have arrived at the conclusion, that the defendant is entitled to judgment. The present action is ejectment on the title, and the defence set up by the defendant is, a recovery of the possession of the said lands by a civil bill ejectment; and the question for the court to determine is, whether or not that is a bar to the present action. These proceedings are chiefly in relation to section 73 of the Civil Bill Act, the language of which, it must be admitted, is very strong as to the effect of a judgment in civil bill ejectment;

providing, as it does, that except some of the modes of redress which it specifies be taken advantage of by the tenant, he will be barred from all relief at law or equity as to the subject matter of the suit. *Prima facie* such words would have the effect of barring a subsequent ejectment, but still such words are no stronger than the language of the old Ejectment Statutes, and I do not think that these words have been held to operate as a conclusive bar in all cases—I allude to the decision of *Doe d. Hitchins v. Lewis*, (1 Burr. 619,) and I think that case assumes that these words cannot in all cases have such an effect. That was an action of ejectment for non-payment of rent, and there were points raised in that case which would appear to have been perfectly unnecessary if the mere fact of a recovery under the Ejectment Statutes foreclosed the right. Also in *Black v. Davis*, (Batty, 80,) the court, I think, assumed that there was no such conclusive effect to be gathered from the mere words of that statute. So also in *Kenmare v. Supple*, (Vern. & Scri. 1,) and *Long d. Connor v. Disney*, (1 Hud. & Bro. 116.) But supposing this to be so, and that such is the conclusion to be derived from these decisions, yet as far as I can see, the principle goes no further than this: that although the fact of the recovery of lands in an ejectment for non-payment of rent will not of itself debar the tenant from bringing a cross-ejectment; yet that it is not to be carried to this extent, that the defendant can in a cross-ejectment *retry* every fact or matter of evidence that came into controversy in the former action. I can find no authority going to that extent, and I conceive that the cases go no further than this, that if the landlord succeed in the original ejectment, it is competent for the tenant in a second action of ejectment to show that the relation of landlord and tenant did not exist between the parties at the time of the bringing of the former action; or that certain circumstances existed at the time which prevented the case coming within the operation of the Ejectment Statutes, or else that the court had not jurisdiction to entertain the case; and under such circumstances it was in his power to recover possession of the premises in a cross-ejectment upon the title. If that be the proper view of the question, and I have not been able to find any case carrying the principle further, I think that it is incumbent upon the court, before whom the defendant brings his cross-ejectment, to see that he makes out a case of this kind, and that he should show something like want of jurisdiction in the court before whom the original ejectment was brought; and *Black v. Davis*, in which the landlord having mortgaged his interest had parted with the legal estate, is to that effect. In that case the person to whom the landlord had conveyed his estate in the premises had not been made a party to the ejectment; and the court held that the tenant was entitled to show that the person bringing the ejectment was not his landlord, and, therefore, that inasmuch as the Ejectment Statutes are only cognizant of matters between landlord and tenant, the recovery in the ejectment was not warranted by those statutes. Thus I conceive to be the true principle of the construction of these statutes, and, that being so, let us consider

what is the question in the present case. The objection that has been made to the former proceedings merely amounts to this, that the nature of the tenure set forth in the civil bill process was incorrectly stated, and therefore that the relation of the defendant to his landlord was erroneously described; it being alleged, not that he was a lessee under a sealed instrument, but that he was merely a tenant from year to year. I need not repeat that I concur in the judgment that has been pronounced by Baron Richards, and in the force of his arguments, as it cannot be contended that the court below had no jurisdiction in this case. There did exist the relation of landlord and tenant between the parties. The amount of rent was within the limit prescribed by the statute, and the sole objection was as to a variance between the statement in the civil bill process and the real nature of the tenancy, and it is to be observed that this variance does not appear in the decree, which does not purport to contain any statement on this head save the mere relation of landlord and tenant as existing between the parties. Such is the view I have taken of the case, leaving out altogether the consideration of sections 105 and 106; but I think that under the provisions of the latter section the Assistant Barrister would have been authorized to have amended the civil bill process. It would not, as I conceive, have been an amendment going to the merits of the case; it could not have had the effect of placing the defendant in a worse position than he was in before. I think it would be a very strong proposition for this court to hold, that because of this error in the process not appearing in the decree, which might have been amended at the trial by the Assistant Barrister, and which does not affect the jurisdiction of the court, that the tenant should have it in his power to overturn all that has been done on account of a mere technical mistake. I am not prepared to go this length. We must, therefore, hold that the facts of the case do not authorize the tenant to bring this cross ejectment. The only case offering any material difficulty is *Coffey v. Rahilly*, and as to that decision it may be said in the first place that the state of the law is not exactly what it was when that case was decided. There were other circumstances also distinguishing that case from the present, but more particularly the effect of the statement of the tenancy in the *decree* appeared to weigh with the court; and, therefore, giving full effect to all the proceedings below, they held, that if the tenant set up in a new ejectment *another* interest not evicted by the judgment in the original suit, the latter will be no bar. This I conceive to be a fair distinction, and, if so, that case does not so exactly bear upon the present one as to bind our decision. In this case we have a general decree not describing any particular interest as being evicted, and this decree was pronounced because the rent was proved to have been due and unpaid. Under these circumstances I conceive that there should be judgment for the defendant, at the same time that I must confess that the case is not altogether free from difficulty.

Judgment for the defendant.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

HANDCOCK v. DELACOUR.—April 30.

Practice—Rehearing—Respondent—Cause Petition—Service of notice of proceedings—General Orders 6, 10, 15—Court of Chancery Regulation Act.

A person had been named in the prayer of a cause petition as respondent, but had not been served with notice of the petition, and did not appear at the hearing, although aware of the proceedings. His name did not appear in the docket for setting down the petition for hearing, and a decree having been made in the cause by consent, his name did not appear in the decree. Upon an application by him for a rehearing of the cause, Held, that he was not entitled to have the cause reheard, not being a party to the proceedings.

THIS was an application made on behalf of a party who had been named in the prayer of a cause petition that had been filed in this case as respondent, but who had not been served with notice of the petition,—to set down the petition for a rehearing after the case had been argued and judgment given by consent.

F. Walsh in support of the application.—Although we have not been served with notice, yet we are a party and bound by the decree, being named as respondent in the prayer of the petition; but, even if not bound by the decree, we should be entitled to a rehearing under the circumstances.—13 & 14 Vic. c. 89, s. 30. We were not present at the hearing of the cause, but that was not necessary. The 6th General Order, (31st July, 1851,) provides that in the prayer of every cause petition the persons shall be named against whom any amount, payment, conveyance, or other direct relief is sought, and such persons only shall be deemed the respondents thereto as shall be so named in such prayer, until notice thereof shall have been given to any other party, when the name of such party shall be added as a respondent thereto in the title of the subsequent proceedings thereon. If a person named as respondent be desirous of being served with notice of the proceedings in the cause, he is to enter an appearance, but the 6th General Order provides that in default of such appearance being so entered, it shall not be necessary for the petitioner to serve the party so neglecting to appear with notice of any further proceedings in such petition, unless the court or Master in the matter shall otherwise specially direct; or the court shall give leave, on special motion, that such appearance may be entered on any day after the time hereby limited; but the respondent shall, notwithstanding, be at liberty to file affidavits in answer to the petition, and to appear on the hearing thereof, and defend his rights therein. In the docket for hearing, entered at the Registrar's office, the names of all the respondents, as well those served as those not served, should appear.—17th Gen. Or. We were in the position of a notice party under the old practice, only being named for the purpose of obtaining our concurrence. A third party may have a rehearing, although not a party to the suit. *Berry*

v. The Attorney General, (2 M'Naght. & Gor. 16) ; *Gwynne v. Edwards*, (9 Beav. 22.) [Lord Chancellor.—Your client's name does not appear on the docket setting down the cause for hearing.] That omission will not deprive us of our rights, and the docket is erroneous, as not having the names of all the parties mentioned in the prayer of the petition. If this party had been irregularly served he would have been bound by the proceedings; and there never has been a rule entered to dismiss this petition as against him. The plaintiff was our trustee, and for that reason we were not entitled to be served with notice of the proceedings in the first instance.—10th Gen. Ord. The question is, whether or not we could have appeared at the hearing. [Lord Chancellor.—Does the decree contain the name of your client?] It does not set forth the name specifically, but it contains the words "and others," which must be regarded as including the name of my client. We were aware of the proceedings in the suit, and if we do not interpose, we shall be bound by the decree, and our rights compromised. The grounds of this application are, that we, being merely in the position of *cestui que trusts*, and our trustee being a party to the case, we, confiding in the latter, did not appear as a party, and that we now find ourselves damnified by a decree that has been taken by consent. The decree may hereafter be set up against us, and we shall not be able to impeach its validity, unless we now interpose to obtain a rehearing. *Prendergast v. Lushington*, (5 Hare, 177.) [Brewster, Q. C. contra.—We now offer to enter a rule to dismiss the petition as against Mr. Walsh's client *nunc pro tunc*. Lord Chancellor.—If he had not been named at all in the prayer of the petition, he would not be in a better position.] We cannot accept this offer, as we shall be nevertheless affected by the decree in the cause. We have assisted in the proceedings in the cause, although not actually served, which could not have been so, if we had not been named. [Lord Chancellor.—It would be a very hard thing to allow all the proceedings in this cause to be overturned by a person in the position of your client.] We rely upon our strict rights under the 6th and 10th General Orders.

Brewster, Q. C. contra.—This application is made by a person who is not a party to the cause, not having been served. It is open to him to adopt any other proceedings he may think fit, but he cannot be allowed to overturn this decree. This appears from the first section of the Chancery Regulation Act, which provides that service of notice of the petition being made, "the person so served shall, from the time of such service, become a party to such proceedings, and be bound thereby in all respects in the same manner as if a bill or information had been filed, and such person had appeared to subpoena to appear and answer." This shows that merely naming in a petition persons against whom relief is prayed does not of itself make them respondents, but it is left to the discretion of the petitioner to serve such parties as he shall think fit. The words "and others," which appear in the heading of the decree, are clearly erroneous, and should have been omitted; besides, the applicant has filed

affidavits in this cause, and names himself in them as "this deponent," not as "respondent." The proceedings by petition differ from the old proceeding by bill, and therefore, the latter analogy cannot be established between them. Service is necessary to entitle a party to enter an appearance, except by leave of the court—15th General Order.

Sergeant O'Brien, Hughes, Q. C., Lynch, Q. C., and H. Leslie, were heard for other parties.

Napier, Q. C., was heard in reply.

LORD CHANCELLOR.—I do not think that I can comply with this application, considering the position of the person on whose behalf it is made. He appears to have been merely named in the prayer as respondent, but this is not sufficient, as the Act of Parliament does not treat him as a party until he has been served with notice of the proceedings; and therefore, he cannot, strictly speaking, be considered as such, although named in the prayer of the petition. It appears that he has been aware of the state of the proceedings all through, and yet he does not interpose until after the decree has been pronounced; and it would be rendering the provisions of the statute nugatory, if the court should now yield to this application. But, in point of fact, he cannot be regarded as a party to this proceeding. The cause was not set down for hearing as against him; and however he may be bound by his own conduct, yet he cannot be regarded as a party to these proceedings. A fair offer has been made to him by the other side, to dismiss the petition as to him *nunc pro tunc*; and the court considering that, and also seeing that he has not been served with notice of the proceedings, cannot consider him entitled to a re-hearing. As Mr. Lynch has contended, if this person be a party, he is bound by the decree, and therefore cannot impeach it, there being a consent; if, on the other hand, he is not a party, he will not be bound by the proceedings, and can adopt some other course. I must regard him as not being a party, never having been served with notice of the petition; and I shall therefore refuse this application, but without costs, and also without prejudice to any other suit or proceeding that this party may be advised to institute.

Motion refused.

COURT OF QUEEN'S BENCH.

EASTER TERM, 1855.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PRET, Esq., Barristers-at-Law.]

LYNCH v. THE GUARDIANS OF THE POOR OF THE CELBRIDGE UNION.—April 24.

Costs—Tender—Amendment of judgment roll—Rule 200.

In an action brought to recover £28 1s., the defendant pleaded as to £23 4s. 10d. a plea of tender accompanied with the usual lodgment in court, and as to the residue a denial of the cause of action. A verdict was found for the defendant upon the latter issue, and for the plaintiff upon the issue joined upon the plea of tender, but without assessing damages. Judgment having been marked for the defendant, it was ordered by the court, on a mo-

tion under section 200, that the judgment should be set aside and the *postea* amended by inserting nominal damages, and that it should thereon be delivered to the plaintiff in order that he might mark judgment thereon and so become entitled to the general cause of action.

H. Smyth, Q. C. (with whom was *P. McKenna*.) moved that the judgment marked for defendant in this case be set aside, and that the *postea* be amended by inserting a finding of nominal damages for the plaintiff upon the plea of tender, and that it thereon be delivered to the plaintiff in order to mark judgment and so entitle him to the general costs of the action.—This was an action for goods sold and delivered, bought for £28 1s., in which the defendant pleaded a tender as to £23 4s. 10d., accompanied with a lodgment in court and a denial as to the residue. The jury found for the defendant on the latter issue, but they found for the plaintiff on the tender, without any assessment of damages. The *postea* thereon was delivered to the defendant, who marked judgment in his own favour, which it was now sought to vacate. This motion becomes necessary by reason of Rule 200, which provides that “in no case shall error be brought for any error in a judgment, with respect to costs only, until after application to the court in which such judgment may have been given to amend the judgment in that respect.” An application was made in Chamber to the Lord Chief Justice who tried this case to amend the *postea* by the insertion of nominal damages, but he thought that he had no controul over it in consequence of the judgment having been made up. The plea of tender, although accompanied with a lodgment of money, is essentially different from a plea of payment into court. The latter admits a liability up to the time of payment; a plea of tender goes to the entire action, and the money which accompanies is only a part of the plea. In *Archbold's Practice*, 1178, it is said, “In all cases where there has been a tender, but there is some doubt as to its sufficiency, it is safest to pay the money into court without pleading the tender; for though the payment of money into court subjects the defendant to costs up to the time of paying it in, if the plaintiff do not proceed further, nevertheless, if the defendant plead a tender and the plaintiff take issue thereon, and the defendant fail in proving it, he will thereby, at all events, subject himself to the costs of the trial, and the general costs of the cause.” *Hibbert v. Fox*, (5 Taun. 660.) There, in an action of *assumpsit*, there was a plea as to the £12, and general issue as to the residue, which last issue the defendant established; but the plaintiff recovered a verdict with £1 damages on the plea of tender. The court held that the plaintiff was entitled to the general costs, and they refused to re-open the taxation. The court will amend the judgment roll to insert nominal damages, which are necessary in order to carry costs. *Finch v. Brooke*, (2 Sco. 511—17. Were not the law so, the defendant would in all cases be better advised to plead a tender, than payment into court, as he would secure all the advantages of the latter course of proceeding, without incurring the liability of having to pay the costs up to the time of lodgment, in cases the plaintiff accepted the money lodged

in full discharge of the action. [He also cited *Gray on Costs*, 307, referring to *Le Grew v. Cooke*, (7 B. & P. 333.)]

R. Armstrong, Q. C., contra.—The real dispute in the case was with respect to the sum claimed in addition to what was paid into court. The jury were not asked to give any damages on the issue found against the defendant on the tender, and without damages costs will not follow—16 & 17 Vic. c. 113, s. 60. [*Moore, J.*—That only relates to the costs of different issues.] The case referred to in *Archbold*, was where there was a plea of tender and no other. We succeeded on the substantial question in controversy at the trial. [*Moore, J.*—If no tender be actually made, the plaintiff is entitled to controvert that fact, and why should he not be entitled to the costs of the trial.] He should get the costs of the plea.

PER CURIAM.—The case reported in 2 Scott, decides that the general costs must be given to the plaintiff in a case like the present. The defendant here, however, is entitled to set off the costs of the issue found for him.

SWAN v. BOOKEY.—April 7, May 1.

Landlord and tenant—Apportionment of rent between personal representatives of tenant for life and remainderman—23 & 24 Geo. 3, c. 46—4 & 5 W. 4, c. 22.*

* 4 & 5 W. 4, cap. 22, s. 2.—“That from and after the passing of this Act all rents service reserved, on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which lease shall have been granted after the passing of this Act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this Act, or (being a will or testamentary instrument) that shall come into operation after the passing of this Act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate fund or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, or his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, &c., and other payments, according to the time which shall have elapsed from the commencement or last period thereof respectively, (as the case may be,) including the day of the death of such person, or the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, &c., being made; and that every such person, his or her executors, &c., shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, &c., when the entire portion, of which such apportioned parts shall form part, shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, &c., and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents, of which such portions shall form a part, shall be received and recovered by the person or persons who, if this Act had not passed, would have been

Lands were demised in 1805, prior to the passing of the 4 and 5 Wm. 4, c. 22, for a term of lives and years still subsisting, and in 1835, after said Act passed, the reversion in fee expectant on said leases was settled upon A for life, remainder to B in tail. After the death of A in 1853, in the middle of a current half year, his executor claimed from B an apportionment thereof pursuant to the 4 & 5 W. 4, c. 22, s. 2; Held, that inasmuch as the lease was prior to the passing of the Act, the case was not provided for, and no apportionment could take place.

A portion of the above lands were set by A to tenants from year to year. B permitted them to continue in possession, and received the current half-year's rent; Held, that inasmuch as the several tenancies from year to year had expired with the determination of A's life estate, the representatives of A would have been entitled to maintain an action pursuant to the 23 & 24 Geo. 3, c. 46, (Ir.) to an apportioned rent for the broken gale, and might recover the same as against B for money had and received to his use.

THIS was an action for £99 4s. 10d. for money had and received by the defendant for the use of the plaintiff. The summons and plaint was endorsed with particulars setting forth several sums of money alleged to be proportionate parts of certain gales of rent collected by the defendant, to which the plaintiff claimed to be entitled. The defendant pleaded that one Thos. Swan was in and previous to 1805 seised of Monagrenny, and in said year executed the said leases mentioned in the said particulars to hold for the several and respective periods therein mentioned (three lives and thirty-one years); that, by lease dated 7th September, 1835, said lands were conveyed by Thomas Swan, subject to said lease, to trustees upon certain trusts for John Swan for life, with remainder to Thomas Swan, a minor, in tail male; that plaintiff, as administrator of John Swan, was not entitled to £78 19s. 2½d., claimed by the particulars, as an apportionment of the rent reserved on such leases, or any of them, between the gale day before the death of said John Swan and the day of his death, inasmuch as the same were respectively reserved upon leases made prior to the passing of the 4 & 5 W. 4, cap. 22, sec. 1; that the sum of £20 5s. 7½d. being the residue of the monies received by the defendant, as stated in the summons and plaint, was so received by him as the guardian of said Thos. Swan, a minor, in respect of and on account of rents on paid demises from year to year, made by said John Swan in his lifetime, of portions of the same lands to the several tenants mentioned in the said particulars; and that plaintiff, as such administrator, was not entitled to an apportionment of the said last-mentioned rents under the said Act of Parliament above mentioned; that the several sums of money claimed by the plaintiff, as such administrator, from the defendant, as such guardian of said Thos. Swan, the

remainderman and first tenant in tail of said land, were the proportionate part of the rents reserved by such leases respectively, and made payable under said parol demises, and which respectively accrued due between the last gale day prior to the death of the said John Swan, and the death of the said John Swan, the tenant for life of said lands, which took place on the 26th of January, 1853, and that same were not payable by the defendant as such guardian, &c., to the plaintiff, as administrator of said deceased tenant for life under the provisions of the aforesaid Act of Parliament. Demurrer—for that John Swan became entitled to a life estate on the lands, subject to certain leases, &c., subsequent to the passing of the 4 & 5 W. 4, cap. 22; that the plaintiff, as such administrator, was entitled to recover a proportion of the rent reserved on leases made prior to the Apportionment Act, (4 & 5 W. 4, cap. 22); that the value of the estate of Thomas Swan did not appear; that the leases from year to year were determined by the death of John Swan, and hence that the plaintiff was entitled to recover for a proportion of the rents on them.

The case was argued by *Escham* and *Ball, Q.C.*, for the plaintiff, and by *Coates* and *Stevens* for the defendant. [They cited the following cases:—*Trimmer v. Danby*, (23 L. J. Chan. 979); *Knight v. Boughton*, (12 Beav. 312); *Keritt v. Davies*, (15 Sim. 466); *Hayes' Conveyancing*, 4th ed. 292; *Re Markby*, (4 M. & C. 84); *Lock v. De Burgh*, (20 L. J., n. s., C. 384, s. c. 4 De Gex & Sm. 470); *Swan v. Swan*, (6 Ir. Jur. 299); 1 *Fur-long's Land. & Ten.* 367.]

Cur. adv. vult.

May 1.—LEFROY, C.J.—In this case questions have arisen with respect to the right to an apportionment between the remainderman and the representative of the tenant for life of the rents due upon continuing leases, and also upon parol demises, made prior to the 4 & 5 W. 4, c. 22. We have already, in the progress of the argument, intimated in general terms our opinion that with regard to the first class of leases, namely, those made antecedent to the 4 & 5 W. 4, c. 22, no right of apportionment exists; but with respect to rents due upon parol leases from year to year, made by the tenant for life himself, that there is such a right of apportionment. The question respecting the first class of rent arises under the 4 & 5 W. 4, cap. 22, by section 2 of which it is enacted that from and after the passing of that Act all rents service reserved on any lease, &c. [His Lordship read the second section of the Act.] It is to be observed with respect to this class that the remedy by way of apportionment provided by that Act is essentially different from what has been given by any previous Act. By the 23 & 24 Geo. 4, cap. 46, the remedy was given to the landlord whose title had expired against the tenant himself, and so, antecedently to this Act, there was not any provision for the apportionment of any rent accruing upon a continuing demise. This was the first Act which introduced this species of apportionment. The apportionments under former Acts were founded upon this principle, that otherwise that portion

entitled to entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this Act in any action or suit at law or in equity."

of the rent would have been wholly lost, no person being entitled to enter and distrain for a broken gale. Then came the 11 Geo. 2, cap. 9, in England, and in Ireland the 22 & 23 Geo. 4, cap. 46, which went to provide a remedy for the defect existing at common law, namely, a right to recover a proportion of the rent, which would otherwise have been lost before the rent became due according to the terms of the contract, by the death of the only party, who could have recovered the same, as else the rent would have been recoverable at the period only at which it was payable. The Irish Act 23 & 24 Geo. 3, provided for every case of that sort, which could happen by the determination of the estate of the tenant for life and the failure of the interest granted to the tenant. The Irish Act went further than the 11 Geo. 2, which simply provided for the determination of the lease by the death of the tenant for life. Our Irish Act, on the other hand, by the second section, provides for the determination of the lease in other ways, namely, where the lease was made by a tenant in fee to his immediate lessee for a life, and by the fall of which or in any other way the tenant's interest determined. A lease for years granted by the tenant for life would determine upon his death just as well as it would have done if it had been a lease for his own life. All these cases were provided for by the Irish Act, and when I shall come to speak of the several classes of leases under consideration, it will be manifest that whatever question may have existed in England relative to those prior to the passing of the 4 & 5 Wm. 4, c. 22, no such doubt could have existed in Ireland. With regard to the first class, it is clear to me that in the plainest words continuing leases then existing are not provided for by this Act (4 & 5 Wm. 4, cap. 22.) The words of section 2 are, "which leases shall have been granted *after* the passing of this Act." There is no ground for expunging these plain terms, or for giving a remedy by way of apportionment of any other species of leases than this Act provides for. This Act contains for the first time a provision for the apportionment of rent services upon leases by tenants in fee, &c. or granted under powers which might be continuing leases, in case the terms for which they were granted were of a continuing nature. Such leases were not previously the subject of apportionment, because either the heir-at-law or the remainderman were entitled to recover the entire gale. But, in addition to the system of apportionment between landlord and tenant, we have now by this Act one created between the representatives of the tenant for life and the remainderman, or perhaps, as it may be argued, between the heir-at-law and the executor of the previous tenant in fee. That latter is, however, a *veraxa questio*. With regard to the apportionment applying to antecedent leases, we must take the law as the statute has given it, and that has confined this right to leases made subsequent thereto. It has, however, been argued that because the settlement was made subsequent to the Act, that was sufficient to entitle the executor of the tenant for life to an apportionment. That is not the case, inasmuch as the settlement is not the instrument under which the rent is payable or becomes due.

It would have been otherwise if it had been a rent charge which for the first time became due under that settlement; but, even there, the settlement must be executed "after the passing of this Act" which words show to demonstration that the Legislature meant that the similar words, as applied to the leases themselves, should also have effect. Therefore, as to rent reserved upon leases, before the Act, though the tenant for life derived his right to the estate after the Act, that furnishes no ground, consistently with the words of the Act, to give an apportionment of the rent reserved upon such leases, and we come to the same conclusion where we consider the principle of these Acts providing for an apportionment which were intended to provide for cases where otherwise the rent would be lost; for where the leases are continuing, there is the remainderman to receive the rent, upon the lease, which may have accrued due after the death of the tenant for life. Therefore, in such a case no loss can accrue. Here the apportionment was intended only for a particular class of cases of that description, and we cannot carry it beyond the very terms of the Act. That being so, with respect to the first class of rents, we are of opinion that there is no right vested in the executor of the tenant for life to claim an apportionment of rents reserved upon leases made by the owner in fee anterior to the passing of the Act. Then, with regard to the leases from year to year created by parol, according to Lord Cottenham in *Re Markby*, (4 M. & Cr. 484,) the rent is not apportionable under the second section of the Act, for he decided that no rent or rent charge was apportionable thereunder except reserved by a written instrument. He considered that under this section there should be two requisites—first, that the instrument creating the payment should be in writing; and, secondly, that it should be executed after the passing of this Act. But though the case does not come within this Act, rents accruing upon such leases as that, are sufficiently provided for by the 23 & 24 Geo. 3, c. 46, which provides for the apportionment of rents which would otherwise have been lost by the determination of the lease by the death of the tenant for life. Therefore, although the case of a tenancy from year to year expiring upon the death of a tenant for life by whom it has been created is not provided for by the second section of the 4 & 5 Wm. 4, c. 22, it does come within the former Act. I should just wish to observe, with respect to the case of *Knight v. Boughton*, (12 Beav. 312,) that that was, in fact, the case of the bequest of a rent charge. The subject matter of the will was a rent charge, and not an existing rent service, for if a party grant a rent charge payable out of an existing rent service, no remedy can be had against the tenant for the recovery of that. Hence, it was the practice in Ireland to have recourse to a Court of Equity for the recovery of the arrears of such rent, as you had no remedy at law. It is to be remarked that the Master of the Rolls in *Knight v. Boughton* did not advert to the first portion of the second section, which regards rent service, but he takes it up at the second part, which treats of the rent charges created under any

instrument executed or any will coming into operation since the passing of this Act, under which the case came. I am, therefore, of opinion that with regard to the continuing leases in the present case there should be no apportionment; but as to the leases from year to year, that there should be an apportionment.

CRAMPTON, J.—It is not necessary for me to add anything to what has been already said; but I will venture to make a few observations upon what has suggested the only difficulty relative to the determination of the present case. Whether the case of *Knight v. Boughton* is well decided or not, it is not necessary to pronounce an opinion regarding it. It has been relied on as a fact in favour of the plaintiff that the leases then before the court, and about the produce of which an apportionment was sought, were made anterior to the passing of the Act; and naturally enough, counsel for the plaintiff relied on that case as a decisive authority in his favour. That case turns altogether upon what I may term the rent-charge portion of the Act. It is remarkable that the enactment contained in the second section consists of two parts. One portion applies to rent service solely, and these must be reserved upon leases made subsequent to the passing of the Act. The other class of apportionments, in this section, applies to rent-charges and other rents payable at stated periods. It is impossible to read the words "other rents" following the word "rent-charge" as signifying rent services. If so, the prior words of the clause would be unnecessary. Therefore, the decision in 12 Beavan must not be referred to the portion of the section which deals with rent service; but the case was put solely upon the second portion, which deals with rent-charges. The Lord Chief Justice has stated the same reason for this, regarding that the Master of the Rolls considered that case as more properly coming within the second portion of the section than the first, and that the Master of the Rolls applied his judgment solely to the second portion; and that he thought the case before him was one of a devise, not of the rent reserved by lease, but of an equitable estate carved out of them by the testator, and as such, created by the will, being in fact an equitable charge upon the rents, which the trustee, after deducting the requisite expenditure, was to pay over to the lady. It is plain that so far as the tenancies by parol are concerned, the plaintiff is entitled to recover, but the defendant must succeed as to the residue. Since the Procedure Act, a demurrer need not be wholly overruled or allowed, but may be overruled in part and allowed in part.

MOORE, J.*—I concur with what has been expressed. We find words in the Act of Parliament which it is impossible to deviate from, making this power of apportionment applicable to such leases only as were executed *after* the passing of this Act. I however cannot see why this was confined to leases made after its passing, for by the second section the rents are payable in the first place to the same person, as they would have been if the Act had not passed, and the policy of the law applies

equally to cases of rent created *before* as after the passing of this Act; and the Legislature evidently *intended* to apportion *all* rents wherever the relation of tenant for life and reversioner was *created* after the passing of the Act. With respect to the case in 12 Beavan, I consider that there are equitable grounds upon which that decision might be supported in a Court of Equity. At all events, that case was decided only under the second branch of the second section, and it was not necessary for that purpose to pronounce a decision relative to the construction of the first part. If, however, it were otherwise, it ought to be overruled, for it would run counter at least to the express words used by the Legislature.

Judgment accordingly.

COURT OF EXCHEQUER.

EASTER TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

[*Coram* RICHARDS and GREENE, B. B.*]

SAYERS v. BACHELOR.—April 16.

Demurrer—Oral slander—Pleading—Common Law Procedure Act.

Alleged slanderous words must be shown to have been spoken of the plaintiff in his trade.

To say of a person that "he is a rogue," or that "he is a thief," is not, per se, actionable, unless the words be spoken in connection with other slanderous expressions, or connected with some facts or circumstances, and special damage must be averred.

THIS was a demurrer taken to the summons and plaint. The summons and plaint stated—first, that while the plaintiff was exercising his trade as an upholsterer and cabinet-maker, and while being employed in such his trade to do certain works for the defendant, he, the defendant, falsely and maliciously spoke and published of the plaintiff, &c., and concerning him in such his trade the following words: that "M. S., when repairing my desk, took a masonic ornament which was in it, and that a woman in the shop saw him take it (meaning that the plaintiff, when in the exercise of his trade of cabinet-maker and upholsterer in the repairing of a desk of and for the defendant, took and converted to his own use a certain ornament,") &c.; 2nd, "and also falsely and maliciously spoke, &c.": "There were four or five shillings in change in my desk, which M. S. also took," meaning that the said plaintiff, when in the exercise of his trade in repairing a desk, &c. took out, &c., and applied same to his own use;" 3rd, and also falsely and maliciously spoke and published of and concerning the plaintiff in his trade, &c.: "He is a rogue," (meaning that the said plaintiff, while exercising his trade in the employment of the defendant, was guilty of theft); 4th, and also falsely and maliciously spoke, &c.: "When he was at my house one evening a parcel containing valuable vesting was taken out of the hall, and there was no person in the house who could have taken it but S.," (meaning that said

* Perriu, J., was absent.

* Pigot, C. B. and Pennefather, B. were absent.

plaintiff, while exercising his trade in the employment of the defendant, stole out of the defendant's house a piece of cloth for making vests.) Plaintiff averred that, by reason of the premises, he was injured in his good name, fame, and credit, and in his trade and business of cabinet-maker and upholsterer, and that divers neighbours and customers in such trade refused, and still refuse, to deal or have any transaction with him in his trade, &c. and therefore he claims £200 as damages. 5th, and the plaintiff also complained that the defendant falsely and maliciously uttered the words—"He is a thief;" and therefore he claims £200 as further damages. The grounds of demurrer assigned were as to the first paragraph of said plaint, that it did not disclose any cause of action good in substance, because the words therein alleged to have been spoken, &c. are not shown to have been spoken of plaintiff in his trade or as a tradesman, or to impute any want of skill or ability in his trade, and because the said words, even if shown to be spoken of the plaintiff in his trade, are not actionable in themselves, and there is no statement of any special damage sufficient to confer a right of action, and no customer of the plaintiff, whose loss plaintiff alleges, is named in said paragraph. Similar grounds of demurrer were assigned in respect of the second paragraph. To the third paragraph it was objected that it was not shown by any *colloquium* or otherwise, or at all, in what manner the defendant connected the words "He is a rogue" with the plaintiff's trade, or with him in the exercise thereof, and because the words stated are not actionable without the aid of the innuendo, and the meaning given by the innuendo cannot be fairly collected from the said words alone, and there is no previous averment of any facts or conversation to warrant the meaning imputed by the innuendo, and there was no averment that the words were used in a defamatory sense, and no statement of any special damage sufficient to confer a right of action, and no customers, &c., named, &c. Similar grounds of demurrer were assigned regarding the fourth paragraph. And to the fifth paragraph defendant saith he did not falsely and maliciously, or at all, speak and publish the words "He is a thief," and therefore, &c.

William J. Sidney opened the demurrer.—The innuendo, attached to the allegation relative to the abstraction of the "masonic ornament," does not aver it to have been feloniously taken or stolen, and nothing is stated tending to show that it was the property of any one, and certainly not that of the defendant. It is necessary on the face of the pleading to show that the alleged slanderous words have relation to and are spoken of the plaintiff in connection with his trade or calling. [*Greene, B.*—Does not the innuendo say, when in the exercise of his trade and calling?] There is no felony averred; the slanderous words must allege the commission of a criminal offence punishable by law, and be disparaging to the plaintiff, or must show special damage. The summons and plaint disclose none such here; *non constat* but that the masonic ornament was the plaintiff's own property, and taken without any felonious intent, it not being even laid in the plaint as being the property of

the defendant. It is clear that the words, to be actionable, must be spoken of the defendant in reference to his character or conduct in his office, trade, or calling.—*Lumby v. Allday*, (1 Cr. & Jer. 301.) The words complained of are not in our case spoken as touching the plaintiff in his trade or calling, and are as applicable to anyone else in the community as to him.—*Ayre v. Craven*, (2 A. & E. 2.) There is no averment of special damage; and on the authority of *Vicars v. Wilcocks*, (8 East. 1.) he should have set out the names of the persons in order to admit of the allegations being controverted by defendant. The same objections may be urged with respect to the paragraph containing the charge of alleging the taking the money from out the desk. As respects the third paragraph, wherein the slanderous words are said to be, "He is a rogue," it is decided that the meaning of words imputed cannot be enlarged by innuendo, yet here the meaning of the term "rogue" has been extended. [*Greene, B.*—The question is, what is the meaning of the word "theft?"] If the words imputing theft be equivalent to those saying that "he is a rogue," there is no difference here charged. [*Greene, B.*—There is no doubt that, under the former system of pleading, the meaning of words could not by innuendo be enlarged, unsupported by any prefatory averment; the question is, whether, under the new state of things, such cannot now be done?] *Hawkes v. Hawkes*, (8 East. 427); *Gompertz v. Levey*, (9 A. & E. 282.) As to the new practice, the only advantage is, that if the words, *per se*, impute libellous matter, an innuendo is unnecessary; an innuendo cannot extend them beyond their plain import. [*Greene, B.*—The words ought to be plainly capable of the construction put upon them by the innuendo.] The words in the third paragraph suggest not an indictable offence, allege no special damage, and are unconnected with plaintiff's trade. With regard to the fourth paragraph, the vesting stated to have been taken is not laid in the plaint as being the property of the defendant, *non constat* but that it belonged to the plaintiff; the innuendo is here more extensive than the words. [*Greene, B.*—Under the old system you could not allege by innuendo any fact which you had not averred by "colloquium," as it was termed, or prefatory averment.] *Goldstein v. Foss*, (6 B. & C. 159.)

Charles Coates in support of summons and plaint. By the 81st section of the Common Law Procedure Act all pleading should set forth the cause of action, &c., with reasonable clearness and distinctness, in a common-sense way, and without formalities and technicalities. All the cases cited on the other side were, doubtless, good authorities under the old system of pleading, but do not now apply. By the 65th section of the Common Law Procedure Amendment Act it is sufficient to aver that the words complained of "were used in a defamatory sense, specifying such alleged defamatory sense, without any prefatory averment showing how such words or matter were used in that sense."—(*Vide* 15 & 16 Vic., cap. 76, sec. 61.) Thus we get rid of prefatory averments, and of nice distinctions and technicalities, and sufficiently allege the cause of action. [Reads third and

fourth paragraphs.] The word "rogne" does not I admit, imply an indictable offence, but the words here must be construed with reference to the meaning intended by the party speaking; the fair inference is, that the word rogue charged him with being a thief. [*Greene, B.*—If he charged him with theft, would that be a good indictment? that is the question here. *Richards, B.*—The word theft does not necessarily imply an act punishable by law.] There is an express decision showing that to say "he is a thief" is libellous and actionable, *per se*, without any inuendo. [*Richards, B.*—Where is that case? It strikes me that the word thief is ambiguous; that is the substratum of your argument in this case, and the authority to support which you do not appear to have.] We need not aver that the property stolen was the defendant's. The averment in the fourth paragraph plainly alleges a crime. [*Greene, B.*—If your inuendo avers the crime of larceny, it matters little to whom the article taken belonged.]

Lynch, Q. C., followed on the same side with *Coates*.—The words averred in the first paragraph are actionable, and come within the rule laid down in 2 Chitt. Plead. 641, d. (n.); *Thomas v. Jackson*, (3 Bing. 104.) The case of *Ayre v. Craven and others*, cited on the other side, turned on the point that their trades were merely accidental, and not necessarily connected with the charge laid in the declaration. The imputation in this present summons and plaint affects the plaintiff's moral character, and renders him liable not to be employed in his trade or business, and raises doubts of his trustworthiness. The charge made directly was, that he made use of his occupation and of his being employed, to misappropriate articles to his own use. It is just the same as if he were charged with having converted to his own use the desk or other articles he was employed to repair. In the second paragraph the custody of the 4 or 5 shillings distinctly imports, *prima facie*, the ownership of the property. The test to apply to the third paragraph is, do the words averred charge an indictable offence. [*Greene, B.*—If they are not actionable *per se*, you should by inuendo attach to them such a meaning as implies an indictable offence?] To say a man is a thief is actionable—1 Saund. 242, b. n. (William's Edition.) [*Greene, B.*—That I conceive to be no authority for that proposition. The decision there was on a different matter, and other slanderous words were added.] The word "thief" states guilt and criminality, and every person of common sense would know that the crime of larceny was implied. In the fourth paragraph it is said "he stole," and stealing is a technical word, and it was spoken of plaintiff in the way of his trade. The new system of pleading helps the generality of the first three paragraphs. [*Greene, B.*—The only cases where I find the word "thief" to be held as being actionable, are cases in which it is spoken in connection with other words; see the case of *Penfold v. Westcote*, (2 Bos. & Pull. N. R. 335.) Under the present system of pleading in the ordinary sense of language used by ordinary men, the word "thief" implies an indictable offence.

R. Armstrong, Q. C., in reply.—The plaintiff has here unnaturally wrested the words beyond their

natural import—2 Sel. Ni. Pri. 1262–3. They have no right to attach an extraordinary meaning to an ordinary phrase or word, without showing reason or circumstances for doing so by prefatory averment. Under the 65th section of the Common Law Procedure Act the pleader has an option to introduce the averment or not; here he has not availed himself of the provisions or formulæ of the new Act, he has elected to proceed under the old system, consequently he must be bound by the old practice. There were no words here upon which an issue could be raised as to the meaning in which the words complained of were used, and therefore, the defendant would be bound by the meaning put upon them in the plaintiff's inuendo, whereas in the old system under the general issue the defendant could have shown that the words were not used in the sense ascribed to them by the inuendo. Then the words "he is a rogue" or "a thief," are tortured unnaturally and do not, *per se*, impute an offence liable to punishment. Sel. Ni. Pri. 1255. The only issue here would be one which would conclude us under the plaint, and which would be contrary to justice. The words here in the fourth paragraph might have been spoken with perfect innocence. They attempt here by the inuendo not only to enlarge the word "taken" into "stolen," but also to extend it to an act done while exercising his trade. The sting of the slander is, that it was done while exercising his trade, and there are no prefatory averments explanatory of the facts of the case so as sufficiently to support the inuendo. 2 Sel. Ni. Pri. 1263.

RICHARDS, B.—The three first paragraphs do not contain, in my opinion, any ground of action; as to the fourth paragraph, it does strike me that it imputes a crime, and that the action can be sustained, [reads the demurrer.] The words in the last-mentioned paragraph were spoken of the plaintiff while he was exercising his trade, and I think that if a person says of an individual that he took an article out of my house, he evidently implies that he stole it. The demurrer must be allowed as to the three first causes of action, and overruled as to the fourth paragraph.

GREENE, B., concurred.

Judgment accordingly.

FOX AND ANOTHER v. ATKINSON.—April
26, 1855.

Practice—Security for Costs—Necessary Affidavit.

The summons and plaint contained two counts, one for the recovery of the amount of certain sales, the other for an alleged breach of care and diligence as a commission agent. The affidavit, on which was grounded the application to stay proceedings until plaintiffs gave security for costs, stated that the defendant had a good defence on the merits, inasmuch as he had paid over to the plaintiffs the amount realized by the sale of the goods, less by commission, &c., which he was entitled to set-off against the plaintiffs demand, but did not notice the other counts in the summons and plaint. The affidavit was held to be sufficient.

Purcell moved that the plaintiffs should be stayed from proceeding until they had given security for costs.

Charles Barry made a preliminary objection that a notice of motion for the same purpose had been previously served on behalf of defendant grounded on a defective affidavit, which had been allowed to be discharged with costs, and that it was not competent for him to renew the application, at least upon a fresh affidavit. If a party were allowed to do so, the plaintiffs might be tied up for ever by repeated service and withdrawal of such notices. [*Richards, B.*—We would not allow that. We will hear the motion.]

Purcell said that the error in the former affidavit alluded to by counsel on the other side consisted in defendant's having sworn simply that he had a good defence on the merits—a form approved of in the other courts, but which is not considered sufficient in this court, and that, on discovering his mistake, he allowed it to be discharged, and of course had to pay the costs of it, but that was no bar to the present application. Counsel then opened the affidavit of the defendant, which stated the absence of the plaintiffs out of the jurisdiction, the service of the usual preliminary notice, and that he had a good and valid defence on the merits to the plaintiff's action, inasmuch as he had before action brought paid over to the plaintiffs the amount realized by the sale of the goods mentioned in the summons and plaint, less by commission and other charges and expenses on the sale of said goods, and other commission and charges on other goods sold by defendant for the plaintiffs, which he was advised and believed he was justly and legally entitled to set off against the residue of plaintiff's demand. The action was brought against the defendant as a commission agent to recover the amount of sales, and he apprehended that the affidavit complied with the requisites laid down in this court, as it both swore pointedly to a good defence on the merits, and stated to the court generally the grounds of it.

Charles Barry said, that if the court overruled his preliminary objection, he submitted that the notice must, at all events, be refused on the insufficiency of the affidavit. The former affidavit was defective for not showing what merits the defendant had. The present was objectionable, as showing he had none at all. The action had been brought, as stated, for the recovery of the amount of sales; but the plaint also sought damages for an alleged negligence and want of care on the part of the defendant. The defence stated in the affidavit was merely payment and set-off; but it did not in any way cover the count for breach of care and diligence.

Purcell, in reply, submitted that it was not necessary to answer the whole plaint. In fact, two causes of action were stated, and if defendant denied either of them, he was entitled to security for the costs of that issue on which he might succeed. Besides, in the present case, a motion was pending to set aside the portion of the plaint referred to.

PER CURIAM.—The affidavit appears to be sufficient. Let the plaintiffs therefore give security for the costs of this action, the costs of the mo-

tion to be costs in the cause; but let defendant pay plaintiffs £3 for the costs of the abortive notice within two days, otherwise this order to stand discharged with costs.

Rule accordingly.

CAMPBELL v. CONWAY—April 26, 28.

Practice—Interpleader issue—Necessary affidavits.

On a sheriff applying for an interpleader issue where a claimant to the goods under seizure had served a notice apprising the sheriff that the defendant had, by deed duly executed and gazetted, assigned all his goods and chattels to him, in trust for himself and other creditors. The court before making the order required the claimant to make an affidavit stating the deed to have been duly made and executed without collusion, &c.

THIS was an application on behalf of the sheriff of Donegal for a rule on the claimant of certain goods alleged to belong to the defendant, to appear and state the nature of his claim thereto, same having been seized by the sheriff under a *f. fa.* issued in this cause at suit of the plaintiff, and maintain or relinquish the same, and show cause why the court should not make such rule, &c, pursuant to the statute, &c. The defendant's goods had been taken in execution as above stated, and a claimant in the person of one B, a merchant in Belfast, served a cautionary notice on the sheriff apprising him that the defendant had by deed duly executed and gazetted, assigned all his goods and chattels to him in trust for himself and the other creditors of the defendant.

Alexander Norman appeared for the sheriff.

D. M'Causland for the execution creditors, contended that the sheriff should have investigated the deed set up; that it was not enough for a claimant merely to produce a deed, but the sheriff and court should be satisfied the deed was *bona fide*. *Powell v. Lock*, (3 Ad. & Ell. 315.)

Faloon appeared for the claimant.—It has never been the practice to oblige a claimant to go into his case in the first instance, where a regular deed is in existence. We take the issue at our peril. [The Court intimated that that was too general a proposition; the mere throwing down a deed was not sufficient to justify an interpleader issue.] If that were the opinion of the court, the claimant would make an affidavit.

The court directed the case to stand for this purpose.

April 28.—*Faloon* produced an affidavit stating that the deed was duly made and attested for the purpose it professed to carry out, that it was *bona fide*, and executed without collusion, fraud, or artifice.

RICHARDS, B.—That is quite satisfactory, let the issue go and the trial be had in the County of Donegal, where the seizure was made. The costs to abide the event.

Rule accordingly.

COURT OF CHANCERY.

[Reported by BRODER L. FLEMING, Esq. Barrister-at-Law.]

THE ECCLESIASTICAL COMMISSIONERS v. THE
MARQUIS OF SLIGO.—May 2.*Tithe rent charge—Limitation—3 & 4 W. 4, cap.
27—1 & 2 Vic., cap. 109.**The 3 & 4 W. 4, c. 27, applies to tithe rent-charge,
and therefore only six years' arrears of that spe-
cies of property can be recovered by the tithe-
owner.*

THIS was a cause petition for recovering the arrears of tithe rent charge, the property of the Ecclesiastical Commissioners, and chargeable upon certain parishes, in which Lord Sligo was the owner of the first estate of inheritance. The only question raised by the respondent was, as to the effect of the Statute of Limitations upon the arrears.

Martley, Q. C., in support of the petition.—The 3 & 4 W. 4, c. 27, cannot be held to apply to tithe rent charge, and this is the only Statute of Limitations that can affect the question. By the 54 Geo. 3, c. 68, s. 5, (Ir.) the time of limitation of actions for penalties for not setting out tithes, and of suits in any Court of Equity, or in any Ecclesiastical Court, for recovery of the value of tithes, was declared to be six years; but actions or suits to recover statutable composition, or tithe rent charge, must stand upon a different footing. The question as to composition does not require discussion, it having been abolished by 1 & 2 Vic., cap. 109, and therefore this question, which is one of considerable importance, is limited to the construction of 3 & 4 W. 4, c. 27. By the 42nd section of that statute it is provided that "No arrear of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, &c., shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due," &c.; and the interpretation clause describes "rent" as including "all heriots, and all services and suits for which a distress may be made, and all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)." It is not contended that tithe rent charge comes within the description "modus" or "composition," but it is submitted that this species of property (which was not in existence at the time of the passing of this Act) does not come within the meaning of the interpretation clause, although the language at first sight might appear to include it. In *Ex parte Warburton*, (10 Ir. Eq. Rep. 206,) an application was made on behalf of the landlord having the first perpetual estate in certain lands, that the receiver appointed over these lands should pay to him a sum including nine years' arrears of rent charge, paid by him under the provisions of 1 & 2 Vic., cap. 109, ss. 7 and 8, and the Master of the Rolls granted the application, although it was contended by the other side that the demand was limited to six years' arrears under the

provisions of 3 & 4 W. 4, c. 27, s. 42. His Honor said in his judgment: "The rent charge is therefore recoverable from the tenant as rent reserved by the lease, and the case of *Paget v. Foley*, (2 B. N. C. 679,) and other cases, have decided that in such a case the 3 & 4 W. 4, c. 27, does not apply. I am, therefore, of opinion that the petitioner is entitled to the whole arrears." Also in *Sheil v. The Incorporated Society*, (10 Ir. Eq. Rep. 411,) it was held, that 3 & 4 Wm. 4, c. 27, applied only as between adverse claimants of estates in tithe rent charge, and conventional rents are not within the scope of the statute: *Daly v. Lord Bloomfield*, (5 Ir. L. R. 65.) It is, therefore, clear that the landlord can recover from the tenant more than six years' arrear of tithe rent charge, and the question is, whether the right of the owner of the tithe rent charge is to be affected by a statute passed before this kind of property in tithes was created. [*Lord Chancellor*.—There is nothing new in a rent charge or annuity.] This is a peculiar sort of rent charge. If the objection is a good one, this inconsistency will follow, that a person having the first estate of inheritance under 1 & 2 Vic. c. 109, will be in a position to recover twenty years' arrears of tithe rent charge from the tenant, while the tithe owner will only be able to recover six years' arrears of the same property, and it has been held that this statute (3 & 4 W. 4, c. 27,) does not include conventional rents. [*Lord Chancellor*.—If there does not exist six years' limitation for the recovery of tithe rent charge, there will be none at all. The Legislature may have omitted to lay down a period of limitation for this sort of property, supposing that it came within the provisions of the former Act.]

[Counsel on the other side was not called upon.]

LORD CHANCELLOR.—I think I must hold that this demand is limited to six years; I shall therefore make a decree for that amount of arrears.

Decree accordingly.

BEAMISH v. VIGNOLES.—May 11, 1855.

Specific performance—Deed—Delivery—Escrow—
Contract—Misrepresentation—Laches.

A, a jointress, having been offered a sum of money by B for her jointure, accepted the offer, and accordingly articles of agreement for the sale of it at a specified sum were prepared in duplicate, and engrossed, and one part was signed and witnessed in the ordinary way by A, and the other by B. The part signed by A was sent by her to her attorney, whom she had previously instructed to see that all necessary arrangements were made, and the part signed by B was left in the hands of his attorney. A's attorney, having discovered that B had made some misrepresentations as to the amount of his property, and apprehending that he would be unable to pay the purchase money, refused to interchange the parts of the instrument, so as to complete the contract, unless B gave him further security, which the latter refused to do, and for two months after the refusal of the other party to interchange the parts of the instrument, took no further steps towards the

completion of the contract. A cause petition was then presented for the purpose of compelling A to a specific performance of the contents of the instrument, and dismissed upon the grounds that under the circumstances no complete contract for the sale of her jointure had been entered into by A.

THIS was a petition for specific performance of an agreement. The respondent in this case was the relict of John Vignoles, and at his decease had become entitled to a jointure of £500 *per annum*, charged upon certain lands in the County of Westmeath, which the petitioner being in treaty to purchase in the Incumbered Estates Court, offered to the respondent's attorney the sum of £7,500 for her interest in the charge of £500 *per annum*, and his offer having been accepted by the respondent, her solicitor prepared draft articles of agreement, which were approved by the other side, and engrossed in duplicate, containing an agreement on the part of the respondent to sell the charge in question to the petitioner for the sum of £7,500, payable as follows: £2,500 upon the ensuing month of November, and the remainder by a transfer of stock, equivalent to the balance, to the names of two trustees to be nominated, one by each of the parties, the latter sum to be further secured by mortgage upon fee simple lands. The petition alleged that one part of the agreement had been accordingly executed by the petitioner and his trustee; and charged that the other part had been executed by the respondent, and sent by her to her attorney, Mr. Fetherston, to be exchanged with the petitioner, but that the latter refused to complete the contract by an exchange of the documents, although often requested so to do, and prayed that the court should direct a fulfilment of the agreement according to the terms of the articles. The respondent admitted that the sum of £7,500 had been offered, and that the articles of agreement had been executed as stated, but relied upon the following grounds of defence: that the petitioner had misrepresented to her that he had purchased several other charges upon the estate; that the articles of agreement executed by the respondent were by her forwarded to her attorney, in order that he might ascertain and be satisfied, before the duplicates were interchanged, that the other side was in a position to carry out the agreement, and that the necessary preliminaries had been arranged; but, denying that her execution of the part was not unconditional or irrevocable, she having been informed that the petitioner had lately been declared a bankrupt, and that since that time he had acquired no property, so as to enable him to carry out the agreement; that she had no direct communication whatever with the petitioner, having committed the entire management of the affair to her solicitor. The respondent's solicitor admitted that the other side had tendered in exchange one part of the instrument, and that upon that occasion he had refused to interchange the parts, unless the petitioner should show what means he had of completing the contract, which he refused to do until the contract was completed, and that he had further offered to abate £500 of the purchase money if

the petitioner would, within ten days, transfer the remainder, which the petitioner declined. Several subsequent applications having been made to the respondent's solicitor to complete the contract, and furnish an abstract of title, he wrote a letter to the other attorney upon the 8th November, 1854, stating that the contract never had been completed, the deed having been retained by him as an escrow, and that he refused to deliver it up because of the refusal of the petitioner to show that he could supply funds to carry out the purchase, but offering to complete the purchase if the petitioner would, within two days, pay into the Bank of Ireland £2,500 to the joint credit of himself and Mrs. Vignoles, and invest a sum of £5,000 in stock upon the same day, and to the same credit, which the petitioner refused to do, insisting upon a fulfilment of the original contract. This petition was filed on the 30th January, 1854.

Christian, Q. C., (with him F. Fitzgerald, Q. C.,) in support of the petition.—The respondent was not entitled to call upon the petitioner to invest the purchase money to their joint account, it being a very different thing to vest it in the name of trustees, which the petitioner was always ready to do under the terms of the contract. Nor was the petitioner bound to advance the purchase money until the completion of the contract by the other side; and the respondent having regularly executed the deed, could not by a mere mental reservation get rid of the effect of its execution, and give it the character of a mere escrow. *Blennerhasset v. Davy, (Beat. 468.)*

Berkely, Q. C., (with him Lawson,) contra.—The respondent swears that she delivered this deed to her solicitor's charge, not to be handed over by him until he was satisfied of the solvency of the petitioner; and under such circumstances this instrument cannot have the effect of a deed regularly delivered. The circumstances of the case show sufficiently that the respondent's attorney had a valid reason for suspecting that the petitioner was a mere adventurer, and therefore he was justified in requiring security for the payment of the purchase money, having discovered that he had been a bankrupt, that some of his creditors had not been paid off, and besides seeing the reluctance of the petitioner to complete the contract for ready money, even at an abatement of £500. But supposing that this was a complete contract, it is not one that a Court of Equity would enforce, their being a mode of redress at common law; the compelling of specific performance being discretionary with the court. Fraud or misrepresentation practised upon the opposite party during the progress of a contract, will create a disability to compel a specific performance. *Clermont v. Tasburgh, (1 Jac. & Walk. 112.) [Lord Chancellor.*—The fraud must in such cases have reference to the subject matter of the contract.] The fraud imputed is, both that the petitioner induced us to suppose that we were treating with his trustees, instead of with himself; and also his stating that he had become the owner of certain charges on the property. But, strictly speaking, the agreement was not complete until the interchange of the duplicates; nor did it appear that the respondent had authorised his attorney to make such exchange.

It is unusual to prepare such documents in duplicate, and therefore the court will consider the reason of such an arrangement: viz., to prevent the completion of the contract until the interchange, the parties residing at a distance apart. If it were otherwise, the part executed by the petitioner would have been sent to the respondent for her execution, and therefore he cannot be regarded as bound by the document executed by him; and although she did not formally execute the instrument as an escrow, yet she avers that her solicitor had a general authority from her as to carrying out the arrangement.

Woodroffe was heard in reply.

LORD CHANCELLOR.—This is a case which must be decided upon the merits; and I cannot, consistently with the facts that have been proved, grant the relief sought by the petitioner, there being no such agreement between the parties as the court could enforce. There are several peculiarities in this case, which, however, do not appear to me to affect the merits. The question for the court to consider is, what was the actual agreement between the parties; and this does not depend upon this or that particular fact, but must be gathered from the entire transaction. Let us then consider the nature of the case. This lady was desirous of effecting the sale of her jointure. She had a solicitor in Dublin, with whom she was in constant communication, and he submits to her the proposition of *Mrs. Beamish* as to the purchase of this jointure. She approves of the offer, after having instructed her attorney, *Mr. Fetherstone*, to make the necessary preliminary arrangements, and he appears to have been entrusted by her with the management of the entire transaction; and under such circumstances, it is not because there does not appear to have been letters from *Mrs. Vignoles* to her solicitor containing directions as to this particular matter, that the court is to suppose that *Mr. Fetherstone* was not entitled on her behalf to make what conditions he thought proper in regard to this purchase. Difficulties appear to have arisen in the completion of the agreement before the articles containing the contract were engrossed; and it is important to consider the nature of these documents, as if any relief is to be given by the court, it must be in the form of the contract contained in the articles. These documents having been prepared, duplicates were engrossed, and the signatures of the parties were attached to each part severally; and the question now raised on both sides is, whether the preparation and execution of these articles by the signature of both parties is a transaction amounting to such a complete accomplishment of the agreement between them, as a Court of Equity will support. The mere production of the instrument is not sufficient for this court. It must regard all the circumstances connected with the case. Nor will the mere signature attached to the instrument containing the agreement be sufficient, when it appears that the document signed was afterwards so entrusted by the principal to her agent; and apart from the doctrine of escrow, we must consider the entire transaction between the parties collectively and separately. It appears that *Mr. Fetherstone* sent the document to *Mr. Vignoles* for his signature, in order to have it

ready for the completion of the contract when the parties should meet. It was returned to him with her signature, and he kept it for that purpose. There is one defect as to this portion of the case, that there appears to have been no writing connected with that part of the transaction; however, it is clear that there had been an agreement between the parties that there should be a meeting for the purpose of completing the contract. *Mr. Beamish*, the petitioner, appears also to have signed the other part of the document, but it was given back to his solicitor, and he was to retain it until the meeting between the parties to interchange the documents should take place. The parties did meet subsequently, but the documents were not interchanged. *Mr. Beamish* does not appear at the time to have complained that the contract was not completed, nor did he insist upon the performance of the agreement on that occasion, nor demand an interchange of the documents. Nothing of the kind took place. *Mr. Fetherstone* complains that *Mr. Beamish's* means are not sufficient to enable him to carry out the contract; and for two months after the meeting of the parties *Mr. Beamish* does nothing. That appears to me to have been, on his part, a clear recognition of the transaction, and an admission of *Mr. Fetherstone's* authority in the matter, and of his power over the documents. During that period of time nothing is done, and what *Mr. Beamish* now seeks is not an interchange of the documents, which, if the instrument was regarded as valid, would be his object; but a new completion of the contract. Two months is certainly a short period of time, but it must be considered otherwise in a case of this nature. I conceive that I should be pressing very hard upon *Mrs. Vignoles*, if I should compel her after what has taken place to carry out this contract, for I do not think that there was a complete agreement between the parties to do so. Here was an agreement for the sale of her jointure, which might have considerably embarrassed this lady if it should turn out that *Mr. Beamish* had not the requisite amount of money. *Mr. Fetherstone* was clearly authorised as *Mrs. Vignoles's* agent to take precaution that she should not be so entangled; and it is plain that *Mr. Beamish* held himself out as being the owner of a large fortune, which it would appear was not the case: and really the Incumbered Estates Court, instead of being a benefit, would almost amount to a nuisance if speculations of this nature were to be encouraged, and *Mr. Beamish* has not up to the present time alleged that he has funds sufficient to carry out this contract. I therefore think that *Mr. Fetherstone* was right in putting an end to this agreement, which might have involved the interests of his client. Upon these grounds, as there does not appear to have existed at any time such a contract as this court would enforce, I must dismiss this petition, but without prejudice to the petitioner adopting any other proceeding that he may be advised. The real question in the case is as to the costs, and upon this part of the subject a great deal may be said on either side. As to this, I think that the letter of the 8th November, instead of entitling the respondent to the costs, must be regarded as having rather a different effect, as it

does admit of the existence of a contract to some extent. Upon these grounds therefore, as I think that Mr. Beamish was in some way led into this course by the conduct of the opposite party, I will dismiss the petition without costs, and without prejudice to any further proceedings he may be advised to take at law.

Decree accordingly.

WILLIAMS v. LANGLEY.—May 12, 1855.

Specific performance—Agreement for lease—Covenant.

A being in treaty to obtain a lease of certain lands from B, the following memorandum of agreement was made with mutual consent:—"31st March, 1852. Term 61 years. Rent, from the 1st of May, £75. Taxes and rates to be paid by (A), and allowed out of the first gale. Covenant to expend £300 in permanent buildings in two years. Covenant to give tenant the refusal in case of (B) selling." A entered into possession in the same year, and paid rent, and obtained receipts, but did not expend the sum of £300 in improvements upon the lands, and in the year 1854 he furnished a draft lease for approval to B, who refused to receive it, alleging that A had not entitled himself to a lease having failed to expend the sum of £300 within the specified time. A cause petition having been filed by A to obtain specific performance of the memorandum of agreement, Held, that relief could not be granted under the circumstances, the petitioner having admittedly violated an essential portion of the agreement.

CAUSE petition for specific performance. A treaty had been entered into for the letting of certain lands by the respondent to the petitioner in the year 1851, and the following memorandum in writing was made by the mutual consent of both parties: "31st of March, 1852. Term 61 years—rent from the 1st of May, £75—taxes and rates to be paid by Mr. Williams and allowed out of the first gale—covenant to expend £300 in permanent buildings in two years—covenant to give tenant the refusal in case of Mr. Langley's selling." At the time of the entry of this memorandum, the lands in question were in the occupation of another tenant, who refused to deliver up possession unless he was paid the sum of £3, which the petitioner advanced to him at the recommendation of the respondent's attorney, who subsequently refunded to him that sum; and the petitioner accordingly entered into possession of the farm in 1852, but did not require the execution of the lease, nor did he expend the sum of £300 in permanent buildings upon the premises within two years from the time he had entered into possession. The petitioner alleged as an excuse for having failed to lay out the above sum within the time specified in the memorandum of agreement, that he had been prevented from doing so by illness and death in his family, and also that he had not been required by notice to do so, alleging that he had expended upwards of £40 upon the lands. The petitioner had paid rent and obtained receipts from the respondent, and upon the 20th of October, 1854, furnished a draft lease for the approval of the respondent, stat-

ing that he was only waiting for the perfection of the lease to expend the sum of £300 as required in the memorandum of agreement; but the respondent refused to receive the draft, or to perfect the demise, upon the grounds that the petitioner had failed to expend the sum of £300 within two years from the date of the memorandum. The respondent relied upon the strict terms of the memorandum, and also upon the facts that the receipts given for rent paid by the petitioner, contained a clause stating that they were without prejudice to the covenants contemplated in the lease.

F. Fitzgerald, Q. C., in support of the petition. If the respondent had intended to insist upon the expenditure of the sum of £300 upon the premises, he should have served notice to that effect, or called upon the petitioner to take out his lease, as the latter was under the impression, from the terms of the memorandum, that the money was not to have been expended until the execution of the lease. It may be contended that it was the duty of the tenant to have tendered the draft lease for approval, but there is no such principle at law. In *Burke v. Smith*, (3 Jou. & Lat. 193,) Sir E. Sugden in delivering judgment says: "I am not aware what is the practice in this country in such cases, but I desire to know why the lessor did not himself tender a lease to the tenant to be executed by him. In England the solicitor for the lessor always prepares the lease and tenders it for execution, though the lessee has to pay for it." It would have been an answer to a bill for specific performance, if there had been a lease *in esse* containing such a clause as was contemplated in the memorandum, and giving a right of re-entry upon breach, for there the party aggrieved would have had relief at common law; but it is otherwise in cases like the present, or even where there is a mere covenant to build, without a clause of re-entry. *Gourley v. Somerset*, (Ves. & Beam. 68); *Loat v. Ranelagh*, (3 Ves. & Beam. 29.) Besides, in the present case, the landlord must be regarded as having precluded himself from setting up this defence by acquiescence and regular receipt of rents.

Christian, Q. C., contra.—The petitioner cannot enforce specific performance unless he perform his portion of the agreement; but this petition must be refused upon other grounds, for the court cannot grant the prayer of the petition without directing the execution of such a lease as would enable the respondent to bring an ejectment the very day after its execution, and that would be contrary to the principles of the court. This agreement was made not only upon the faith of an expenditure of £300, but also that it would be made within a certain time. As to the principle relied upon by the other side, it is submitted that the landlord would have been entitled to a right of re-entry for breach of this covenant, just as much as for non-payment of rent, and that being so, the court must grant this petition; and the case of *Gourley v. Somerset*, is also distinguishable, as treating only of the mismanagement of the farm which was the subject matter of the suit, a matter sounding in damages. This appears from the judgment of Lord Eldon. But this principle has been carried further, and is thus laid

down in *Jones v. Jones*, (12 Ves. 188,) by Sir W. Grant, "It is admitted that this court will never decree the specific performance of an agreement, if it is clear that covenants must of necessity be introduced into the instrument to be executed, that the party resisting the performance may immediately take advantage of it to deprive the other of all benefit from that instrument." The same principle is recognized in *Hill v. Barclay*, (18 Ves. 63.) *Nunn v. Truscott*, (13 Jur. 114,) is a stronger case. There a bill was filed for specific performance of an agreement to create a lease after the petitioner had entered into possession and allowed the premises to go out of repair, and the landlord having served a notice to quit, the court refused to compel specific performance, although there was no covenant to expend or repair as in the present case. Besides, the period of time allowed by the tenant to elapse before he applied for the execution of the lease, must be taken into consideration.

Harris for the petitioner.—*Nunn v. Truscott* is distinguishable, for it was admitted that the premises were allowed to go out of repair, which is controverted in this case. Also in *Jones v. Jones*, the Master of the Rolls says, page 189, that whenever there is any doubt (as in the present case) whether the covenant has been broken, the court should not deny relief. [Lord Chancellor.—There was what amounts to a covenant to lay out a sum of money in building within a certain time, that time has expired, and how can I say whether or not the petitioner is solvent?]

J. B. Walsh, on the same side, was called upon by the court.—This is at most a mere breach of a collateral covenant; but, even supposing that there had been a condition of re-entry, the court would grant relief in such cases as the present. In *Sanders v. Pope*, (12 Ves. 282,) it is laid down that this court will grant relief in such cases. That was a stronger case than the present, there having been a forfeiture at law, and relief was nevertheless sought from the extraordinary jurisdiction of the court, and granted. In that case there had been an actual forfeiture, resulting from nonpayment of rent. This is not a case of active waste, which distinguishes it from cases of a similar nature.

LORD CHANCELLOR.—The case of *Sanders v. Pope* did create some doubt in my mind as to whether, under the circumstances of the present case, this court should afford the relief sought by the petitioner. Here the court is asked to make a decree for specific performance of an agreement where one of the covenants in the agreement has been violated, and in respect of which breach the landlord would be entitled to proceed by action. These circumstances make a great difference; for the court is now asked to carry out an agreement, a most important portion of which has been violated; and when we consider the object of this covenant, it plainly appears to have been for the purpose of securing the solvency of the tenant, and the payment of the rent, an object which the granting of the relief sought by this petition might render ineffectual. It is clear, (whatever might be the decision of a jury upon the question,) that the petitioner has broken an essential part of the contract. The present case is dis-

tinguishable from *Nunn v. Truscott*. In that case it was beyond a doubt that damage had been done by the tenant, whereas in the present case there may be some question as to whether or not that is the case. My difficulty in this case is, as to making a decree for specific performance in a case where the party seeking it admits, in the most unequivocal manner, that he has been guilty of a breach of a most important part of the agreement which he seeks to enforce. If this petition is granted it may be said that the landlord may have his remedy at law; but in such a case a jury might not give him sixpence damages, and it would be therefore very hard to leave him to what redress he might obtain by action. I cannot, therefore, grant relief under these circumstances, and must dismiss the petition with costs.

Decree accordingly.

ROLLS COURT.

[Reported by R. W. GAMBLE, Esq. Barrister-at Law.]

CORBALLY v. GRAINGER.—Nov. 3 and 13, 1855.

Husband and wife.—Jointure.—Acquiescence.—Arrears.

A, by marriage settlement, granted certain lands to trustees, in trust to pay his wife an annuity for her sole and separate use. *A* and his wife always lived together, and he received the annuity. In 1850 the wife applied to *A* for her annuity. In the year 1850, and in the early part of the year 1851, there were judgments obtained against *A*. In April and May, 1851, the wife and her brother applied to the trustee to obtain payment of the annuity; he applied by his solicitor to *A* for payment of it, but it was not stated particularly at what time this application was made. A petition was presented for recovery of the annuity on the 18th April, 1853, held, that the wife was entitled to the arrears of the annuity only from the 18th April, 1852, being one year from the time of filing the petition, the application not appearing to have been made "bona fide."

THE petition in this matter had been filed by Matthew E. Corbally and Anna Maria Grainger on the 18th April, 1853, from which it appeared that upon the marriage of the petitioner, Anna Maria Grainger, in the year 1842, it was agreed that the sum of £3000, a moiety of her fortune, should be lent to the intended husband, William Edward Grainger, upon the security of a mortgage of his fee simple estates. Accordingly, by indenture bearing date the 2nd April, 1842, and made between the said William Edward Grainger of the one part, and J. L. Eyre, (now deceased,) and Matthew E. Corbally, (the petitioner,) of the other part, the said William E. Grainger, in consideration of the said £3000 so lent, conveyed certain lands therein mentioned, by way of mortgage, to the said J. L. Eyre and Matthew E. Corbally, subject to redemption on payment of said sum of £3000 and interest at 6 per cent. By an indenture of marriage settlement, bearing even date with mortgage but executed after it, it was declared that the said J. L. Eyre and Matthew E. Corbally, their executors, administrators, and assigns, should stand possessed

of the said sum of £3000 and interest, secured by the said mortgage, and also a further sum of £3000, the remaining moiety of the said Anna Maria's fortune, upon trust to invest the said last mentioned sums in the public funds, or upon mortgage or judgment securities, as therein mentioned, and upon trust out of the annual proceeds or dividends to pay the annual sum of £100, in quarterly payments, to such persons and in such manner as the petitioner, Anna Maria, should by writing under her hand appoint, and in default of appointment then to the said Anna Maria for her separate use, free from the control of her husband, the said William Edward Grainger, upon her own receipt. The remaining £3000 was also, afterwards, lent to the said Wm. Edwd. Grainger. He and his wife always continued to live together. The petition stated that no payment having been made to the petitioner, Anna Maria, on foot of the said annual sum of £100, the said Anna Maria, in the early part of the year 1850, applied to the said William Edward Grainger for payment of the said annual sum, but not having received any payment on foot thereof the petitioner, Anna Maria, in the month of April, 1851, and her brother, Thomas Eyre, in the month of May, 1851, called upon the petitioner, Matthew E. Corbally, as the surviving trustee to procure payment to her of the said annual sum. That the petitioner, M. E. Corbally, communicated such application to the said William E. Grainger through the petitioner's solicitors, Messrs. Cavanagh and O'Hagan, but the said William E. Grainger did not make any payment on foot of said annual sum. That repeated applications had been made by the petitioner, Anna Maria, to the said William Edwd. Grainger for payment of the said annual sums, but without effect. The petitioner claimed six years arrears of the annuity. A receiver had been appointed over the lands in 1852 at the suit of a creditor having a charge thereon. The petition prayed an account of the sums due for arrears on foot of the annuity, and that the same might be declared to be well charged on the lands, and that the receiver might be extended to pay the same. The petition was directed to stand as a charge, and a discharge thereto was filed by the Rev. Denis O'Brien, who claimed as a judgment creditor of the said W. E. Grainger, claiming under two judgments of Easter Term, 1850 and 1851, respectively, for £3000, and £4,837 penalty, respectively, and stated by way of discharge that the said W. E. Grainger was permitted, down to the time of the filing of the petition, to receive the interest on the mortgage for £3000, and that such receipt was with the full acquiescence and concurrence of the said A. M. Grainger, and that, therefore, she was not entitled to receive more than one year's arrear of interest prior to the filing of the petition. But it was not alleged in the discharge that any portion of the annuity had been actually paid. The matter came before Master Henn upon charge and discharge, and he made his order of the 22nd May, 1854, declaring the petitioner, Matthew E. Corbally, as trustee of the said Anna Maria Grainger, entitled to the sum of £200, being the arrears of the said annual sum of £100 secured for the separate use of the said Anna Maria Grainger by the settlement of the 2nd April, 1842,

in said petition mentioned, which accrued due from the 18th April, 1852, being the period of one year prior to the filing of the petition. From this order the petitioners appealed, claiming to be entitled to the sum of £400, as for four years arrears of the annuity.

Deasy, Q.C., (with whom was *O'Hagan, Q.C.*.) contended that Mrs. Grainger was entitled, under the circumstances, to six years' arrears of the annuity, or at least to all arrears that accrued due from one year prior to the time that Mrs. Grainger first demanded her annuity in April, 1851. It is admitted that as long as the husband and wife lived together, and she permitted him to receive the interest without applying for it, she may be precluded from now seeking an account of it, but from the time it was first demanded she is entitled to receive it—*Powel v. Hankey*, (2 P. W. 84); *Thomas v. Bennett*, (2 P. W. 341); *Smith v. Camelford*, (2 Ves. jun. 716); *Howard v. Digby*, (2 Clk. & Fin. 665); *Arthur v. Arthur*, (11 Ir. E. Rep. 511); *Leech v. Way*, (5 L. J., n. s., C. 100); *Ridout v. Lewis*, (1 Atk. 269.) When a regular demand of the annuity is proved, the wife is from that time in the same position as if a bill was filed for the purpose of raising it. The only question arises on account of the husband and wife having resided together, but that is plainly insufficient, because the settlement contemplated that they should live together, and yet that the wife should have a separate allowance. Therefore there must be something more than the mere fact of their living together to show that the wife acquiesced in the payment to the husband. Here she did everything for the purpose of obtaining it, except the actual bringing of a suit. The trustees actually applied to their solicitor to obtain it. If it should be decided in this case that the wife is not entitled from a year before she applied for it, it will establish the principle that in no case can a wife recover her separate allowance unless she actually file a bill for the purpose. The absence of any act by the wife showing a wish to enforce her right, is foundation of all those cases which hold that she is not entitled. When this is not the case, she is in the same position as any other claimant.

Lyons contra.—As long as there is an absence of demand by the wife clearly proved, her acquiescence will be presumed. There cannot properly be a demand of several years of an annual income when the husband and wife live together. Whatever may be the rights as against the husband, she is not entitled to arrears of an annual allowance as against creditors or assignees—*Ex parte Ray*, (1 Mad. Rep. 207); *Adamson v. Armitage*, (Coop. 283.) In the last case the Lord Chancellor disapproved of the case of *Beresford v. The Archbishop of Armagh*, (13 Sim. 643.) The rule of not allowing arrears is founded upon the acquiescence of the wife, and whenever there is this acquiescence the arrears are only allowed from one year prior to the filing of the petition. If the demand in this case was followed up by any proceedings, it might be shown there was no acquiescence, but that is not the case here.

O'Hagan, Q.C., in reply.—The rule is that in

the absence of evidence to the contrary it will be presumed there was acquiescence on the part of the wife, but where there is evidence it displaces the rule. Here it is charged, and not denied, that application was made for the allowance, through the solicitor, to the husband, and this is sufficient. She should then be entitled to the arrears from a year before the time of the first application.

Nov. 18.—His Honor now gave judgment in this case.

MASTER OF THE ROLLS.—This was a motion by way of appeal from an order of Master Henn which declared the trustees of Mrs. Grainger entitled to £200 for two years' arrears of an annuity being for twelve months prior to the filing of the petition on her behalf to secure the same. [Having then stated the facts, as given above, his Honor proceeded]:—The petition then states that Mr. and Mrs. Grainger lived together, and that Mr. Grainger was permitted to receive the interest of the money. Now this was acquiescence and concurrence on the part of Mrs. A. M. Grainger, which would prevent her, as against her husband, being entitled to arrears of the allowance for more than one year prior to the filing of the petition. Now the allowance was secured by the settlement of April, 1822. What steps were taken then by Mrs. Grainger to enforce its payment? The petition states that in the year 1850 Anna Maria Grainger first applied to her husband for payment of this annual sum, and that not having succeeded in getting payment, she applied in 1851 to her trustee, Matthew Elias Corbally, to procure payment, and that her brother also applied to the trustee for the same purpose. The petition then states that the said Matthew E. Corbally (the trustee) communicated this application to the said W. E. Grainger through his (the trustee's) solicitors, Messrs. Cavanagh and O'Hagan, but the petition does not fix any date for this application; it might have been the day before the petition was filed. It then says that repeated applications were made, but it fixes no date for them, and the petition is then only verified in the short form; such then was the nature of the demand made by Mrs. Grainger for her allowance here. Now what is the rule of law? The case of *Arthur v. Arthur*, (11 Ir. Eq. Rep. 511,) decided that where a married woman has been supported by her husband, no retrospective account is given of her separate estate against his assets, and there is no distinction whether it be pin money or not, or whether it is secured by articles remaining "in *feri*," or an executed trust. The Lord Chancellor there says: "I do not rely on the distinction between pin money and separate estate; that distinction is observed on in the note to the case of *Ex parte Elder*, (2 Mad. C. P. 732—3,) but I do not rely on it for this purpose. The authorities there cited do appear to establish that where a husband has been permitted by his wife to receive the income of her separate estate, she, on an account prayed against him, shall not have the account carried back beyond a year. The authorities there reviewed differ only as to this, whether the account should be carried back even for a year, but beyond that no doubt is suggested." The ac-

quiescence of the wife, by leaving the receipt of the money to the husband, is evidence of a direction on her part that the husband shall receive it. The case of *Caton v. Ridout*, (1 M.N. & Gor. 599,) in England is very clear about the effect of that acquiescence on her part. The Lord Chancellor says there: "The question depends entirely upon the force of the evidence before me, upon which alone I can proceed, for there is no doubt whatever about the rule of law, or rather the rule of equity. A wife having property settled to her separate use is entitled to deal with the money as she pleases. If she directly authorizes the money to be paid to her husband, he is entitled to receive it, and she can never recall it. No direct authority has been produced which affects the case before me. If the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband, to be used by him, (of course for their joint purpose,) that would amount to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him." It may be conceded that if the wife had called upon her trustees to obtain the money, and had followed up that demand, that this would have entitled her to recover the arrears. But what are the facts relied on. The discharge of Mr. O'Brien does not state the date of his judgments, but they are dated—one in Easter Term, 1850, for £3,000 penalty; the other in Easter Term, 1851, for £4,837. The petition then does not state that any claim was made on the part of Mrs. Grainger during the early part of the year 1851. But when, in point of fact, Mr. O'Brien had obtained his judgment in the early part of that year, then Mrs. Grainger called on her trustees to obtain payment of her allowance, and no date is fixed to any other application that was made. This claim then appears to have been made in order to prevent any other puisne creditor from obtaining payment, and yet, in the meantime, to allow the husband to receive it. In my opinion the claim was not made *bona fide*, or, if it was made *bona fide*, then that it was not followed up. I must, therefore, refuse the motion, and confirm the Master's order.

The following order was made:

"Refuse said motion with costs, to be paid by the petitioners to the Rev. Denis O'Brien, when taxed and ascertained, and refer it to one of the taxing masters of the court to tax said costs, and let the deposit be handed over to the said Rev. Denis O'Brien or to his solicitor, Mr. William Lyons, in part payment of said costs, said William Lyons undertaking that if said costs shall not be taxed to the amount of the deposit so lodged, to refund the difference."

NOLAN v. DRINAN.—April 16, 1855.

Practice—Cause Petition—Interrogatories—*Notice of Motion.*

Where application is made for liberty to file inter-

rogatories, it must be upon notice to the other party.

William Smith, for the petitioner in this case, applied for liberty to file interrogatories. The petition had been filed for the purpose of obtaining a partnership account, affidavits in answer had been filed by the respondent without admitting or denying the partnership, the petitioner therefore now required to file interrogatories in the nature of a bill of discovery. Motions of this kind had always been considered moveable, as motions of course.

MASTER OF THE ROLLS.—I cannot give liberty to file these interrogatories without notice being served on the respondent, that he may have an opportunity of showing whether it may be necessary to file interrogatories.

COURT OF QUEEN'S BENCH.

EASTER TERM, 1855.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

POLLOCK v. HAGERTY.—May 4.

Evidence—Proof of service of notice to quit—Absconding witness—Secondary evidence.

In an ejectment on the title, upon a notice to quit, the party who served the notice had been duly served with a subpoena, but did not attend at the trial in obedience thereto; Held, that under the circumstances secondary evidence of the service of the notice by proof of the indorsement in the handwriting of the party was inadmissible.

Seemle, that even though actual collusion between the notice server and the defendant were proved, such evidence would not have been admissible, and that the rule of law respecting the dispensation with the viva voce testimony of absent living witnesses applies only to the case of attesting witnesses.

THIS was an action of ejectment on the title against an overholding tenant. At the trial of the cause before Mr. Sergeant Howley at the Galway Spring Assizes, a witness, who was one of the plaintiff's tenants on the property, and by whom the notice to quit had been served, and by whom a memorandum of the service had been endorsed, was called upon his subpoena, but did not appear. Service upon him of the subpoena was proved; as also that he had been seen very recently before the assizes. Under these circumstances the plaintiff proposed to prove the service of the notice by evidence of the indorsement being in his handwriting, upon the surmise of his being kept out of the way by the opposite party. This evidence the learned judge rejected, and nonsuited the plaintiff. A conditional order having been obtained to set aside the nonsuit, and for a new trial,

Fitzgibbon, Q.C. (with whom was *W. J. Sidney*), showed cause; and *Robinson, Q.C.* and *Concannon*, were heard in support of the motion. [The following cases and authorities were cited:—*Godbolt*, 326; *Burt v. Walker*, (4 B. & A. 697); *Crosby v. Percy*, (1 Taunt. 364); *Price v. Turrington*, (1

Salk. 285); *Taylor on Evidence*, 381—4; *Slapton v. Clough*, (2 El. & Bl. 983.)]

LEFROY, C.J.—This case has been brought before us upon this simple ground, that the judge ought to have admitted secondary evidence. With respect to the nature of the secondary evidence proposed to be given, I am of opinion that no ground was furnished for relaxing the rule of evidence which requires the production of the actual witness to prove the fact in question. The witness proved to have been the agent employed by the plaintiff is not forthcoming. It has been said that that was owing to collusion between the tenants of the estate, and that in that conspiracy the defendant took part, and therefore that by the default of the defendant the witness was not forthcoming. We may however say, that even if that could operate as an exception, the evidence did not establish that particular ground for dispensing with the ordinary rule of law. The question which then arises is this, whether upon the general principles of law there is any ground, under the circumstances here given, for such a dispensation. The courts have certainly decided, that in the case of an attesting witness, who by reason of a fatality is not forthcoming, proof of his handwriting may be given. It has been admitted that there is no case in which a similar proposition has ever been yet decided, except in the case of an attesting witness, and we are now called upon to extend that rule to the present case, which is not one of an attesting witness, but of a person employed to do an act, and to dispense with his evidence upon the ground that he is not forthcoming. We are unanimously of opinion that upon the mere ground of the witness not being forthcoming at the trial, and that he cannot be found upon inquiry, there being no reason for considering him to be dead, we cannot extend to a case like the present, the rule relative to an attesting witness under similar circumstances. Such a course would indeed be a dangerous novelty. A party in the choice of his agent will obviously look to his own interest. If his object can be equally obtained by keeping the witness out of the way, while secondary evidence can all the while be given of his alleged acts, it is manifest that the most palpable fraud and injustice may be perpetrated. As to what has been said relative to this course of proceeding promoting the ends of justice, it is manifest that these will be best promoted not by what may possibly conduce thereto in a particular case, but by adhering to those rules and principles of law which have been devised for the promotion of justice in the generality of cases. It is far better that a particular inconvenience should occur than a general mischief. I rest my opinion on that ground, without going at length into the particular facts of the case. It has come before us upon the abstract question of right, and upon that the case was argued, and though there might be found some convenience in our setting aside, as a matter of favor, this verdict and granting a new trial, yet as the case involves a principle of law, we are unwilling to run the risk of having it hereafter cited as a precedent of a violation, on our part, of a rule of law, more especially as there are other actions now pending at the suit of the plaintiff. Therefore we

will not set aside this nonsuit upon the ground of convenience, lest we might be thought to have infringed upon the principle of law, which whilst it allows in the cases referred to, of proof of the hand-writing of the attesting witness, does not go the length of permitting what would inevitably lead to fraud and injustice in the generality of cases.

CRAMPTON, J.—I concur with the rule of the court, as pronounced by them, with respect to this question of law. I suppose that the law is considered too stringent for us now, and so we are called on to introduce a new principle therein, as was formerly done with respect to attesting witnesses, and to let in evidence such as we have hitherto allowed between party and party. We have seen that the stringency of the old law with regard to attesting witnesses was materially relaxed, even before the recent statute, and it is impossible to say how far the law may be hereafter relaxed in other instances, in which it is now difficult for a party to produce a witness. We cannot, however, do so in this case. As to the present motion, it has been put upon certain legal grounds which we cannot countenance; but I did think that there was a ground upon which the court might have interfered, namely, a fatality on the part of the plaintiff. He seemed to have done what he could to produce the witness, but a fatality occurred, and my mind was impressed with the idea that there was collusion between the tenants and the witness, and I cannot help thinking that the defendant was somehow connected with that; but I do not think, on the other hand, that the evidence established that against him. Under these circumstances, if the same view had been taken by my Lord Chief Justice and my brother Moore, I would have been better pleased, without reference to the question of evidence, to have set aside the nonsuit upon the ground of fatality, and the collusion of the tenants, giving the defendant the costs of the motion.

MOORE, J.—I concur with the opinion expressed by my Lord Chief Justice. I am glad that we do not differ about the law, about which there does not appear to be a shadow of doubt. The case was rested solely upon the question of law. I concur with my Lord Chief Justice in thinking that it would be dangerous to grant a new trial to the plaintiff upon other grounds, lest it should be thought that we were trenching on the rule of law which governs this case.

Cause shown allowed.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

TRINITY TERM, 1855.

KEILY AND OTHERS v. KEILY AND OTHERS.—

May 23.

Injunction—Trust—Legal estate—Equity.

A testator, by his will, devised certain lands, held for life, in trust, that his wife should reside upon the lands, and be maintained out of the proceeds, and that his executors should divide the estate between the respondent and his brothers. After the decease of the testator, the lease having expired,

a renewal was granted to the respondent alone who was not one of the executors, with a proviso for the maintenance of his mother upon the lands, and the family continued to reside upon the premises as under the former lease, but no division of the property had ever been made by the executors. The respondent for some time managed the farm, and having become paralytic, his brother (one of the petitioners) undertook the management of it for him; but subsequently, they having quarrelled, the respondent tried to remove his brother from the lands, and having brought an action of ejectment on the title against him, obtained judgment in that suit, as also for mesne rates.

A motion for an injunction to restrain the respondent from executing the habere, or enforcing the judgment for mesne rates, until the hearing of a cause petition between the same parties praying that the lease made to the respondent might be declared to be a graft upon the original lease, upon the grounds that there had been an understanding that the former lease was held in trust, was refused, the respondent being owner of the entire legal estate in the lands, and at least of a moiety of the beneficial estate, and the alleged trust not being established.

THIS was an application for an injunction to restrain the respondent from executing a writ of *habere* upon a judgment obtained by him in an action of ejectment obtained against the petitioner, and from issuing execution for mesne rates, in another action in which he had recovered judgment. The lands which had been the subject of the above ejectment were held by John Keily, deceased, from Denis Keane, for the life of the latter, who held them for a like term from the Earl of Kingston, and in the year 1825, John Keily made his last will, desiring thereby that his wife Jane (one of the petitioners in this petition) should enjoy the dwelling-house, or a competent part of it, during her life, and that the farm and lands should be divided between the testator's son John (one of the respondents), and whichever of his other sons, Robert or William (one of the petitioners), his executors should think fit, with such maintenance to his wife Jane, and William his son, as his executors should think proper, and that John and his sisters should not come in for their parts until his executors should think fit; and he appointed his son Patrick and two other persons his executors. Upon the death of John Keily, his executors obtained a lease of the same lands in their own names from Denis Keane during his life, but all the children of the testator continued to reside upon the premises as before, and managed the farm with the consent of the executors; and the daughters of the testator subsequently married and received their portions out of the proceeds of the lands and the residuary property of the testator, which they accepted as such under the will. In the year 1830, the lease under which the executors held having expired, the Earl of Kingston agreed to grant another lease, which was accordingly executed to John Keily only, for the term of three lives, and which lease was alleged to have been so made to him after an agreement between the petitioners and respondents that such lease was

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to be held by him in trust for the several parties entitled to the interest in the former lease, and it was alleged by affidavit made in support of the present motion, that he had stated that he had no intention of taking out the lease except as trustee for those entitled under the will of his father, and that he had offered to execute a deed of trust to that effect, and that it was contemplated to execute such a deed of trust, but that the petitioners reposed such confidence in John Keily that they did not think it necessary to incur the expense, but that they all continued to cultivate the farm in common. The executors under the will of John Keily, deceased, never made any division as directed by the testator of his interest in the farm, and John Keily, junior, having subsequently become paralytic, his brother William (one of the petitioners) had for some years undertaken the management of the farm: but after a time John Keily tried to remove his brother William from the dwelling-house, and subsequently brought an ejectment on the title, to which defence was taken, but (as the petitioners alleged) it was not supposed that it would be carried out, and judgment was obtained by the plaintiff, and mesne rates assessed to the amount of £90. The petitioners had paid half a year's rent to the head landlord since the ejectment was brought, besides poor-rates and county cess. The petition in this cause was for the purpose of obtaining a decree of the court that the lease so obtained by John Keily, jun., should be declared a graft upon the lease originally held by the testator, his father, and that the trusts of the will should be carried out accordingly, and that in the meantime an injunction should issue. The respondent relied upon the lease made to him, which was to himself absolutely, and his executors, administrators, and assigns, for three lives or twenty-one years, but which contained a proviso that his mother, Jane Keily, should, during her life, reside and be maintained upon the premises, and denied that he had taken the lease in a fiduciary character, save as to his mother's maintenance; he denied that he was aware of any intention as to the execution of a deed of trust, and alleging as a reason for bringing the ejectment, that William (whom he had employed as manager over the farm) had misconducted himself as such; and alleged that he had never accounted with the other parties as to the proceeds of the farm since he took out the lease in his own name.

J. E. Walsh in support of the motion.

Exham contra.

H. P. Jellitt in reply.

LORD CHANCELLOR.—I do not think that I should grant this application for an injunction. This is a motion to restrain the execution of a writ of *habere* by a person who has a clear title to the whole of the legal estate in these lands, and as to the equitable estate, it is submitted that he is entitled to one half, it being alleged that other parties are entitled to the other moiety. As to this, it appears that a discretionary power was vested in the executors to direct the division of this estate between these parties; but it does not appear that any such division has been made, and, therefore, as regards William Keily, no proof of his title has

been established. The respondent, besides being owner of the legal estate, appears to have been in possession for several years, and since the execution of this lease to him no step has been taken to establish these trusts. Whether they can be enforced or not may hereafter become a question, when this petition comes on for hearing; but at present there is not before the court sufficient to sustain the present application. There is unquestionably some doubtful conduct upon the part of the respondent, and he does not appear to have acted altogether satisfactorily; but here is a judgment in an action of ejectment obtained by a person having the entire legal estate, and an equitable demand to a moiety. If the petitioner has any title under the principle of graft, that will be considered at the hearing; but I think it would be prejudging this case to grant the present motion, the petitioner at present having no title at law or equity. I shall, therefore, refuse the motion, but without costs.

Motion refused.

SYNGE v. SYNGE.—May 24, 1855.

Trust—Limitations over in the event of insolvency—Fraud—Creditor—Public policy—Charging order.

A obtained judgment in 1850 against B, who was the devisee for life of certain annual proceeds and dividends of Bank Stock under a devise made in 1827. In 1853 A obtained a charging order attaching B's interest in that property towards payment of his judgment debt. By deed of 1827 between B, C (a trustee), and other parties creditors of B, (and holding securities prior to that of A,) the interest of B in the above was assigned upon trust for him until he should become bankrupt or insolvent, or should assign, or until some one of his creditors should do any act for the purpose of attaching such interest, and upon the happening of such event, then to divide the property among the creditors named in the schedule, and parties to the deed. Held, that such limitation was void.

THE respondent in this case was indebted to the petitioner in the sum of £10,800, secured by deed of mortgage bearing date 1st August, 1849, with covenant for payment of that sum on the 1st of August next ensuing, with 4 per cent. interest, and the petitioner, having sued the respondent, obtained as of Easter Term, 1850, a judgment against him for £36,800, which was duly registered. By the will of Lady E. Hutchinson, bearing date the 5th of April, 1827, she, being possessed of considerable property in Bank Stock and $3\frac{1}{2}$ per cent. Government Stock Irish, bequeathed it to trustees upon trust to permit the respondent to receive the annual interest and dividends upon it during his natural life; and the executors, J. D. Latouche and R. T. Jessop, having paid the legacies and other bequests created under the will, assented to the bequest of the interest and dividends in the above stock to the respondent. In 1853 there was standing to the names of the above executors a sum of £2,564 Bank Stock, of which £1,846 was portion

of the stock bequeathed for his life to the respondent, and also £5,809 Government $3\frac{1}{4}$ per cent., to a life use in the dividends of which the respondent was entitled; and in that year the petitioner having revived his judgment as of Michaelmas Term, 1852, presented a petition to the Court of Chancery pursuant to the provisions of 3 & 4 Vic., c. 103, ss. 23 and 24, praying that the interest of the respondent in the Bank Stock and $3\frac{1}{4}$ per cent. Government Stock should be charged with the amount due to the petitioner under the judgment of 1850; and upon the 21st of January, 1853, a conditional order was accordingly made for charging the sum of £1,846, and cause having been shown, founded chiefly upon a deed of May, 1852, the Master of the Rolls, in April, 1853, made an order directing that the dividends and interest upon the sum of £1,846 should stand charged, as far as they should extend, with the payment of the sum due to the petitioner at foot of the judgment. The deed of May, 1852, which was relied upon as cause against the above order, had been made between the respondent of the first part, W. D. La Touche, of the second part, and the several creditors, whose names appeared therein, of the third part, (being the conusees of judgments prior to that of the petitioner;) and after reciting that the several parties so named were creditors to the respondent to the several amounts specified in the schedules attached thereto, and that they had demanded payment, which he was unable to make, and that they had, in consequence, issued execution against his person, but had consented to withdraw such execution on condition that he would convey his property to the trusts of the deed, and that he was willing so to do, after reciting the will of Lady E. Hutchinson, and the bequests made thereby to the petitioner, and also reciting that the latter was entitled to other property, proceeded to convey to W. D. La Touche the respondent's interest and dividends in the above stock under the will of Lady E. Hutchinson, including the sum of £1846, with other property, upon trust to pay the dividends and interest upon such sums to the respondent for his maintenance and support, until he should become bankrupt or insolvent, or assign the same, or until any creditor of the respondent should do any act for the purpose of having such dividends and interest applied towards payment of his or their own undivided debt; but upon the happening of any of the above events, then upon trust to hold the property so assigned upon several trusts for payment of expenses and premiums, and as to the residue, to divide it rateably between the creditors named in the schedule attached to the deed. This deed was not executed by all the creditors named in the schedule attached to it; but the claim of the petitioner, and the debt due to him, were altogether omitted from the schedule. The present petition charged that the deed was in the possession of William D. La Touche; that the respondent was in insolvent circumstances, and unable to meet his liabilities; that he had no other property, beyond what was comprised in this deed, to meet the petitioner's demands; and concluded by praying that the court should declare the proviso in the deed of May,

1852, limiting over the dividends and interest upon the sum of £1,846 upon the events specified, to be void, and for a declaration that the petitioner was entitled to receive such dividends and interest from time to time during his life, until the debt secured by judgment against the respondent should be satisfied.

F. Fitzgerald, Q. C., (with him *Leslie*), in support of the petition, cited *Phipps v. Lord Ennismore*, (4 Russ. 131); *In Re Casey's Trusts*, (7 Ir. Jur. 134.) [*Lord Chancellor*.—I cannot distinguish this case from *Phipps v. Lord Ennismore*, and I shall therefore call upon the other side.]

Otway, Q. C., (with him *La Touche*), contra.—There are two questions arising in this case, first, whether there be words sufficient in this deed to carry out its intention; and secondly, whether this property was such as the respondent could convey in this manner. The words are clearly sufficient, and as to the property, this transaction must come within that class of cases deciding that when an estate comes from a stranger, it may be thus dealt with: for here the creditors, who must be regarded as the real owners, under this deed allow the respondent a certain life estate; besides this deed is not for the benefit of the wife or family of the respondent but virtually for that of his creditors themselves, which distinguishes it from other instruments of a similar character that have been held void, as being against public policy. It must be also considered, that this petition seeks to obtain this property for only one of the creditors, whereas the effect of the deed will be to affect an equal distribution among the greater number of them. In *Casey's trusts*, the settlor conveyed the estate to trustees, upon trust, in case of his bankruptcy or insolvency, for his wife for her separate use, and it was held that such a limitation was void on the grounds of public policy. In that case the settlor had derived no property or benefit from his wife; and also in the case of *Phipps v. Lord Ennismore*, it appears that the wife's fortune was settled by a separate deed to her sole use, which distinguishes these cases from that class of authorities which decide that where the settlor has derived a benefit from, or been subjected to a certain liability on account of his wife's property, he is entitled to assign his own estate in trust for her separate use, in case of his bankruptcy or insolvency. In *Ex parte Meaghan*, (Sch. & Lef. 174,) the bankrupt had, before his bankruptcy, received £600 as his wife's portion, and given a bond for £1,000 to a trustee in consideration of it; and it was provided by his marriage settlement that the sum of £1,000 should be held in trust for the settlor for his life in case he should continue solvent, and in case of his insolvency or death, to pay the interest to such person as his wife should appoint, to the intent that such sum might not be subject to his debts; and the principal sum to be divided between his children: and the settlor having become a bankrupt, the claim of the trustee on behalf of the wife was allowed as far as the sum of £600. This decision has been followed in several subsequent cases, amongst others, *Ex parte Young*, (3 Madd. 124), which was an extension of the above principle, it being there applied to contingent interests of the settlor under the set-

tlement. In *Ex parte Hinton*, (14 Ves. 598), a settlement was made, previous to marriage, of a sum of money, the property of the wife, upon the petitioner, with power to him to lend it to the husband, which was accordingly done, the latter giving his bond. At the time of the lending, by articles of agreement, reciting the bond and proposed marriage, it was declared that the petitioner should hold the bond as trustee and apply the interest of the money to the use of the husband for life, during his solvency; but that if he should become bankrupt that the interest should be paid to his intended wife for her separate use; and the settlor having become bankrupt, this demand was permitted to be proved under the commission of bankruptcy. The same principle exists in this case, and will, therefore, distinguish it from *Phipps v. Lord Ennismore* and *Cassey's Trusts*, for the respondent here was under a liability to his prior creditors, and they having called upon him to satisfy their demands, which he is unable to do, consented to allow him a small annual sum, amounting to about £100 a-year for his actual support, and he then conveys upon trust for their benefit. Provisoes of this nature may be inserted in composition deeds. [They also cited *Ex parte Vere*, (19 Ves. 93,) and *Ex parte Elder*, (2 Madd. 282.)]

LORD CHANCELLOR.—I think that this is a plain case. The provisions of this deed seem to me to be just as void as if the event provided for was the bankruptcy or insolvency of the person assigning the property to trustees. The event in the present case was that if any one of the creditors should proceed to attach the property, then the trustees should transfer the entire rateably among all the creditors. Now suppose a creditor were to issue a writ of execution at common law, and to deliver it to a sheriff, but to instruct him not to levy the amount of the debt until some other creditor should proceed to raise his demand, a court of law would hold that this would be a fraud upon the other creditors, and that a subsequent creditor might issue his execution, and sweep away the entire property, and how would a case of this kind be regarded in a court of law? There is no such case as the present to be found in the books; but a very strong analogy is furnished by the case which I have suggested, of a party giving his writ to the sheriff for execution, and finding that the estate has been assigned to a trustee in trust for other parties who had forborne their rights for a time.* This is a plain answer to the case made by the respondents. I think, therefore, that this case is a plain one, being both calculated to create fraud, and to injure the interests of the creditors, and subject to the same observations as were made by the court in the case of *Phipps v. Lord Ennismore*, as to the fraudulent nature of the transaction. This case is, I think, even stronger than a case of bankruptcy or insolvency, and cannot be sustained. I shall, therefore, make a decree that the property is chargeable in accordance with the prayer of the petition.

Decree accordingly.

* See *Kirwan, in error, v. Jennings*, (3 Ir. Jur. 180.)

COURT OF QUEEN'S BENCH.

EASTER TERM, 1855.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PRET, Esq., Barristers-at-Law.]

GASON v. O'RYAN.—April 24.

Pleading—Forms in Schedules of Common Law Procedure Act.

In actions for goods sold and delivered, &c., &c., it is sufficient to declare in the summons and plaint that the defendant is indebted to the plaintiff in £ , being the price and value of the goods sold and delivered, without the insertion of the words "for money payable by the defendant to the plaintiff," preceding the statement of the particular cause of action, as directed by Schedule C of the 16 & 17 Vic., cap. 113.

The forms of pleadings in that Act are not obligatory.

SUMMONS and plaint: "That the defendant, William O'Ryan, is indebted to the plaintiff in the sum of £60, being the price and value of a horse sold and delivered by plaintiff to defendant, the particulars whereof are endorsed herein," &c. Demurrer: that it did not appear in and by said plaint that the sum of £60 therein mentioned was payable to the plaintiff at the commencement of action, or that plaintiff was then entitled to enforce payment of same, and that for anything that appeared to the contrary the right to sue had not accrued to the plaintiff at the time said action was commenced, and that said plaint did not follow the forms given in Schedule C to the Common Law Procedure Act, but on the contrary omits the words "money payable," which are expressly required by said schedule to be inserted therein.

Hemphill in support of the demurrer.—The form of the declaration, by the omission of the words "for money payable," &c., is a substantial departure from the form in Schedule C of the 16 & 17 Vic., chap. 113. Section 53 provides that "the forms of pleading contained in Schedule C to this Act annexed shall be sufficient in the cause to which they apply, and then and the like forms may be used, with such modifications as may be necessary to meet the facts of the case." The section then provides that the letter of these forms may be departed from, provided that the substance be adhered to. Here, however, there is a substantial variation. The 93rd section of the 15 & 16 Vic., cap. 76, (English Common Law Procedure Act,) is similar to the 53rd section referred to. This is the ground of general demurrer. So it was ruled in England in a case similar to the present, where the objection was taken on general demurrer in *Place v. Potts*, (8 Exch. R. 705,) where, in an action for payment, the declaration alleged that defendants were indebted to the plaintiff for freight, and was held bad for not following the corresponding form in the English Act "for money payable by the plaintiff to the defendant." In *Fagg v. Nudd*, (3 Ell. & Bl. 650,) a similar objection was held not to lie to the omission in these words in a count for an account stated, upon the ground that the law implied as much. The Court of Common Pleas in this

country decided that a departure from the form in a plaint in use and occupation, where the words "by the plaintiff's permission" were omitted, was held bad.—*M^cNeal v. M^cCourt*, (6th Irish Jurist, 256.) [*Moore, J.*—That would be bad at common law.] In *Smith v. Thompson*, (Exch., East. Ter., Ap. 20, 1855, not reported,) a demurrer was allowed to a plaint which stated that defendant was indebted to plaintiff for goods sold by plaintiff to a third person at defendant's request. It may be said that this mode of pleading is justified by the 8th section, which provides that personal actions shall be commenced by a writ of summons and plaint according to Form No. 1 in Schedule B, and that that form recognizes the omission of these words. That section, however, contains a mistake. [*Moore, J.*—Is that the only mistake in the Act?] It intended merely to provide a skeleton form for the writ, but its words literally import an impossibility, for they would seem to imply that every writ should be in the form of the particular specimen in Schedule B. [*Crampton, J.*—The Act, however, shows that it shall be sufficient for the plaintiff to plead in the form stated there.] It is consistent with the plaint that the horse might have been the subject of barter, and not of a sale for money.

Billing, contra, was not called on.

LEFROY, C.J.—Independently of the considerations which my brother Crampton has suggested, the 5th section, in addition to providing that it shall be sufficient in the summons and plaint to state a cause or ground of action good in substance, uses the additional negative words, "without framing the statement in any particular form"—thus showing the marked distinction which it draws between form and substance. The whole tenor of the Act evinces a preference for substance over form, and discountenances mere technicalities; just as Lord Campbell said in the case in 3 Ellis and Blackstone, p. 650: "Objections such as the present have often prevailed, and it was thought not creditable to the administration of justice that they should prevail, and to avoid them in future the Legislature gave forms which it declared should be sufficient, and by section 91 it carefully provided that no deviation from these forms should be erroneous, so long as the substance was preserved." Here we have the endorsement of the debt upon the writ. The statement of the cause of action is good in point of substance.

Demurrer overruled.

TRINITY TERM, 1855.

CROFTON AND OTHERS v. SHOLDICE—May 23.

Ejectment for nonpayment of rent—Lease—Pleading—16 & 17 Vic. c. 113.

In an action of ejectment for nonpayment of rent, brought under the new forms of pleading prescribed by 16 & 17 Vic. c. 113, it appeared at the trial that the lease which bore date the 24th May, 1853, was, as well as the counterpart, executed by the lessee, who thereon went into possession about that time, and by two of the grantees shortly afterwards, but not by the remaining two until the 25th July, 1854. No rent was ever paid under that lease,

and the rent alleged to be due was for one year and a half, ending the 29th September, 1854, the gale day next before the bringing of the action. The issues of *Nisi Prius* were, whether the defendant held under the lease stated in the summons and plaint, and whether the alleged rent was due. Held, that under these issues the defendant was not entitled to rely upon the fact, quantum valeat, that since the actual completion of the lease, only one half year's rent accrued due.

Quære, whether that would have amounted to a defence to this action, if it were open on the pleadings.

Semble, per *Moore, J.*, that the counterpart executed by the lessee, although not per se a demise, contained a sufficient minute or article so as to bring the case within the operation of the Ejectment Statutes.

EJECTMENT for nonpayment of rent. The summons and plaint stated that the defendant held a house in Abbey-street, in the City of Dublin, as tenant to plaintiffs under a lease at the yearly rent of £25, and that £37 10s. being for one and a half-year's of such rent, due and ending on the 29th day of September last, was due to plaintiffs. The defendant took defence, alleging that he did not hold the premises in the summons and plaint mentioned as tenants to the plaintiffs or any or either of them under a lease, as in said summons and plaint alleged. The following issues were settled for trial: first, whether the defendant held the premises under the lease of the 2nd of May, 1853; secondly, whether the defendant was indebted to the plaintiffs in the sum of £37 10s. or any other and what sum for rent of the premises. At the trial of the cause at the sittings of the Consolidated *Nisi Prius* Court during Easter Term 1855, before Bull, J., it appeared that the defendant executed both the lease and the counterpart at or about the period it bore date; that two of the lessees executed it then, but the remaining two did not execute it until the 25th of July, 1854. Evidence was given of acts of ownership by the defendant, such as the receipt of rent from under-tenants, &c. Counsel for defendant called for a nonsuit, upon the following ground, *inter alia*, namely, that the lease was not executed by two of the plaintiffs till July, 1854, and consequently was not complete as a lease till then, and no rent was due under it till the succeeding gale day, which was the 29th of September, 1854, and that as the ejectment was brought in January, 1855, when only half a year's rent was due, the action could not be sustained. The learned judge having refused to nonsuit, the defendant went into his case, which had reference to the point already mentioned, and another not now before the court. In the course of his examination the defendant stated that he got possession of the premises about the middle of May, 1853, and had never been disturbed therein, except by the bringing of the present ejectment; that he had the premises let to tenants ever since he had got possession, and that the tenants had paid him their rents; that he had never paid any rent to the plaintiffs, nor had he any title except under the plaintiffs. He also stated that after the first year's rent accrued due, a clerk of Baker, an agent, waited on him for payment of it, and that he replied that

he was ready to pay all his rent, if Baker would send him the lease, and that he heard nothing more on the subject till served with the ejectment. The jury having found affirmatively on both the foregoing issues, his Lordship left a collateral issue to the jury to say, in case the defendant was not held by the court to be liable to rent until the 29th of September, 1854, what rent was due by him in January, 1855, when the ejectment was brought; and also what rent was due by him at the time of the trial. The jury found that in said event £12 10s., namely, one half year's rent, was due at the time of action brought, and £25 at the time of the trial. His Lordship then reserved liberty to the defendant to move the court to enter such a verdict as they thought fit under the circumstances. A conditional order having been obtained, pursuant to leave reserved, cause was shown by

Fitzgibbon, Q. C., (with whom was *H. Ormsby*.)

O'Driscoll and M'Donagh, Q. C., contra.—The ejectment is maintainable only on foot of the lease. Until its execution by *all* the lessors, there was no valid demise, which commenced only at the date of the execution by the last. *Wilson v. Woolfryes*, (6 M. & S. 3417); *Steel v. Mart*, (6 D. & Ry. 392); *Clayton's case*, (5 Rep. .) We have the finding of the jury that, assuming the demise to have commenced in July, 1854, only one half year's rent was due at the time of the commencement of this action. No subsequently accrued rent can be taken into account in order to support this ejectment. The execution by the lessee does not estop him from showing mere execution by the lessor, nor has the instrument the character of a lease until then. *Doe dem. Munroe v. Wiggins*, (4 Q. B. 367); *Rose v. Poulton*, (2 B. & Ad. 828.) An action on the lessee's covenants is not maintainable until execution by the lessor. *Swatman v. Ambler*, (8 Exch. R. 841); *Cardwell v. Lucas*, (2 M. & W. 111.) [*Moore, J.*—Can you say, from your recollection, whether it has not been decided that the Ejectment Statutes require an article, minute, or contract in writing for ascertaining the rent, in order to maintain an ejectment for nonpayment of rent, to be executed by the lessor to the lessee, or would it be sufficient for such to be executed by either the one or the other, although no demise were contained in the articles? There is no reported authority on the subject that I am aware of, but I certainly do recollect that it was held so upon an instrument signed only by the defendant. This point was, however, not argued here at the other side. [*Moore, J.*—That was my recollection of the law.]

Ormsby in reply.—The lease when once executed related back to the day of the commencement of the rent in the *habendum*, namely, March 25, 1853. *Wilson v. Woolfryes* is no authority to the contrary, as the words were, that the rent should commence from the 25th of March "last," and the only criterion thereof was the date of the execution. [*Moore, J.*—You would not surely contend that if a lease had been executed only the day before the suing out of the writ of summons and plaint, the rent would commence, it might be three years before.] The authorities would go to that length.

Perrin, J.—In this case an action of ejectment

for nonpayment of rent had been tried before Mr. Justice Ball, and a conditional order was granted to set aside the verdict. The ground upon which that proceeded was, that the two issues which were found for the plaintiff ought to have been found in favour of the defendant. The facts of the case, so far as they bear on the present question, were these. The lease was intended to have been executed in the month of May, 1853, commencing from the 25th of March of that year, for the term of thirty-one years. That lease was executed on the 5th of May by two of the lessors, and also by the lessee, and the latter got into possession of the premises, and has held them since that time. The lease was finally executed by the two remaining lessors in July, 1854, and in January, 1855, the present proceedings were instituted. In this action the plaintiffs say that the defendant held the premises under a lease at the yearly rent of £25, and that £37 10s., being one and a half year's rent of same, was due on the 29th of September last. The defendant has pleaded that he does not hold the premises in the summons and plaint mentioned as tenant under a lease, he having been in possession from the time of the date of the lease, and having then executed the lease, although that was not finally completed until July, 1854. There has been much ingenious argument addressed to the court in favour of that position, and I do not say that the point contended for, cannot be sustained. No doubt in May, 1854, no rent was due under this lease, for it was not executed till then, nor did it become a lease until its final execution; but the defence here does not allege this, but that on the day stated the defendant did not hold the premises *under a lease* at the yearly rent in the summons and plaint mentioned. That is not merely the form of the pleading, but the two issues which have been joined pursuant to the recent statute are these—first, whether the defendant holds the premises under the lease in question? No doubt that he holds the premises under *the* lease. Then the next issue is, whether the amount of rent for the premises was due to the plaintiff? There is no question that the defendant owes that rent. After the issues have been settled in this manner. I am loath to depart from the simplified form of issues now in use, for if we begin to do this, I do not know where we are to end. I am determined, until informed to the contrary by higher authority, strictly to pursue the literal meaning of the issues, for I am afraid of setting a bad example if I attempted to form a notion of what the parties might have intended by the issue they have framed—more especially when it is a question for a jury and not for me, and the jury have found justly and properly as they have done here. There will be no injustice in thus dealing with the present case, for an amount of rent was due sufficient to satisfy the Ejectment Acts, and these two issues were properly found for the plaintiff. The cause shown must, therefore, in my opinion be allowed.

MOORE, J.—I concur in the opinion expressed by my brother Perrin that the cause shown in this case should be allowed. It is plain according to the literal terms of the issues that the plaintiff should succeed. It has been argued that the cou-

struction of the issues should be according to the intention of the parties. I do not say that there might not be cases in which I should be willing to do so if there were merits; but, before I would thus enlarge the terms of the issues, I should require to be satisfied that the party requiring that liberal construction was entitled in justice to succeed. I think that under the facts and circumstances in the present case an action of ejectment, independently of the form of the issues, would be maintainable pursuant to the Ejectment Statutes, and, at all events, I would not extend the issues beyond their legitimate meaning to defeat the substantial right which the plaintiffs have to recover, in the present action. I do not, however, go along with Mr. Fitzgibbon and Mr. Ormsby in holding that if a lease were executed but one day before the issuing of the writ of summons and plaint, it might relate back so as to entitle a party to maintain an ejectment for nonpayment of the bygone rent.

Cause shown allowed.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

MOFFETT v. BURROWES.—Nov. 14, 1854,
April 24, 1855.

14 & 15 Vic. c. 57.—Action on Civil Bill Decree.

A having obtained a decree in a Civil Bill Court for the sum of £20, on foot of which £10 had been paid, brought an action in this court on the decree, for the balance. Held, per Monahan, C. J., and Ball, J., that the action was well brought, sed per Torrens and Jackson, J. J., that the remedy must be pursued in the Inferior Courts, and that no action in the Superior Courts would lie.

Berkely v. Elderkin, (1 Ell. & B. 805,) and Austen v. Mills, (9 Exch. 288,) considered.

THIS was a demurrer to the plaintiff's plaint. The action was brought to recover from the defendant the sum of £10, being a balance due on foot of a civil bill decree for £20, obtained in the Assistant Barrister's court in the County of Sligo, on the 4th of January, 1853. The grounds of the demurrer were, that no action was maintainable in this court on an Assistant Barrister's decree, but that the decree should be renewed according to the provisions of the 14 and 15 Vic. cap. 57. By direction of the court the demurrer was argued twice, but in the present report the arguments on both occasions are combined.

H. Browne, (with him Robinson, Q. C.,) in support of the demurrer.—This action is altogether novel, and is against the spirit and policy of the Civil Bill Act, (14 & 15 Vic. c. 57.) By section 144 of the Civil Bill Act, a decree in the Civil Bill Court is void at the end of seven years, but if this action can be supported, a plaintiff who has obtained a decree in the Civil Bill Court, has only to bring his action, on the decree in this court, just before the seven years expire, obtain a judgment, and his

right is set up for 90 years. That was never the intention of the Legislature in passing the Civil Bill Act, inasmuch as the policy of that Act was to limit actions and to assist the poorer class in the recovery of small debts. The policy of the Legislature in passing the Civil Bill Act was also to protect the goods and person of the humbler classes, for by section 125 the wearing apparel, bedding, tools, and implements of the debtor to the value of £5, were protected from seizure; by sections 147 and 148, he is protected from a collusive sale of his cattle or goods, and where, under the provisions of the 11 & 12 Vic. c. 28, the person of the debtor was protected from arrest for any debt under £10, it was only by observing the stringent directions pointed out by the 116th section of the Civil Bill Act, that that protection could be removed; whereas, if the present action lies, all these protective clauses will be worthless, because, if the creditor can bring his action in the Superior Courts upon the decree of the Inferior Court, and seek the sum due by the addition of large costs, the debtor is deprived of the protection afforded by the provisions of the Civil Bill Act, and it becomes a nullity. An affidavit also is, under sections 140–1–2, a condition precedent to the renewal of decrees in the Civil Bill Court, and if an action will lie in the Superior Courts on the decree, the defendant will lose the protection afforded by this affidavit. Before the creditor can arrest the person of the debtor for a debt under £10, it is necessary, under the 116th section to obtain a decree against his person, founded on the former decree. No action will lie on this second decree, and as there is no difference between decrees in the Assistant Barrister's Court—by analogy this action will not lie. The remedy is cumulative, and sections 36 and 111 show, that a party once having gone into the Inferior Court, should be confined to it, and when a new right and a new remedy is given, a party is confined to the remedy pointed out. An action of debt does not lie on this decree, because on the decree no writ of error or false judgment can be brought, and there is no mode of trying whether the original decree is good, but the parties are remitted to the Manor Court. *Shaw v. Thompson, (4 Coke R. 13 B.)* And an action in the Superior Courts should not be allowed to effect what cannot be effected in the Inferior Court. The case of *Austen v. Mills, (9 Ex. R. 288,)* shows that negative words are not necessary to take away the right of bringing an action in the Superior Courts on a decree of an Inferior Court. [They cited *Berkely v. Elderkin, (1 Ell. & B. 805); Austen v. Mills, (9 Ex. 288.)*]

J. W. Carleton and P. J. Blake, Q. C., contra.—There must be either express words taking away the right to sue in the Superior Courts on a decree obtained in an Inferior Court, or it must be taken away by plain intendment, and if such be not the case, this action lies. There is not a syllable in the Irish Civil Bill Act to take away the jurisdiction of the Superior Courts. And the cases of *Berkely v. Elderkin, and Austen v. Mills* do not apply to the Irish Civil Bill Act, though properly applicable to the English County Courts Act. The decree in the County Courts in England is not final, in Ire-

land it is; therefore, *Berkely v. Elderkin* is well decided on the English Act, but no authority here; and this was one of the principal grounds on which the Court of Queen's Bench decided that case. It is admitted that when a mere legal right is created and a new remedy given, that remedy, and that alone, should be pursued; but this case is altogether clear of that proposition. The 112th section of the Irish Civil Bill Act does not interfere with the finality of the decree, it only declares that it shall not be enforced except at stated times and amounts, it is *debitum in presenti solvendum in futuro*; the decree when pronounced is a decision that the sum is due, and a power is given to the Barrister of regulating how it shall be paid. It is not open to the defendant to question the legality of the original decree, which is final, and a renewal is obtained on the former decree. [They cited *Pulmer v. Robinson*, (1 I. C. L. R. 354.)]

Cur. ad. vult.

April 24.—JACKSON, J.—The question raised by the demurrer in this case is, whether an action of debt can be maintained on a decree of the Assistant Barrister in the Civil Bill Court. There are two recent cases in England, to which the court has been referred: they are *Berkely v. Elderkin*, (1 Ellis & Black. 806), and *Austen v. Mills*, (9 Ex. R. 288,) and they appear to me to be authorities against the plaintiff's right to sue in the Superior Courts, and I feel myself bound, so long as they continue unreversed, to follow their decision. No doubt, the general rule is, that the jurisdiction of Superior Courts cannot be ousted except by special enactment or necessary implication, but, I think, such was intended by the English statute, 9 & 10 Vic. c. 95, which is equivalent to the Irish Act of 14 & 15 Vic. c. 57. Lord Campbell, in giving judgment in *Berkely v. Elderkin*, appears to be of opinion that it was the intention of the Legislature to limit the remedy on decrees of the Inferior Courts to the remedies given by the English County Courts Act, for he says, "The policy of the Act was to give an easy and cheap remedy for the recovery of small debts; the intention of the Legislature will be entirely defeated if the creditor is at liberty to adopt this course, and when new rights are given with specific remedies, the remedy is confined to those specifically given." Lord Campbell also relies on the 100th section of the English County Courts Act, as preventing the judgment of the County Court from being final, and though there is a provision in the Irish Civil Bill Act for making the debt payable by instalments, yet the Assistant Barrister here cannot vary the decree, as can be done in England, for there is no clause in the Irish Act similar to that contained in the 100th section of the English Act. There is another reason assigned by Lord Campbell, viz., that wearing apparel and implements of trade, to the value of five pounds, are protected from seizure under a decree in the Inferior Courts, but are not so protected from a decree in the Superior Courts. However, I do not think this reason applies here, on account of the statute 11 & 12 Vic. c. 28, s. 9. If this case were not governed, as in my opinion it is, by the decisions in the two English cases I have referred

to, I am not prepared to say I should have come to the conclusion I have upon it; but as I think the question raised there was substantially the same as the present, I consider myself bound to follow those cases; and the cases of *Hopkins v. Freeman*, (13 M. & W. 372,) *Mason v. Nicholls*, (14 M. & W. 118,) and *Slater v. Mackay*, (8 C. B. 553,) though not expressly in point, bear very much on the present case. Still, I think the reasoning of Lord Campbell is very applicable to the provisions of the Irish Act. The object of the Irish Civil Bill Act plainly was to provide a cheap remedy for the recovery of small debts. The costs settled by the Act are small, a table of the fees is exposed in the court-house, and the fee payable to the sheriff is much smaller than that payable in the execution of a *fieri facias*. Then I think it was the intention of the Legislature to confine the remedy on decrees obtained in the Civil Bill Court to the remedies given by the Act, for by section 140, decrees are not to be renewed unless affidavits be made of the amount due; by the 142nd section, renewals of decrees without notice are limited to a period of two years; under the 144th section, the debt is absolutely extinguished after six years, and no renewal can be made; by section 147, cattle or goods seized under a civil bill decree cannot be driven more than five miles from the place where they were taken, and must be publicly sold between the hours of ten and four o'clock, giving four days' notice, under a heavy penalty. It appears to me that these special provisions furnish grounds for the argument that those who avail themselves of this cheap tribunal ought to abide by it, and supply abundant reasons for the applicability of Lord Campbell's reasoning to the present case. I therefore feel myself bound by those cases of *Berkely v. Elderkin* and *Austen v. Mills*, though did they not appear in the books as I have already stated, I should have felt strongly inclined to overrule the demurrer, though at present I think it must be allowed.

BALL, J.—I am free to confess that at first I agreed with my Brother Jackson, but I have lately, upon consideration, changed my opinion, and fully coincide with my Lord Chief Justice in the grounds upon which he puts his judgment. I was under the impression, until this morning, that the majority of the court were of opinion that the demurrer ought to be overruled, and therefore I did not come prepared to state my reasons at length, which however are so similar to those of the Chief Justice that I do not think it necessary to go further than to say, that I fully coincide with him in overruling this demurrer.

TORRENS, J.—I think it necessary, under the circumstances of this case, to state the reasons why I think this demurrer ought to be allowed. This is an action brought in a Superior Court upon a judgment obtained in an Inferior Court for the sum of £20. [His Lordship then stated the facts as already detailed, and proceeded.] The question arises, whether, on the judgment of an Inferior Court, this court of superior jurisdiction should abstract from that Inferior Court the jurisdiction which it has enjoyed for upwards of a hundred years. The first Act which gave a jurisdiction of

this nature to an Inferior Court was passed in the reign of George I., which gave a jurisdiction to a small amount, and under that Act the decision of the Barrister was final, unless reversed on appeal before the going judge of assize. From that time until the passing of the Act of the 14th and 15th of the Queen, there has been an uniform declaration by the Legislature, confirming that jurisdiction, and giving a species of legislative protection, and I am of opinion that the jurisdiction of the Superior Courts does not interfere with that of this Inferior Court. The preamble of the statute of George I. recites that it was enacted for the ease of the poorer subject, whereby he might escape the expense of the Superior Courts, and therefore I think the policy of the code was to give, by special enactment, to the humble suitor, that protection from time to time which was requisite, and therefore to allow the Superior Courts to interfere would be to negative the policy of those statutes. In this entire code of laws there is not a reference to the Superior Courts, and therefore, when I find an exclusive code protecting the humblest suitor from the inconvenience of protracted litigation, and not mentioning the Superior Courts, I feel myself constrained to hold that the following up of that policy by the Legislature puts this code upon a distinct and separate basis, quite apart from interference by the judges of the land. These are the reasons which have led me to the conclusion I have stated upon the policy of the Act; and now I come to the late special enactments. The jurisdiction of the Inferior Court is limited, as well in the amount as also in the execution. The mode of execution is limited, as stated by my brother Jackson, whereas the office in the Superior Courts is not so limited in the mode of execution. The 144th section of the Civil Bill Act appears to me almost conclusive on the present case, and by it no decree or dismissal can be renewed at any time after six years, but the debt and costs shall after seven years be absolutely extinguished, and shall not be capable of being enforced by any proceeding whatsoever. Would not the proceeding contended for here annul that provision? Again, the 147th sec. is to the same effect. And the 112th sec. enacts that the Assistant Barrister, upon pronouncing any decree for any sum of money, may order the time or times when and by what instalments the decree shall be paid. The judge of the County Court in England has an extended jurisdiction; he may make an order suspending execution; the Assistant Barrister in this country may make the decree payable by instalments, but he cannot vary it afterwards: thus I think the Legislature intended a particular code for a particular purpose. No doubt, some of Lord Campbell's reasons do not bear him out; but on the other hand, some of the others are valid. There is also another distinction which occurs. In some of the early statutes the sheriff had a fee of sixpence on an arrest, and also sixpence on levying the goods; that, by the subsequent statute of 14 & 15 Vic. c. 57, is changed, and the sheriff's fee is reduced to three pence in the pound for levying an execution, showing that where proceedings are taken in the Inferior Court, the suitor is mulcted only in three pence, whereas in the Superior Courts

he is obliged to pay a shilling. Shall we then wrest this cheap mode of proceeding from the suitor, and mulct him to a greater extent? In *Berkley v. Elderkin*, Lord Campbell thus expresses himself: "But if this action lies he may be taken in execution exactly as if the creditor had sued in the Superior Court in the first instance, without availing himself previously of the facilities given by the County Court." The other judges have followed the judgment of Lord Campbell on principles which, as I have endeavoured to show, apply to the Civil Bill Court here. Therefore, both on the policy of the Act, and from its special provisions, and from the anxiety shown by the Legislature to protect the humble suitor from the power of a monied man, I am of opinion that this demurrer must be allowed.

MONAHAN, C. J.—It is unfortunate that in this case the court has been unable to come to any decision. Having given this case my most anxious consideration, the more I considered the question at issue the more I was confirmed in the opinion I originally formed upon it, though, at the same time, considerably shaken by the circumstance that the other members of the court differed with me in that opinion. The case is new in this country, and I do not consider the English authorities which have been cited as at all in point, if they were, I should consider my lips closed, and would feel myself bound to follow them just as the courts in England of co-ordinate jurisdiction follow decisions here; but as, in my opinion, these cases are not decisions in point, I feel myself at liberty to consider this question on principle. The civil bill code is not a new one, having been established for more than a century, and I believe until lately, here, and until these cases in England, no one entertained a doubt that an action could be sustained on a civil bill decree; and I am borne out in this opinion by the case of *Palmer v. Robinson*, (1 Ir. C. L. R. 354.) There the demurrer was taken, not because the action would not lie, but because some special matters were not stated which ought to have been, and the court overruled the demurrer and gave judgment for the plaintiff. However, I do not consider that case as a conclusive authority, because the attention of the court was not directed to the Act of Parliament, but only as showing that a general impression existed that an action would lie on a judgment in the Civil Bill Court. Now what was the foundation of the opinion that an action of debt would lie on a decree of the Assistant Barrister's Court? It was this, that it is a general rule of the English law that an action will lie to recover a debt in any of Her Majesty's Superior Courts of Law. There is a recent case of *Williams v. Jones*, (13 M. & W. 628,) in which this principle is so clearly laid down that I think it right to refer to it. In that case the court was of opinion that when a debt was created by the judgment of a competent court an action of debt for its recovery would lie in the Superior Courts, and the demurrer in that case was because the Inferior Court was not a court of record, and there the Chief Baron says:—"It appears to me that our judgment must be for the plaintiff. There are two questions for our consideration: first, whether an action of debt will lie upon

the judgment of an Inferior Court not of record; secondly, whether enough is stated on this declaration to show that the court below had jurisdiction. As to the first point Mr. Pearson appeared almost to concede that *assumpsit* would lie; and if so *debt* will certainly lie also.....It is plain that, on principle, an action of debt will lie upon the judgment of a competent court, whether of record or not of record. Where a party has recovered a sum of money by the judgment of a court of competent jurisdiction a debt is created which may be enforced by an action of debt in the Superior Courts." Parke, B. said:—"The principle on which this action is founded is, that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced, and the same rule applies to Inferior Courts in this country and applies equally whether they be courts of record or not. That the present objection has not been taken in similar cases heretofore may not be a very strong argument, and yet is entitled to considerable weight, when it is considered how obvious the objection is." Now I am of opinion that that case, and the cases referred to in it, establish, beyond a doubt, that, *prima facie*, when any court of justice has jurisdiction to determine the existence of a debt it has also jurisdiction to pronounce a decree. Then it is said that the cases in England, independently of the particular provisions of the Civil Bill Act, are decisions upon an analogous statute in England, and therefore bind us here. These cases are two in number, but the late case in the Court of Exchequer was decided on the authority of the case in the Queen's Bench, in accordance with an established rule in England, that what has been decided in one court is followed by the others, and that is a very proper rule. Therefore, it is necessary for us to consider what are the grounds of the decision in the Court of Queen's Bench. In that case Lord Campbell felt himself constrained to show, either by express enactment or necessary intendment, that the intention of the Legislature was to confine the remedy on the judgments of courts constituted under the Civil Bill Act to the remedies specifically provided in that Act; but he says, that he is clearly of opinion that, *prima facie*, an action can be maintained on the judgment of any court of competent jurisdiction; and he then proceeds to point out the special reasons why the jurisdiction of the Superior Court is taken away, viz., the policy of the Act—the intention of the Legislature to provide a cheap remedy for the recovery of small debts, and so on. No doubt such was the policy of the Act; but that policy was as much for the benefit of the plaintiff and more, as of the defendant, and I am strengthened in this view by the fact that though the Act enables the plaintiff to resort to the court of inferior jurisdiction, still it does not oblige him to do so. Lord Campbell also says, "that if the creditor does not make use of the machinery of the Inferior Court the policy of the Act would be defeated. I do not

agree to that, for the plaintiff may proceed in the Superior Courts and not go to the Civil Bill Court at all. Then with reference to the protection afforded to the defendant's wearing apparel, tools and implements under £5, I say it is a mistake to suppose that would be lost, because that is a general protection given to all debtors, whether sued in a Superior or Inferior Court, and, therefore, no argument can be based upon that, and I have no doubt if Lord Campbell's attention had been drawn to that fact, his opinion would have been influenced by it. Then as to the imprisonment of the debtor's person for only forty days, that is a mistake, or, at least, it does not apply to this country, for before this Civil Bill Act there was no execution issued against the person of the debtor when the debt was under £10, except in cases where you could show that he was possessed of property sufficient to discharge the debt. Therefore, that does not appear to be any argument why an action should not be maintainable here. Now with reference to analogous decisions on Manor Court decrees, is not the decree in the case of *Williams v. Jones* a decision that an action of debt will lie on the decree of a Manor Court, and is the Inferior Court, though a Court of Record, to be different from all others? Now, so much for two of three of the reasons given by Lord Campbell. The third is, and in it I perfectly concur, that from the nature of the Civil Bill Act in England the decree is never final, for the judge can rescind or alter any order he has previously made against the defendant, he can extend the time for payment of the debts, and make it payable by instalments; and therefore, I can well understand why an action of debt in a Superior Court in England will not lie, and this is really the only reason to support Lord Campbell's judgment, but no such reason exists in this country. For, though an Assistant Barrister can make a decree payable by instalments, yet the Act provides that such decree is not to issue until default is made in the payment of some instalment, and then judgment issues for the whole or for the balance due, and it is as much a decree for the balance as if it had originally been a decree for that sum; and therefore, that reason, which was one of those on which the judgment of the Courts in England was based, and which I think is the only valid one, does not in my opinion apply in this country. Now, I come to consider the question whether there are any provisions in the Irish Civil Bill Act which contain any reason that would lead to the conclusion that an action of debt on a decree in a Civil Bill Court, would not lie in the Superior Courts. What then are the provisions in the Civil Bill Act that are inconsistent with such a proceeding in the Superior Courts. *Firstly*, as to the doing away with or frustrating the object of the Act. If I be right that the principal policy of the Act was as much or more for the benefit of the plaintiff as of the defendant, then it appears to me that where the plaintiff does sue in the Civil Bill Court, his decree is only good against the personal property of the debtor, and I think it would be a denial of justice to say, that in a case where the debtor's person or goods cannot be got at, that, therefore, the debt is to be irrecovera-

ble because the creditor is prevented from suing in the Superior Courts, and in that way make the debt a charge upon the debtor's lands. The second reason adduced for this action not being maintainable is, the nature of the execution; because the cattle of the debtor cannot be driven more than five miles from the place where they were taken, and because there must be four days' notice given of the sale, and a certain sum only charged for the bailiff's expenses. Now, it appears to me that all these provisions were introduced, not for the ease of the debtor, but to prevent the process of the court from being abused, and because the sheriff is bound to grant a special warrant, and is not therefore responsible for the execution of the decree. I think there was a case recently decided in this court which bears upon the present, I allude to the case of *Brophy v. Boland*, (see *infra*.) there a judgment had been obtained in the Court of Exchequer for the sum of £9, and the plaintiff being unable to make this judgment available against the person of the defendant, brought his action in this court, avowedly for the purpose of getting a judgment for both debt and costs, in order to arrest the defendant's person, the defendant had pleaded that the sum sought to be recovered was under £10, there was a demurrer to that defence, and on the argument we were referred to several English cases, viz.: *Hopkins v. Freeman*, (13 Mees. & W. 372,) and *Mason v. Nicholls*, (14 Mees. & W. 118,) where the court held the action lay. In *Slator v. Mackey*, (8 C. B. 553,) the party went further, and asked for the costs incurred in bringing an action upon the judgment, because the defendant laughed at the plaintiff, who was unable to arrest his person, as the debt was under £20, and the defendant lived in furnished lodgings, and there the court gave the costs of that action. Now, although these cases are not in point, still they furnish a very strong analogy, for I do not think that, in deciding an abstract question, a court is justified in assuming that the plaintiff, by proceeding in the Superior Courts, is acting from improper motives or for the purpose of oppression; but, rather that he is acting so because he finds that he has exhausted the process of the Inferior Court without having recovered his demand. The other reason, which was strongly pressed, and which influenced my brother Tarrens, viz.: that the Civil Bill Act contains certain provisions for the renewal of the decree, that is, for two years without notice, and after that on notice, and also an express declaration that in no case shall it be renewed after six years; but so far from that being a ground why the action should not lie, it is in my mind an argument the other way, because it would amount to a denial of justice to say that because a debtor has no property or keeps out of the way for six years, by which he could therefore elude the debt altogether; and the same result would happen in the case of a decree against an heir-at-law; therefore, unless an action in the Superior Court was maintainable on a civil bill decree, there would be no mode of keeping the debt alive. There is also another answer to that argument, and it is this. It never was doubted, that in certain cases, a civil bill could be brought on a civil decree, and it has been stated that the As-

sistant Barristers have made a rule on this subject, and there can be no doubt that these rules are founded on the supposition that such a jurisdiction existed. If this be the case, it puts an end to the seven years limitation, for if a civil bill be brought on a civil bill decree six years old, as soon as the plaintiff gets a new decree he has six years more to run, by which the debt is kept alive, and he thus can go on renewing *ad infinitum*. I do not think that any of the other provisions of the Act are sufficiently strong to deprive the Superior Courts of their general jurisdiction where a debt exists. The only question which now remains is, what is to be done in this case; of course there can be no judgment, as the members of the court are divided in their opinions and the rule will therefore be, that the record stand.

BROPHY v. BOLAND.—April 17, 1855.

Action on a judgment—11 & 12 Vic., cap. 28, ss. 1, 4, 5.

An action may be maintained in the Superior Courts on a judgment, although the amount of the judgment may be less than £10, exclusive of costs, notwithstanding the provisions of 11 & 12 Vic., cap. 28, which prevent a plaintiff from arresting a defendant for a sum not exceeding £10, exclusive of costs, unless by the order of an Assistant Barrister, obtained on a civil bill calling on the defendant to show cause why process of arrest should not issue against him.

DEMURRER to a defence. A judgment had been recovered in a former action in the Court of Exchequer against the present defendant for a sum of £9, and costs. No execution had ever issued on this judgment. The plaintiff conceived that it would be useless to issue a *fieri facias*, as the defendant had no goods, and the Imprisonment for Debt Act, (11 & 12 Vic., cap. 28, s. 1,) prevented any arrest for debt in Ireland unless the sum due should exceed £10, exclusive of costs. It was admitted in argument that the object of the plaintiff, in bringing the present action, was to convert the costs of the former action into a debt, and thus to recover a judgment for a sum exceeding £10, exclusive of costs, under which a *capias ad satisfaciendum* might issue. To this the defendant pleaded that the amount of the judgment was for £9, exclusive of costs, and that therefore he defended the action.* The defence relied on was, that the plaintiff's remedy was exclusively confined to the course pointed out in section 4 of 11 & 12 Vic., chap. 28, which permits a plaintiff, who has recovered a judgment for a sum under £10, exclusive of costs, to issue a civil bill of the Assistant Barrister's Court, calling on the defendant to show cause why process of arrest should not issue against him. To this defence the plaintiff demurred.

* A motion had been made by the plaintiff to set aside the defence as embarrassing, but, when the object of the plea was ascertained, the court refused to set aside the defence, leaving the plaintiff to his demurrer.

Exham for the plaintiff.—The English enactment, analogous to section 1 of 11 & 12 Vic. c. 28, is to be found in section 57 of the English Insolvent Debtors' Act, (7 & 8 Vic., cap. 96,) the only material difference being, that the sum for which the arrest is made must exceed £20, exclusive of costs, and not £10, as in Ireland. Since these Acts were passed there have been several cases where defendants opposed plaintiffs who sued on judgments. In *Hopkins v. Freeman*, (13 Mee. & W. 372,) a motion was made to set aside proceedings commenced on a judgment for a sum which, exclusive of costs, was less than £20, but which, inclusive of costs, exceeded £20. The court refused the motion, saying that the defendant should wait until he was taken in execution, and that even then they might not consider him entitled to relief. In the next case the court went still further—*Mason v. Nicholls*, (14 Mee. & W. 118,) for there the defendant was actually taken in execution, and a motion to discharge him was refused. I admit that generally no costs are given on the second action, as 43 Geo. 3, cap. 48, s. 4, takes them away unless the court or a judge certifies; but costs have been given wherever the execution against the goods has been fruitless.—*Anonymous*, (1 Ir. Law Rec., o. s., 212, C.P.); *Dover v. Keily*, (3 Ir. Law Rec., o. s., 272, C.P.); and where the defendant held an appointment in a public office, and lived in furnished lodgings, the costs of the trial in the second action were granted.—*Slater v. Mackay*, (8 C. B. 553.) It has been objected that sections 4 and 5 of 11 & 12 Vic., cap. 28, show that the proper course is by civil bill, but the Act for the Recovery of Small Debts in England contained a similar provision, (s. 99 of 9 & 10 Vic., c. 95,) and it was in force when *Slater v. Mackay* was decided.

O'Donohoe for the defendant.—There are many exceptions to the general rule that an action will lie on a judgment, decree, or order, as, for instance, decrees of Courts of Equity and interlocutory orders. There are two cases in the English courts of actions brought on decrees of County Courts, and the reasons given in them are very applicable here.—*Berkeley v. Elderkin*, (1 Ell. & Bl. 805); *Austin v. Mills*, (2 Eng. Common Law Rep. 411.) In these two cases the decision was, that an action would not lie in the Superior Courts on a County Court decree, and that decision was founded on the policy of the County Courts' Act, which was the same as that of the Imprisonment for Debt Act. In the latter Act there is no general power of arresting a defendant where the debt is under £10. There must first be an inquiry, and section 5 specifies cases where the defendant has been guilty of fraud, and points out the punishment for it. No arrest is allowed unless where fraud is proved, or where it is shown that the defendant has the means of paying. The cases cited on the other side are not applicable; they were applications to stay proceedings. [*Monahan, C. J.*—Yes; but in cases where it appeared on the face of them that the original judgments were for sums under £20.] In those cases the objection was not by demurrer, and did not appear on the record; but in *Berkeley v. Elderkin*, (1 Ell. & Bl. 805,) the objection was

taken by demurrer, and was allowed. That case was followed in *Austin v. Mills*. [*Monahan, C. J.*—In *Austin v. Mills* the Court of Exchequer concurred in the decision of the Queen's Bench, but they did not acquiesce in the reasons for that decision. That was on account of the rule adopted by the English courts to be bound by the decisions of each other until reversed. The judge of the English County Court can at all times order a payment by instalments, and he may postpone payment upon an application made at any time; but the Assistant Barrister cannot do so here. His decree in the first instance may appoint a mode of payment, but, when once pronounced, he has no further control over it. That difference alone would satisfy me that decisions on the peculiarities of County Court decrees are not in point here.] But where a penalty is given to be sued for in a particular way, that has been held to oust the jurisdiction of the Superior Courts.—*Cates qui tam v. Knight*, (3 T. R. 442.)

PER CURIAM.—We have no doubt that this action is properly maintainable. The general rule is, that where a debt is established by the judgment of a court of competent jurisdiction, the plaintiff may recover on that judgment in the Superior Courts, and that is so whether the judgment was originally recovered in a court of inferior or equal jurisdiction. It also holds whether the claim is for a precedent debt alone, or for debt and costs. The Legislature has interposed, and where the debt does not exceed £10, exclusive of costs, no execution can be issued against the person, except the plaintiff can satisfy the Assistant Barrister that there is a proper ground for it. There are express decisions in England on the point, and there is nothing to prevent the action being brought, as the costs are actually a debt. In the first case cited—*Hopkins v. Freeman*—the defendant had not been arrested, and the court refused to stay the proceedings, but allowed him to make an application for his discharge whenever he should be arrested. In the second case—*Mason v. Nicholls*—where a defendant was actually arrested, they refused to discharge him, stating that a creditor clearly had a right, notwithstanding the Act, (7 & 8 Vic., c. 96, s. 57,) to bring an action on the judgment in the former action, taking his risk of losing his costs of the second action, which the court were not in the habit of giving; but the Court of Common Pleas went still further in *Slater v. Mackay*, for there they gave the costs of the second action. The cases cited by the counsel for the defendant are of a different nature, as the judgment of the County Court is not final in its nature until actually paid off, for until then the judge of the County Court has a power over it.

*Demurrer allowed.**

* A motion was subsequently made by the plaintiff for costs under section 4 of 43 Geo. 3, chapter 46, which was granted.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

WILCOCKS v. HANNYNGTON.—May 7, 9.

Power—Appointment—Declaration of trust—Equitable charge—Nudum pactum—Consideration—Separate estate—Feme covert.

An estate was settled upon trust for the separate use of a married woman, "or for such other person or persons as she shall, by any writing under her hand, direct or appoint." Her husband, having incurred debts, and borrowed the sum of £500, gave his bond and warrant of attorney for the penal sum of £1000, conditioned for the payment of £500 and interest, which bond was also signed by his wife, and the latter gave to her husband's creditor a guarantee in the following words:—"My dear Sir—"You hold a bond, dated August, 1841, for £500 sterling, signed by my husband, T. K. Hannington, and myself. I hold myself accountable for the payment of this bond, with interest at 6 per centum, against the lands of, &c., and should Mr. Hannington die, or should I die, my son, Jas. C. Hannington, whom I have made my heir, shall hold himself accountable to you for the amount of the bond of £500, and cause you to be paid, retaining you, or, in the event of your death, your son, J. C. Wilcocks, as agent to the lands of, &c., until said bond be discharged." Held, to be a valid declaration of trust sufficient to charge the separate estate.

THE respondent in this case, the widow of Thomas Knox Hannington, deceased, was, during his lifetime, entitled for her sole and separate use to certain lands in the County of Tyrone, free from the control or liability of her husband, and possessed full power and authority to incumber and charge them during his lifetime. These lands were, during the lifetime of her husband, vested for her separate use in a trustee, who, after his decease, re-conveyed the lands to the respondent, and she subsequently in the year 1850 obtained from the Ecclesiastical Commissioners a conveyance of the lands in fee simple. The husband of the respondent, having been in embarrassed circumstances, obtained a loan of £500 from George Wilcocks, who agreed to take his bond, with warrant of attorney, (signed also by the respondent,) for confessing judgment in the penal sum of £1,000, conditioned for the payment of £500, with interest at 6 per cent.; together with a guarantee from the respondent that the debt of £500 should be charged upon the lands held in trust for her separate use. The letter was as follows:—

"Nov. 13, 1841. Dungannon Castle.

"My dear Sir—You hold a bond, dated Aug. 1841, for £500 sterling, signed by my husband, Thos. Knox Hannington, and myself. I hold myself accountable for the payment of this bond, with interest at 6 per centum, against the lands of Donaghendry," (and the other lands limited to her separate use,) "and should Mr. Hannington die, or should I die, my son, James Caulfield Hannington, whom I have made my heir, shall hold himself accountable to you for the amount of this bond of

£500 sterling, and cause you to be paid, retaining you, or, in the event of your death, your son, J. C. Wilcocks, as agent to the lands of Donaghendry until said bond be discharged.

"Yours sincerely,

"E. G. Hannington.

"To George Wilcocks, Esq."

Judgment was entered against T. K. Hannington, upon the above warrant of attorney, as of Hilary Term, 1842, but George Wilcocks, having made further advances of money to T. K. Hannington, and being desirous also of obtaining further security for the loan of £500, an assignment was executed by the latter to George Wilcocks of certain lands in the County of Tyrone held under a renewable lease, and producing a small annual rent, and he also assigned to him the furniture and chattel property in Dungannon Castle. The respondent and her husband having subsequently left Ireland, an application was made to Geo. Wilcocks, (who had entered into possession of the lands assigned to him by T. K. Hannington, but had not taken possession of the furniture,) by their agent to permit the furniture and chattels to be sold for their benefit, with an undertaking, in case he would give such permission, to pay to him the balance due by T. K. Hannington up to the time of his appointment as agent. George Wilcocks having given permission to that effect, the furniture was sold, but the debt was not paid to Geo. Wilcocks, who, in addition to the bond debt of £500, also claimed the sum of £265 for advances made to the respondent and her husband, though £260 was tendered to him in discharge of the latter debt. T. K. Hannington died about the year 1850, and the respondent, residing abroad, had lately presented a petition for the sale of the lands settled to her separate use, in the schedule of incumbrances annexed to which the bond debt of £500 was not included. The petition alleged that the respondent, during her husband's lifetime, had transacted business in respect of the lands limited to her separate use, as if she had been a *feme sole*, stating that there was now due to petitioner a gross sum of £945 (including the bond debt of £500) at foot of the above demands, prayed for an account, and a decree that the above sum was charged upon the separate estate of the respondent. The respondent alleged in her affidavit that no consideration had passed from Geo. Wilcocks to her on account of the alleged security given for her husband's debt; and that the bond was passed to secure a debt contracted long before, to which the respondent was not privy, the first time when she was aware of it being when she executed the bond, and claiming an account against the petitioner for the rents, &c., received by him; that her husband was not authorized to dispose of the furniture, &c., for any other purpose than the payment of the bond debt of £500, and insisted that the petitioner, as executor of George Wilcocks, having neglected to enforce his security against her husband as principal, had discharged her from liability, she being now in the position of surety. The estate which the petitioner sought to charge in this case had been conveyed to trustees, subject to certain uses, in the following

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terms—"for the sole and separate use and benefit of the said E. A. Hannington," (the respondent,) "her heirs, executors, administrators, and assigns, without being subject or liable to the control, debts, or engagements of the said Thomas K. Hannington, her present husband, or unto or for such other person or persons as she or they shall by any writing under her or their hand or respective hands direct or appoint." This case had been previously argued and judgment pronounced as to the charge of £265, but stood over for re-argument as to the effect of the instrument purporting to create the charge of £500 over the separate estate of Mrs. Harrington.

Christian, Q.C., in support of the petition.—It is contended by the other side that Mrs. Hannington is in this case merely to be treated as the surety of her husband, and that there was a former security for this debt; but the letter must be regarded as an *executed* contract, not as a promise to answer the debt on default of another person, but as an immediate charge upon the separate estate. This is not a proceeding to charge the respondent under the Statute of Frauds, but to establish a claim against her separate estate. The Statute of Frauds merely rendered writing to be necessary to a contract that was valid before the statute, but it did not validate what was previously invalid. This is a present charge by way of mortgage against her separate estate, which is the only way in which a married woman can render herself liable. [*Lord Chancellor*.—As to the necessity of the consideration appearing upon the face of this instrument, it is clear that if it had been under seal there would have been no occasion for it, and the question therefore remains, whether or not it is necessary in the present case.] If the agreement be *executed*, it is not necessary in either case that the consideration should appear on the face of it, and if it was only executory, this court could enforce it whether it was under seal or otherwise. [*Lord Chancellor*.—In this case the question appears to be in reference to a debt due by another person, and for a promise to pay him, and there appears to have been no other consideration.] Suppose a person make the following written memorandum, "Whereas A owes B £40, I do hereby declare that my estate is charged with the payment of that sum," that is such a charge as this court will enforce, giving such equitable charge the effect of a legal interest. A decree for specific performance is not necessary in this case, the debt due by another party being as much a valuable consideration as a debt due by a party himself. It is not necessary that the consideration should move to the person making the promise, it being sufficient if it move from the person to whom it is made, and therefore the only question is, under which section of the Act does this agreement come. I contend that it comes under the 1st section, and that therefore *Wain v. Warers* does not apply, even although this was a promise to pay the debt of the husband. But in such cases a consideration need not appear, a voluntary declaration of trust being sufficient.—*Bentley v. Mackay*, (15 Beav. 12.) It will not be contended that this lady could not have made a present to the debtor of a security for her husband's

debt. The case closely resembles *Stead v. Nelson*, (2 Beav. 245,) in which lands were conveyed to trustees to the separate use of a *feme covert*, or to such persons as she should in writing appoint, and she having entered into an agreement jointly with her husband to mortgage the estate, it was held to bind her as survivor. In such cases as the present, the husband is *prima facie* to be regarded as the debtor.—*Hudson v. Carmichael*, (1 Kay. 618.) [He also cited Sug. Con. Prec. 570; *Drought v. Eustace*, (1 Moll. 328); *Owens v. Dickenson*, (1 Cr. & Phil. 48); *Lord v. Wightwick*, (2 Phil. 110); *Skinner v. M'Doual*, (2 De Gex. & Sm. 273); *Ridgway v. Wharton*, (3 De Gex. M. & Gor. 677); *Murray v. —*, (3 Myl. & Keen. 209); *Bodkin v. Barton*, (7 Ir. Jur. 213); *Woodroffe v. Johnson*, not reported.]

Ball, Q.C., contra.—*Stead v. Nelson* is distinguishable, and no case applies in which the charge was created by deed, as all instruments under seal carry consideration upon the face of them, and therefore it need not otherwise appear. This guarantee was given for a past consideration, and therefore, except the debt had been originally created at her request, Mrs. Hannington could not be held liable as a surety, *Morley v. Boothby*, (3 Bing. 114.) There should therefore appear to have been one of two things in this case in order to make this instrument binding, forbearance of suit, or that the debt was originally created at her instance. The question therefore comes to this: does the fact of her being a married woman, having a separate estate, render her liable when no other person would be so. Suppose that this instrument had been given for an illegal consideration, this court would not support it, although it was in the form of a gift, and the absence of any consideration is equally bad. *Bentley v. Mackay* does not apply, that being merely the case of a gift made by a father to his son. [*Lord Chancellor*.—It may be a voluntary instrument, but at the same time not avoidable, except with the mutual consent of both parties.] The trustee in this case is to be regarded as a banker, upon whom an order is made to pay a certain sum to a stranger, which may at any time be revoked by the person making it. The case of a married woman executing an instrument of this kind in favour of her husband should be treated less strictly than if she had not been under such influence.

May 9.—*LORD CHANCELLOR*.—We have now to consider the charge of £500. This portion of the case has been argued upon the question of consideration; whether it was such a contract as should be considered executed and complete, so as to create a perfect declaration of trust, or whether it was, on the part of Mrs. Hannington, to be completed by some future act, and thus an executory contract. Now, as to the Statute of Frauds, it would be as an agreement clearly open to objection. It appears to have been merely a parol agreement, and there was no consideration flowing to her in relation to this transaction. The money was paid to her husband, as she alleges, without her knowledge or acquiescence, and for the purpose of securing the repayment of it a bond was executed by him, which she signed, and, as a further security, a guarantee

for the payment of this sum of money, so secured, was given by her, the money being made thereby payable immediately; therefore, there appears to have been an utter absence of any consideration flowing to Mrs. Hannington, and, it appears to me, that there were no grounds for alleging that there was any consideration in this case; but, on the contrary, it was nothing more than a *nudum pactum*, and, whether in writing or not, it must be considered as altogether without consideration under the Statute of Frauds. A distinction of this nature is taken in *Crosbie v. M'Douat*, (13 Ves. 148,) between a mere voluntary promise, amounting to nothing but a *nudum pactum*, upon which an action cannot be maintained, and a promise upon the faith of which another party engages to do some particular act; and, therefore, the next question to consider is, whether or not this is a mere executory contract, or whether it amounts to a complete declaration of trust in favour of Mr. Wilcocks, affecting this property so vested in a trustee. The legal estate was in the hands of Mr. Caulfield; he held it in trust for Mrs. Hannington, or for such other person or persons as she might direct or appoint by any writing under her hand; and, therefore, we are to consider whether this letter be a sufficient declaration in writing upon her part to direct the application of the trust property. That this letter amounts to a complete instrument for this purpose is decided by *Kikiwich v. Manning*. (1 De Gex. M. & G. 189,) affirming the proposition that a gift of property of this kind, even without consideration, will be effectual in equity. If anything further had remained to be done, in order to make the appointment complete, it might be otherwise; but, upon the mere grounds of its being voluntary, this court cannot refuse to enforce it. In the case I have alluded to Sir Knight Bruce uses these words: "For that which is considered by this jurisdiction a trust may certainly be created gratuitously, so that the absence of consideration for its execution is, in general, absolutely immaterial. To this doctrine Lord Eldon often referred." The only question, therefore, that remains to be considered is this, what is the nature of the instrument. I confess that I was at first much struck with the language of the letter, "I hold myself accountable,"—as the latter expression might be regarded as having a future signification; but these words may be considered as an express declaration of present liability made by Mrs. Hannington, and communicated by her to the trust property. Therefore as to that I conceive there can be no question. Here there is a present declaration of the existence of a charge affecting these lands expressly made by Mrs. Hannington, and bringing this charge within the clear language of the deed of trust by which the power was created. This is not the case of a married woman binding herself under a promissory note, and in the case before Lord Cottenham, he distinguishes an instrument of that nature, in which the trust lands were not named, from a case like the present. Here the lands were expressly named in the letter, and the trust fund was at her disposal. Viewing it in the light in which I am disposed to do, as the creation of a present charge by Mrs. Hannington, I

conceive that she had no more to do than she has done by this instrument, under which I am of opinion that the trust estate was bound, and that the petitioner was entitled to the sum of £500. I shall, therefore, declare that sum to be well charged upon the estate.

Decree accordingly.

O'FLAHERTY v. O'FLAHERTY.—May 26, 1855.

Practice—Cause petition—Chancery Regulation Act, s. 15—Special administration.

Quære, whether a cause petition, praying for the administration of personal assets, for the purpose of obtaining the possession of a specific chattel, comes within the 15th section of the Chancery Regulation Act.

THIS was a cause petition under the 15th section of the Court of Chancery Regulation Act. The petitioner prayed for a special administration of the personal estates of the respondent, including the payment of an annuity, and that the petitioner might obtain the possession of certain specific goods and chattels, and be quieted in the possession of them, and for an account of the legacies, debts, &c., of the testator.

E. Sullivan moved the petition. [*Lord Chancellor*.—There is an objection to this petition, as coming under the 15th section, namely, that it claims the possession of specific chattels and cattle.] There is also a claim for an annuity, which gives the court jurisdiction to refer the petition to the Master. It is very desirable to the petitioner that he should not lose time in these proceedings. [*Lord Chancellor*.—I doubt very much whether this petition would come within the 15th section; however, if the petitioner is desirous of expedition he may take an order, but it will be at his peril.] We will take the order subject to the objection.

Order accordingly.

BRAHAN v. LAWDER.—May 26, 1855.

Practice—Cause Petition—Chancery Regulation Act, sec. 15—Policy of Insurance.

A cause petition may be presented under the 15th section of the Court of Chancery Regulation Act for sale of a policy of insurance.

THE petition in this case was filed for the purpose of obtaining payment of a judgment debt charged upon lands, and as a collateral security for which a policy of insurance had been assigned to the counsel of the judgment. The petition prayed for a sale of the lands subject to the judgment, and in case the proceeds should not be sufficient to discharge the amount due, for a sale of the policy of insurance.

C. Barry moved the petition.—The 9th General Order comprises such a case under the words, "by the sale of lands or otherwise."

LORD CHANCELLOR.—I think this is a proper case for a summary order.

Order accordingly.

POUNDEN v. HARVEY.—May 26, 1855.

Practice—Court of Chancery Regulation Act, sec. 15—*Cause petition*—Trustee.

Semble, a cause petition cannot be filed under the 15th section of the Chancery Regulation Act against a trustee for an account.

THE petition in this case, which was under the 15th section of the Chancery Regulation Act, prayed an account of certain monies received by the respondent as trustee, and also for the appointment of new trustees. It appeared that the respondent was also administrator, but no account was sought against him in that capacity.

Burroughs moved the petition.

LORD CHANCELLOR.—I do not think that this is a case coming within the provisions of the 15th section, the object of the petition being to make a trustee responsible. I can grant an injunction, if that will be sufficient, but cannot make a summary order.

No order.

ROLLS COURT.

[Reported by R. W. GAMBLE, Esq. Barrister-at Law.]

MONTGOMERY v. MAYNE.—February 14, 1855.

Practice—Cause petition—Interrogatories—Setting down cause—18th and 27th General Orders.

An order for liberty to file interrogatories does not imply an extension of the time for setting down the cause, and, unless such order for the extension of the time is obtained, the petition will stand dismissed pursuant to the 27th General Order—as if there had been no such order.

The court may, in such case, allow the petition to be reinstated.

A GENERAL cause petition under the Chancery Regulation Act had been filed in this matter on the 14th of January, 1854, and respondent had on the same day been duly served with a copy thereof. The respondent filed an appearance on the 20th of January, 1854, and on the 14th of February after filed his answering affidavits. The petitioner then deeming it necessary to file interrogatories, applied to the court for liberty to do so, and on the 16th of May obtained an order for that purpose; but no order was then applied for or made as to extending the time for setting down the cause. The interrogatories were filed pursuant to the Order on the 2nd of June, 1854. No further step was taken until the 15th of February, 1855, when the petitioner's solicitor applied to the Registrar of the court to set down the cause petition for hearing before the Lord Chancellor during the next Easter Term, or in the sittings after, which the Registrar refused to do, considering that the petition stood dismissed for want of prosecution.

Hickey now moved, pursuant to notice, that the Registrar be directed to set down the cause for hearing, the same not having stood dismissed according to the Rules; or for an order that the petition be reinstated pursuant to the 27th General

Order.—The petitioner in this matter had obtained leave to file interrogatories on the 16th of May pursuant to the 16th of the General Orders, which provided that whenever such leave was obtained to file interrogatories, the court should fix the time when the same should be answered, and within which it should be the duty of the petitioner, or he should be at liberty, to set down the petition for hearing. Now, although the order made by the court on the 16th of May was silent as to any extension of time for setting down the cause—still, when the leave was given to file interrogatories, it would have been irregular for the petitioner to have set down the cause before the time had expired within which the respondent was to have answered the interrogatories. The 27th of the General Orders then says that the petition shall stand dismissed if not set down for hearing within two whole Terms from the Term when it might have been so set down; but here the petition could not have been set down till Michaelmas Term, 1854, for the time for answering the interrogatories had not expired soon enough to enable the cause to be set down for the Trinity Term before; and application was made to set it down before the end of Hilary Term, 1855, so that the two Terms, from the time when the cause could have been set down, as mentioned in the 27th of the General Orders, had not then expired. At all events, if an extension of the time for setting down the cause had been asked when leave was obtained for filing the interrogatories it would have been granted, as a matter of course; it was by a mere oversight that it was omitted, and, therefore, we submit that, if the petition is now dismissed by this rule, the court should reinstate it pursuant to the power given by the 27th General Order.

H. Smythe submitted that although power was given to the court by the 16th General Order to extend the time for setting down the cause on interrogatories being filed, it was only done when applied for, but not having been applied for in this case, and no such order having been made, the time was not extended. The cause might therefore have been set down on the 5th February, 1854, being twenty-one days after the petition was filed, and before leave was given to file the interrogatories at all, and the two whole terms were therefore expired at the end of Trinity Term, 1854.

The following order was made:

"The court doth declare that the cause petition in this matter stood dismissed for want of prosecution, under the 18th and 27th General Orders, the petitioner having been at liberty to set down his cause petition for hearing on the 5th of February, 1854, which was twenty-one days after the service thereof, and the petitioner not having obtained any direction in the order of the 16th May, 1854, under the 16th General Order, giving liberty to set down the cause petition after the last day of Trinity Term, 1854. But the court doth direct that the cause petition may be reinstated, and may be set down within one week from the date of this order, and let the costs of this motion be costs in the matter."

IN RE DOOLYS, MINORS.—May 5, 7, 1855.

Minor—Guardian—Receiver—Poundage Fees—2nd Gen. Ord. of 1844.

Petitioner was appointed guardian of the persons and fortunes of a testator's children, and, though a barrister, was appointed receiver over the property, in consequence of a direction in a testator's will, and the collection of the property was accompanied with some expense. Under these circumstances the receiver was allowed poundage fees for collection at 5 per cent., but without deciding the general question that the 2nd General Order of 1844 did not apply to such cases. There having been two separate orders—one directing the receiver to account for certain dividends of stock before the Master in the matter, and another directing him to account before the Receiver Master for the rents, an order was made directing both accounts for the future to be taken before the Receiver Master.

THE petition in this matter stated that the Master had found by his report (which was subsequently confirmed) that the petitioner had been appointed testamentary guardian of the minors; and, by an order made in November, 1853, it was ordered that the Receiver Master be at liberty to accept the petitioner as receiver in the matter, notwithstanding the 41st General Order, (he being a barrister.) This order was made in consequence of the father of the minors having requested him to act as such receiver. The petitioner was accordingly appointed receiver over the property of the minors, and entered into the necessary recognizance, and, on passing his account, the Receiver Master allowed him only £2 10s. per cent. for his poundage fees as such receiver pursuant to the 2nd General Order of April, 1844, he being both receiver and guardian. The petition further stated that part of the property of the minors consisted of a sum of Government Stock, and a mortgage for £100, and that, by an order of his Honor the Master of the Rolls, made the 26th of June, 1854, it was ordered that the Accountant General should transfer to the petitioner an amount of Government Stock equal to £188 18s. 1d., for the purpose of paying certain accounts; and the Receiver Master, in passing the petitioner's account as such receiver, refused to allow him to include in such account the receipt or expenditure of the dividends of the Government Stock or interest of the mortgage, but directed the petitioner to account for same before Master Brooke, the Master in the matter, which the petitioner has done, including in that account also the account of the receipt and expenditure of the £188 18s. 1d. The petition then prayed that the receiver, in passing his next account, should get credit for the 2½ per cent. poundage fees which had been disallowed by the Master. Also, that the petitioner, in passing all future accounts, should be allowed poundage fees at the rate of 5 per cent. Also, that the petitioner should be allowed to account before the Receiver Master for the annual and accruing interest on the Government Stock and mortgage; and that the amount of £58 16s. 8d., found to be due by petitioner on his account as receiver, might be

set off against the sum of £28 10s. 10½d., found to be due by him on the account of Government Stock.

Hemphill now moved, pursuant to notice.—The first part of the notice asked that the receiver should be entitled to five per cent. for his receiver fees, instead of two and a half per cent. The order for appointing Mr. Murray receiver was made in November, 1853. Although he is a barrister, he was appointed receiver, because the testator had in his will specially requested him to act as guardian of the minors and receiver over the property, and he had consented to act only under the impression that he would be entitled to the usual fees of five per cent. There was considerable expense in collecting the property, and he had very little for his trouble. The Master thought this case came within the 2nd of the General Orders of 1844, and that the receiver was only entitled to two and a half per cent. That order is as follows: (see Beasley, 339,) "That whenever one of the Masters in ordinary of this court shall, in pursuance of the 171st General Order, deem it right to appoint a person guardian of the fortune of a minor without a receiver, and to give such person an allowance or poundage for his pains, such Master shall in no case allow such person any greater sum than two and a half per cent. on the sum to be received by him, and that subject to the direction of the court." The part of the 171st of the Orders of 1843 referred to in this order was to the effect that, whenever it is referred to one of the Masters to approve of a proper person to be guardian of the fortune of a minor, and it shall be deemed necessary to have a receiver also appointed, the Master shall be at liberty, if a proper person is willing to act as such guardian without a receiver, and to give security, but desires to have all allowance or poundage for his pains, to appoint such person as guardian, with such allowance, subject to the direction of the court, and such guardian shall be subject to all the responsibilities of a receiver, and enter into similar securities. We submit that these orders do not apply to the present case, for the 171st Order only applies to the case where no receiver has been appointed, but where the guardian is willing to act without a receiver, but here Mr. Murray has been appointed receiver in due form in consequence of the express wish of the testator. [*Master of the Rolls.*—The whole case turns upon the construction of these Orders. Your construction is, that if the guardian of the minors acts as receiver over the property, and that he is not called guardian but receiver, that then, because he is called receiver, he is entitled to get five per cent., whereas, if he were called guardian, he would only be entitled to two and a half per cent.; that would be a strange reason.] As to the second part of this application, the only object which the receiver had was to save expense by having the account both of the lands and stock taken before the same Master; in fact, to have only one account instead of two accounts before different Masters as now, the effect would be to save expense to the estate. Both accounts can be very conveniently taken before the Receiver Master. The third part of the application will follow almost as

a consequence of taking both accounts together; the amount due by the petitioner on one account will be set off against the amount due by him on the other.

MASTER OF THE ROLLS.—I will look over the petition, and see what order I can make in this case.

The following order was made:

May 7.—“The court doth not decide that the construction put by the Master on the General Orders of the 2nd April, 1844, is incorrect; but, under the circumstances of this case, be it so as prayed.”

COURT OF QUEEN'S BENCH.

TRINITY TERM, 1855.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

MURRAY v. CUMMINS.—May 24, 25.

Landlord and tenant—Covenant—Quiet enjoyment.

A granted a lease to B with a covenant for quiet enjoyment in the usual form, namely, that B, duly paying the reserved rent and performing the covenants, &c., should and might peaceably and quietly have, hold, occupy, possess and enjoy the said demised premises, with the appurtenances, during the aforesaid term, without the let, suit, trouble, hindrance, interruption or disturbance of A, his executors, &c., or any other person or persons lawfully claiming or deriving, or to lawfully claim or derive by, from or under him, them or any of them. The premises were afterwards evicted for nonpayment of rent, due by A to his head landlord. B having sued A's representatives in an action for breach of the above covenant, Held, first, that its terms did not extend to such a disturbance as eviction, although occasioned by the default of A; secondly, that whatever covenant might have been otherwise implied from the term “demise,” in the granting part of the lease, such an implied covenant could not co-exist with the express covenant contained in the lease.

Seemable, that in any case the plaintiff was precluded from relying on such implied covenant in the present action, as he had declared upon the express one.

THIS was an action of covenant. The summons and plaint alleged that the testator was, at the time of his death, tenant of certain premises to the plaintiff, and by an indenture dated 9th day of May, 1814, he subdemised to plaintiff the lands in question for 800 years, from 25th March, 1814, at the yearly rent of £5 6s. 6d., Irish currency, payable half yearly, &c. The writ then alleged a covenant by testator for himself, his executors, administrators and assigns, with the plaintiff, that he the plaintiff, duly paying the said reserved yearly rent and performing the covenants and agreements in said indenture mentioned and contained, should and might peaceably and quietly have, hold, occupy, possess and enjoy the said demised premises, with the appurtenances, during the aforesaid term, without the let, trouble, hindrance, interruption or disturbance of the said testator, his executors, administrators or assigns, or any other person or persons

lawfully claiming or deriving, or to lawfully claim or derive by, from or under him, them or any of them. Averment, that the premises, at the time of the sub-demise, and before and at the time of the ejectment proceedings thereinafter mentioned, were, together with other premises of the testator, subject to £142 19s. 1d. head rent, payable by testator in his lifetime, and by defendants since his decease, as his executors, and that it was the duty of the testator, his executors, &c., to pay and satisfy said head rent, so that a forfeiture of plaintiff's head lease should not thereby take place. Averment, of failure of defendants to pay said rent, whereby an arrear of one and a half year's rent accrued due up to and for March 25, 1851, and that by reason thereof the head landlord took ejectment proceedings, and therein lawfully recovered possession of said premises, and by virtue of said proceedings did lawfully evict plaintiff from the said demised premises, and in due course of law put an end to plaintiff's said estate and interest therein, of all which the defendants had due notice, whereby the plaintiff by the default of the defendants, as aforesaid, lost the benefit of his said lease. The defendant, Mary Cummins, demurred upon the ground that it was not shown by the said writ that the plaintiff was evicted or disturbed by the testator, his executors, administrators or assigns, or any person or persons lawfully claiming or deriving by, from or under him, them or any of them; and because it is not alleged in the said summons and plaint that the lease, therein mentioned, contained any covenant on the part of the testator for the quiet enjoyment of the plaintiff of the demised premises, as against the acts of any person claiming by title paramount to the said testator; and because it was not alleged, nor could be inferred, that it was the duty of the testator, his executors and administrators, to pay the head rent in the summons and plaint mentioned; nor was it shown that testator or defendants, or either of them, have or hath broken any express or implied covenant or contract made by testator with the plaintiff; nor was it shown that plaintiff paid the yearly rent, and performed the covenants on his part in the under lease mentioned.

R. R. Warren (in support of the demurrer).—The implied covenant for quiet enjoyment which would otherwise have arisen from the word “demise,” or “grant,” is limited by the express qualified covenant—*Joyce v. Steel*, (1 Law Rec. o. s. 56), per Pennefather, B. The construction of this latter covenant is limited, and does not include the case of an eviction by title paramount—*Stanley v. Hayes*, (3 Q. B. 105.) It does not even appear that the under-tenant had paid his rent to his own landlord, which would be necessary to enable him to maintain this action—*Ireland v. Birchem*, (2 B. N. C. 90); *Joyce v. Steel*, per O'Grady, C.B.

O'Riordan contra.—This eviction was directly within the covenant. The default of the landlord was an act of disturbance within the meaning of the covenant—*Stevenson v. Powell*, (1 Bul. R. 182.) The words “demise,” and “grant,” contain an implied covenant for quiet enjoyment, which, even assuming that the express covenant is in terms

restricted, will reach the present case—*Baker v. Harris*, (9 A. & E. 532); *Hancock v. Caffyn*, (8 Bing. 358); *Evans v. Vaughan*, (4 B. & C. 261); *Hurd v. Fletcher*, (Doug. 45); *Bandy v. Cartright*, (8 Eas. 913); *Ireland v. Bircham*, (2 B. N. C. 90.) [Moore, J.—It is possible that in the word “demise” a covenant may be implied, but that is not what you have declared on.]

PERRIN, J.—In this case the express covenant is a narrower one than what you are seeking to imply from the word “demise.” It is clear that where there is an express covenant you cannot imply another from the terms of the grant, which would otherwise have existed by implication. There has been no breach in this case of the express covenant.

MOORE, J., concurred.

*Demurrer allowed.**

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

HILARY TERM, 1855.

CURRAN v. CURRAN.—Jan. 26.

Practice—Affidavit to plead several matters—
16 & 17 Vic., cap. 113, s. 57.

Where a defendant moved for liberty to plead several matters without an affidavit of the truth of them, and the court thought an affidavit necessary, the time for pleading was extended to enable the defendant to prepare an affidavit.

Coffey moved for leave to plead two several defences.—The action was brought for goods supplied to the defendant's son, and the defendant wished to plead that the goods were not supplied at the request of the defendant, and also a special defence that the defendant's son had performed certain services for the plaintiff, which were agreed to be a full discharge of the plaintiff's demand. There was no affidavit of the truth of either of the proposed pleas, as it was not considered necessary.

PER CURIAM.—We shall require an affidavit of the truth of the proposed defences, but we allow you a week's time to plead, for the purpose of enabling you to prepare an affidavit, as parties are not obliged to know that an affidavit will be required.

EASTER TERM, 1855.

GUARDIANS OF NAVAN UNION v. MACLOUGHLIN.
—April 26, 1855.

Contract—1 & 2 Vic. c. 56, (Poor Law Act.)

Where a party, in answer to an advertisement calling for tenders for supplying meal, and requiring that a bond for the due performance of the contract, if approved of, should be perfected by a certain day, sent in a proposal to supply meal, which proposal had been approved of, but no notice of such approval was given to the contractor,

who subsequently withdrew his tender, and did not enter into the bond. Held, that no contract was made which bound the party making the tender.

THIS was an action to recover the sum of £80, being the amount paid by the plaintiffs for a quantity of meal above the price at which the defendant had proposed to supply same to the plaintiffs. It appeared that the plaintiffs had advertised in the usual manner, inviting proposals for contracts for, among other things, the supply of meal for the workhouse at Navan, and requiring that all bonds for the due performance of the contracts should be perfected within a certain time, otherwise the contract to be void; that the defendant had put in a proposal, on the day named in the advertisement, to supply these goods at a certain price, and that this proposal had been accepted by the Board of Guardians, but no communication of such acceptance had been made to the defendant, the proposal simply having the word “approved” written across it by the chairman of the Board. It also appeared that the defendant, in consequence of certain reports, wrote to the plaintiffs on the following board day to say that he required to be paid monthly, or he would decline the contract. Of this communication, however, no notice was taken by the Board, and the defendant did not complete his bond. At the trial, after the last sittings, the jury had found a verdict for the plaintiff for the amount claimed, liberty being reserved to the defendant to turn it into a verdict for him in case the court above should be of opinion that this proposal so accepted did not constitute a binding contract. A conditional order having been obtained,

Fitzgibbon, Q.C., (with him *Hamill*), now showed cause.—This is a deliberate proposal made by the defendant in answer to the advertisement of the plaintiffs; it is signed by him, and specifies the terms of the intended bargain, and is therefore binding on him. It is on the same day accepted by the chairman, acting on behalf of the plaintiffs, and is a mutual contract. The defendant could maintain an action against the plaintiffs on this instrument. [*Monahan, C.J.*—The question is, whether the tender is a contract on the part of the defendant, or simply a proposal to enter into a contract.] It is a proposal made by the defendant, and intended to be binding on him if accepted by the guardians.

Battersby, Q.C., and *Sir Colman O’Loghlen, Q.C.*, contra.—This proposal did not amount to a binding contract on the day it was written; it is only a tender and not a contract, and never could amount to such until both parties were bound, which the Board were not, as they gave the defendant nothing which could bind them to him. To make this acceptance binding, notice should have been given to the defendant, and, besides, the defendant's second letter was a plain retraction of his offer. The bond has not been perfected within the time stated in the plaintiffs' advertisement, and consequently the contract, if any there be, is void. This contract, not having been signed by three guardians, is not in accordance with the rules of the Poor Law Commissioners, and is therefore voidable, and, being so, the defendant is not bound. [They cited the

* Lefroy, C. J., and Crampton, J., absent.

following authorities—Pothier on Contracts, cap. 1, p. 1, sec. 2, art. 1, pp. 4 and 5; *Mac Iver v. Richardson*, (1 M. & Sel. 557); *Moxley v. Tinkler*, (1 C. M. & R. 692); *Routledge v. Grant*, (4 Bing. 653); *Cook v. Oxley*, (3 T. R. 653); *Guardians of Hull Union v. Petch*, (24 L. J. Exch. 23); 1 & 2 Vic. c. 56, ss. 28 and 92.

Hamil, in reply.—In the Hull case the party was called on to sign a written contract after the proposal was accepted; that was not the case here. It was the fault of the defendant not to have got an acceptance from the guardians to bind them; they have got one from him, and he is bound. The rules of the Poor Law Commissioners are conditions subsequent, and are meant only as a protection to the Poor Law Guardians; but in the Hull case it was a condition precedent, a preliminary offer meant to be followed by a binding contract. When the word "approved" was written it ceased to be a tender, and became a contract. [The following cases were cited—*Saunderson v. Jackson*, (2 Bos. & P. 238); *Dunlop v. Higgins*, (12 Jur. 295); *Ryan v. Kildysart Union*, (2 I. C. L. R. 1.)

MONAHAN, C. J.—We are of opinion that the cause shown must be disallowed. The question is, whether this is a contract mutually binding on both parties, and for that purpose we must see what is the true construction, first, of the advertisement, next, of the tender and its acceptance; and to arrive at that, we must look at the Poor Law Act, (1 & 2 Vic. c. 56,) and the Commissioner's Orders thereunder. It provides that there must first be an advertisement for tenders, then, that if the tenders be accepted there must be a written contract entered into, and a bond given by approved sureties for its due performance. In the case of the *Hull Guardians v. Petch*, there was a postscript to the advertisement, which stated that "all contractors would have to sign a written contract after acceptance of the tender," and here the advertisement has the same meaning. In the Hull case the form was in these words, "I propose to supply your house with meat, according to advertisement, for the ensuing three months, at sixpence per pound." The words were not, "to enter into a contract," but "to supply," and the answer was, "I am directed by the Guardians of the Poor of this town to inform you that you have been appointed butcher to this corporation for the quarter ending," &c. The judgment of the court there was, "The tender was only a proposal for a contract." So, in the present case, we think this was only a proposal for a contract, and we say that even if the acceptance by the Board had been communicated formally to the party, this case would not be distinguishable from the Hull case. Where there are written communications passing between parties, it is not enough to accept a proposal in one's own mind, but it must be done by some act binding on the party; and so in this case we think there was no acceptance of this proposal which could bind the defendant.

Cause shown disallowed.

LYNCH v. CREAGH.—May 22.

Practice—*Inspection of documents*—14 & 15 Vic., cap. 99, s. 6—16 & 17 Vic., cap. 118, s. 64.

The court will, under certain circumstances, compel a plaintiff to furnish the defendant with a copy of a copy of a document, where no other means of procuring either the original or a copy exist.

McDonagh, Q. C., (with whom was *Exham*.) applied, on the part of the defendant, that the plaintiff should furnish the defendant with a copy of the report made to the Poor Law Commissioners by the plaintiff in his capacity of Poor Law Inspector. The application was made under the 14 & 15 Vic., cap. 99, sec. 6, (Law of Evidence Act,) and 16 & 17 Vic., cap. 118, s. 64, (Common Law Procedure Act.) It was an action of libel founded on certain slanderous paragraphs contained in a letter which appeared in the *Evening Packet* newspaper, written by the defendant, commenting on the report made by the plaintiff, a Poor Law Inspector, to the Poor Law Commissioners, of certain proceedings of the Board of Guardians of the Ballyvaughan Union, of which the defendant was a member. It appeared from the affidavit of the defendant that he was unable to plead to the plaint without a copy of the plaintiff's report; that he had applied to the Poor Law Commissioners for the one in their possession, but that they had refused to give either it or a copy of it. The affidavit further stated that the plaintiff had a true copy in his possession.

Lynch, Q. C., (with him *M. Morris*.) opposed the motion, and contended that the original report, being in the custody of the Commissioners, and the plaintiff having only a copy for his own use, that he was not bound to furnish a copy of a copy; and also, that the report being a privileged communication made by the plaintiff in his official capacity, that a bill of discovery would not lie in a Court of Equity. They also contended that the defendant was guilty of delay in not making this application until the last day for pleading.

PER CURIAM.—We think the defendant is entitled to get a copy from the plaintiff, but, as he has been guilty of delay, it must be on the terms of pleading within four days, taking short notice of trial, and paying the costs of the motion.

Rule accordingly.

COURT OF EXCHEQUER.

EASTER TERM, 1855.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

[Coram GREENE, B.]

SYNAN v. TUTHILL.—May.

Practice—*Common Law Procedure Act*, sect. 135—*Charging order.*

The court will grant an order charging the interest of a defendant in a fund lodged to the credit of a cause in the Incumbered Estates Court, the affidavit showing distinctly the defendant to be entitled to the residuum of the fund, after payment of

prior demands, and that a large surplus will be coming to him, although the fund be not yet allocated.

C. R. Barry, of counsel for plaintiff, applied under the 135th section of the Common Law Procedure Act—(16 & 17 Vic. c. 113.)—for an order to charge the defendant's interest in a fund lodged to the credit of the cause in the Incumbered Estates Court. The affidavit stated that the defendant was entitled to the residue of the fund after the payment of prior demands. The fund had not yet been allocated, but it was sworn that a large surplus would be coming to the defendant. As to the fact of the fund not being allocated he cited *Byrne v. McNevin*, (6 Ir. Jur. 126.)

GREENE, B.—You may take the usual order.

Rule accordingly.

[*Coram* **RICHARDS** and **GREENE, B. B.**]

BOLTON v. BYRNE AND OTHERS.—May 1, 1855.

Practice—Common Law Procedure Act, (16 & 17 Vic. cap. 113, sec. 135)—Charging order.

A party seeking a charging order, under the provisions of the 135th section of the Common Law Procedure Act, must satisfy the court as to the existence, nature and extent of the interest claimed by him, and specifically state the rights of the parties.

William Smith, on behalf of the administrator with the will annexed of **R. B.**, deceased, applied, under the provisions of the 135th section of the Common Law Procedure Act, for an order to charge the defendants' interest in certain funds. Counsel relied on an affidavit which stated that a judgment had, in Easter Term, 1846, been obtained by said **R. B.** against the defendants for £4,000. It also recited the decease of **R. B.**, and the obtaining of the letters of administration with the will annexed of the said **R. B.** by the administrator, and also the writ of revivor in 1855, and proceeded to state "that the sum of £857 5s. 11d. now remains justly due to this deponent, as such administrator, on foot of the said judgment, over and above all just credits and allowances for principal and interest and costs, &c., to the best of this deponent's calculation, information, knowledge and belief; that a sum of £2,941 9s. 8d. is now standing in the name of the Accountant General, in the books of the Governor and Company of the Bank of Ireland, to the credit of a matter pending in the Court of Chancery, wherein one **F. W.** is petitioner and one **S. H.** is respondent, in which money the said defendants have respectively estates and interests."

PER CURIAM.—Your affidavit is insufficient. It is not enough to state merely that you have an interest, you must satisfy the court as to the existence and nature of such interest, and state specifically the rights of the parties. You had better amend your affidavit.

No rule on the motion.

TRINITY TERM, 1855.

IN RE FOOTT.—May 22.

Practice—Admission as an attorney—University Degree.

In order to obtain the benefit of the provisions of the 1 & 2 Geo. 4, cap. 48, persons who seek to be admitted to practise as attorneys after a service of three years only, in consequence of being Graduates of one of the Universities, must have completed their undergraduate course within six years from the date of their matriculation, and have taken that degree previous to being bound apprentices, the intention of the Legislature being to secure the undivided attention of clerks to the acquisition of the knowledge of their profession during the term of apprenticeship.

The courts require the existence of very special circumstances to induce them to relax the strict provisions of the Acts of Parliament regulating the admission of attorneys.

Martley, Q.C., (with whom was **Edward Sullivan**,) moved that **Mr. Foott**, the petitioner, might be admitted an attorney of this court on the last day of this (Trinity) Term, notwithstanding his having been bound apprentice to **Edw. Farmer**, gentleman attorney for five years, three whereof only will have expired at the termination of the Term. The application was grounded on the indenture of apprenticeship, dated the 25th November, 1852, and duly enrolled in the three law courts as of Michaelmas Term, 1852, and on several affidavits. **E. Farmer** stated that the petitioner, subsequent to his being bound apprentice to him, had, on the 28th of February, 1854, obtained the degree of B.A., and that, during the period of his apprenticeship, he had discharged his duty as such apprentice faithfully, honestly, and to the full satisfaction of his master, who was willing that he should be admitted to practise as an attorney during the present Term. The petitioner's affidavit stated that he had been admitted a student in the University of Dublin on the 1st July, 1846, wherein during his undergraduate course he had obtained certificates of recommendation for honors in classics; that he was bound apprentice to **Edw. Farmer** for five years in Michaelmas Term, 1852; that, at the time he was so bound, there remained but one examination for him to undergo, previously to obtaining his degree of B.A.—namely, the "degree examination" in 1850, so as to entitle him to take his degree at the "commencements" held in the month of March, 1851, which examination the petitioner would have attended but for the following circumstances:—He was entitled to a sum of £1,200, and £40 per annum under his father's will, charged on the estate of his eldest brother, with whom he resided up to the year 1849. His brother became embarrassed in his circumstances, and had ceased to reside in this country, and a receiver had been appointed by the Court of Chancery over his estates at the suit of some prior creditors. The petitioner had been, in consequence of these proceedings, deprived of all means of paying for his degree, or of supporting himself, inas-

much as he had not received any interest on his said charge, nor one shilling out of the said estate, from the year 1848 until, after having presented a petition for the sale of the estates in the Incumbered Estates Court in July, 1850, the funds arising from the sale of the estates were, in June, 1853, distributed. Before the said distribution he had bound himself apprentice to Farmer, giving the said charge as security for payment of the apprenticeship-fee and the costs of the necessary stamps; as soon as the rules of the University admitted, he replaced his name upon its books, and took out his degree on the 28th of February, 1854; and, but for the want of funds, caused by his brother's embarrassments, and the difficult position of the estates, he would have taken out his degree previous to being bound apprentice. During his apprenticeship he attended seven Terms in Dublin, and in every other respect performed the duties of service faithfully, honestly, and diligently, and to the satisfaction of his master. The usual notices, pursuant to the statute, were posted in the three Law Courts, and notice of the application had been served on the Secretary of the Law Society of Ireland, but that body did not offer any opposition to the application, leaving it to the discretion of the court. The Rev. Michael Roberts, M.A., F.T.C.D., whose pupil Foott had been, certified his having passed through his undergraduate course in the University with credit, and taken his degree respectfully, and his having been recommended for honors. The 7th George 2, chapter 5, section 2, requires an apprenticeship for the space of five years. This was followed by the Act for the better Regulation of the Admission and Practice of Attorneys, 13 & 14 Geo. 3, cap. 23, which gives, in section 7, a power to the judges and barons to make, in cases of sickness or other unavoidable accidents, such allowances and exceptions as they, in their discretion, shall think fit; and in section 9 it is enacted, that the Act was not to be construed to extend to prevent the judges or barons from admitting or refusing to admit such persons, and in such manner, and with such discretion as the said judges were theretofore lawfully used. The 1st & 2nd Geo. 4, cap. 48, sec. 1, provides that any person who shall have taken or shall take the degree of B.A. or LL.B. [or B.C.L.] in either of the universities of Oxford, Cambridge, or of Dublin, and who shall, at any time after he shall have taken or shall take such degree, be bound to serve as a clerk for the space of three years, and who shall, during that term, continue in such service, and during the whole time shall continue and be actually employed by such attorney, &c., in the proper business and practice, &c., of an attorney, &c., shall be admitted to practise as an attorney as if he had served for five years. The 4th section, however, provides that nothing in the Act shall extend to any person who shall have taken or shall take such degree of B.A., unless he shall take said degree within six years, [or the degree of LL.B., &c., within eight years, *vide* 3 Geo. 4, cap. 16.] next after the day he shall be first matriculated in said university, and unless such person shall be so bound within four years next after the day he shall

have taken such degree. This court had established the precedent of admitting a person to practise, even without having served a regular or complete apprenticeship. The decision *In re Colville*, (6 L. R., n. s., 121,) though apparently so, is not adverse to the present application. That case was neither within the spirit nor letter, and was made as of right, and not to the discretion of the court. [*Pennefather, B.*—In the present case the preparation for at least one important examination in college was made during his apprenticeship. *Richards, B.*—If he had answered the last examination we might, although the degree had not actually been taken at “the commencements,” have strained a point in his favour. *Pennefather, B.*—No fatality has, as it appears to me, occurred here. The mere taking of a degree is but a formal matter, but it is otherwise with the preparation of the last examination, which is one of importance, and the business for which he had to prepare during his apprenticeship, and while learning his profession as an attorney. *Greene, B.*—The want of funds does not amount to a fatality. If we yielded to that plea we should, in effect, be construing the Act of Parliament, which is very explicit, one way for a poor man, and another way for a rich.] The court possesses a discretionary power to admit an attorney, even though he have not served an apprenticeship pursuant to the statute—*In re Lyons*, (Jones and Carey, 197; s. c. L. R., n. s., 116.) [*Pennefather, B.*—The court there did not wish to visit with rigour a person who had merely been misled, as it were, by a vicious precedent, and that was the ground of their decision.] There may certainly, in the present case, have been some theoretical application of a portion of his time in preparing for the last college examination, which is really little more than a matter of form. This motion is made with perfect *bona fides*, and there has been, substantially, a complete compliance with the statute. This is a fair case for the exercise of the discretion of the court. If there be any other circumstances concerning which the court would wish further information, we would ask permission to file additional affidavits.

PENNEFATHER, B.—We have already, during the progress of the argument, stated our views respecting the application. We are very sorry we cannot comply with the motion. We do not think the case falls within the scope of the Act, and though doubtless the courts have a dispensing power to relax the strictness of the provisions laid down in the Acts, under special circumstances, we do not think a case has been made out sufficient to warrant the court in exercising that discretion in the present case.*

Motion refused.

* By the 14 & 15 Vic. cap. 88, “Amending the several Acts for the regulation of Attorneys and Solicitors,” the provisions of the 1 & 2 Geo. 4, cap. 48, and 3 Geo. 4, cap. 16, relating to the admission and enrolment as attorneys of Bachelors of Arts or Laws at Dublin, are extended to the degrees of Bachelors of Arts and of Laws in the Queen's University in Ireland; and certain provisions of the former Acts as to persons bound for five years, &c., extended to students of Queen's Colleges attending lectures and passing

[*Coram GREENE, B.*]

DAVIS v. REEVES.*—May 24, 1855.

Practice—17 & 18 Vic., c. 34—Subpœna ad testificandum—Attendance of witnesses from England—Sufficiency of affidavit.

A party seeking to obtain writs of subpœna ad testificandum and subpœna duces tecum to enforce the attendance of witnesses from England, must, in his affidavit, satisfy the court and show facts indicating, that the attendance of the witnesses required is necessary, and that the testimony they are expected to afford cannot be obtained from other quarters.

THIS was an action for oral slander—the nature of and pleadings in which will be seen by reference to vol. vii., page 118, of the Irish Jurist.

W. EXHAM, counsel for plaintiff, applied, under the provisions of 17 & 18 Vic., cap. 34, that the court should order writs of *subpœna ad testificandum* and *subpœna duces tecum* to compel the attendance of certain necessary witnesses resident at Liverpool, Manchester, and Birmingham in England. Counsel grounded his motion on the affidavit of the plaintiff, which stated that “E. B. B. and W. J., of Liverpool, W. S., of Warrington, and J. C., of Birmingham, all in England, were necessary witnesses for plaintiff on the trial, notice for which has been served; that he had seen and conversed, within the present month, with all of the aforesaid persons who were then, and, he believes, are still, in good health, and none of them exceeding fifty years of age, three of them being about thirty-five years of age; that the said E. B. B. is Secretary to the ‘Magnetic Telegraph Company’ in Liverpool, and, as such, has the custody, as deponent has been informed and believes, of all the original manuscripts of the telegraphic messages transmitted by the company to Dublin and elsewhere; that said W. J. was on board the ship called ‘the Champion of the Seas,’ on the day on which deponent was also on board, on which occasion deponent was in conversation with the said W. J.; that said W. S. was, as deponent has been informed and believes, in Dublin on the occasion when the slanderous and defamatory language was made use of as in summons and plaint mentioned; that said J. C. admitted to deponent, within the last fortnight, that he and his partners in trade had received several telegraphic messages in reference to deponent’s alleged departure for Australia; that the evidence to be given by the above-mentioned four persons could not be given by any persons in Ireland, as this deponent believes, nor is it in deponent’s power to procure the evidence which he expects will be given by them; that he is advised and believes that the evidence of the aforesaid witnesses is ab-

solutely necessary to sustain his case, and that he could not safely proceed to trial without their evidence.” [*Greene, B.*—Why could not the witnesses be examined under a commission?] Because the “Electric Telegraph Company,” by the terms of their charter, are bound not to produce the originals of any messages transmitted through their offices, save in a court of justice. [*Greene, B.*—Is not an examination under a commission a proceeding before a court of justice?] There are peculiarities in this case requiring the attendance of the witnesses. The court granted orders similar to that now sought in *Lawder v. Lawder*, (7 Ir. Jur. 28); and in *Wade v. Fox*, (7 Ir. Jur. 48); [vide *Nerwich v. Gregory*, (7 Ir. Jur. 144.)] The secretary of the company must, on the trial, produce the original document, and it is most important for the plaintiff that it should be shown to witnesses in order to identify the handwriting to the message, and we must also have the attendance of the clerk who transmitted the message.

GREENE, B.—You have shown sufficient in the affidavit to entitle the plaintiff to the order sought. Let a *subpœna duces tecum* issue to the secretary and clerk of the company, and a *subpœna ad testificandum* to compel the attendance of the other two witnesses.

BAKER v. ARMSTRONG.—May 24, 1855.

Practice—Common Law Procedure Act, sec. 136—Sequestration order.

Upon an application to obtain an order to extend a sequestration to the matter of a pre-existing judgment, under the 16 & 17 Vic. c. 113, s. 136, order refused, it not appearing clearly to the court that the judgment creditor was in a position to issue execution at law.

Edward Sullivan moved, on behalf of the plaintiff, for liberty to extend a sequestration, and that the sequestrator should account under the provisions of the 136th section of the Common Law Procedure Amendment Act. Counsel grounded his motion on the affidavit of the plaintiff which stated that he had obtained a judgment in the Court of Exchequer as of Hilary Term, 1846, on the bond of Rev. J. Armstrong, the defendant, for the penal sum of £500, which was registered and revived in the usual form in Easter Term, 1847, and was registered pursuant to the statute in 1855. On the 29th of April, 1847, plaintiff caused a writ of *feri facias*, directed to the Sheriff of County Clare, to be issued against defendant on foot of the judgment, and a return was made thereto “that the said Rev. J. Armstrong had not any goods or chattels or any lay fee in the bailiwick whereof the sheriff could cause to be made the debt and damages; but he certified the defendant as being a beneficed clerk and possessed of the Deanery of Kilfenora and Rectory of Clonnelly, which said deanery is within the diocese of the Bishop of Killaloe and Kilfenora, &c. An order was obtained on May 25, 1847, from the Court of Exchequer for liberty to issue a writ of *feri facias de bonis ecclesiasticis* against defendant for £287, principal and interest then due, which writ

examinations in the Faculty of Law during two collegiate years, and also the privileges given by 6 & 7 Vic. cap. 73, to Bachelors of Arts or of Laws in the Universities of Oxford, Cambridge, Dublin, &c., as to attorneys’ admission in England, are extended to Bachelors of Arts or Laws in the Queen’s University.

* Vide ante page 118.

was forwarded to the Bishop, the receipt of which the Bishop acknowledged by letter in April, 1848, stating that he had lodged it with the registrar of the diocese. No communication relative to the writ having been received by plaintiff he wrote to the registrar in August, 1852, to know how the sequestration stood, but received no answer. He accordingly wrote to the bishop, who replied that his letter had been sent to the sequestrator in the defendant's cases; by this sequestrator the plaintiff was informed that he, having been appointed in April, 1847, had since paid the two first sequestrations, and was in process of discharging the third sequestration, and that it would be some time before plaintiff would be likely to receive anything out of the deanery. In the year 1854 it was ascertained that the late registrar had omitted to issue the sequestration in the case of *Baker v. Armstrong*; but of this fact plaintiff had, up to that time, been ignorant. Plaintiff further stated that the said sum of £287, with interest from April, 1848, is still justly due and owing, over and above all just and fair allowances, and that he believed himself to be entitled to an order that the sequestrations which have issued be extended to the matter of his judgment without further writ, and with priority from the date of the lodgment by him of the said writ of execution *de bonis ecclesiasticis*, and that the said sequestrator do furnish accounts from the date of his appointment.

GREENE, B.—I cannot grant the application without your issuing a writ of revivor. A sequestration is in the nature of an execution, *non constat*, but that the preceding sequestrations may have been satisfied, and then you would have an execution without having regularly revived the judgment.

Motion refused.

[*Coram* PENNEFATHER, RICHARDS, AND GREENE, B.B.]

HUGHES v. SHAW.—May 25, 1855.

Practice—Common Law Procedure Act—Special replication.

Where an issue can be framed, on the summons and plaint and defence as they stand, raising the question between the parties, the courts discourage the filing of further pleadings.

Hickey applied for liberty to reply specially. Summons and plaint stated that the defendant assaulted and beat the plaintiff, to the plaintiff's damage and loss. The defence averred that at the time of the assault, defendant, being possessed of a close, the plaintiff was unlawfully and without license and permission upon the same, and without such license, &c., endeavoured to force his way through the close, and assaulted defendant's servant, who, by his directions, endeavoured to prevent the plaintiff from trespassing in the said close, whereupon the defendant, during the said wrongful attempt of the plaintiff to force his way, did on said occasion defend his possession of his said close as it was lawful for him to do, and that if any damage or injury happened to the plaintiff, the same happened of the wrong of the plaintiff, and in defence by the defendant of his said close. The plaintiff sought to reply the excess. It is impracticable to raise the question of excess on the pleadings as at present framed.

PENNEFATHER, B.—Surely you do not require a replication. There is no difficulty in framing an issue involving the question of excess on the pleadings as they at present stand; the object of the Act is to discourage further pleading after the defence.

Motion refused.

COURT OF QUEEN'S BENCH.

TRINITY TERM, 1855.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

MURRAY v. BYRNE & ANOTHER.—June 5.

Trespass—False imprisonment—Commitment to illegal custody—Justification under illegal process—Pleading—3 & 4 Vic. c. 107.

In an action for assault and false imprisonment the defendants, a former execution creditor of the plaintiff and his attorney, pleaded severally, first, a denial of the wrongful acts as alleged; and secondly, a justification under an order by the Insolvent Court for the committal of the plaintiff to Richmond Bridewell for the contempt of having neglected to file his schedule, pursuant to 3 & 4 Vic. c. 107, sec. It appeared upon the pleadings that the plaintiff had been discharged from custody by this court upon habeas corpus. Held, on demurrer to the latter plea, (Lefroy, C.J. dissentiente,) that the plea in question was no justification, inasmuch as, according to the construction of the 3 & 4 Vic. c. 107, ss. 54, 57, as settled in Re Dickson, (5 Ir. Jur. 245), the committal of the plaintiff to Richmond Bridewell was an excess of the jurisdiction of the Insolvent Court, and the order being illegal afforded no justification to either of the defendants for the acts done thereunder.

The foregoing special defence did not expressly admit the commission of the trespass alleged in the summons and plaint, but, on the contrary, stated facts from which an inference might arise that the defendants had been only instrumental in putting the court in motion. Held, that, however the latter facts might operate as a defence under the plea of denial, first pleaded, it must be intended, for the purposes of the argument of the present demurrer, that the special defence was one pleaded in confession and avoidance, pursuant to the 71st section of the Common Law Procedure Act.

Semble, (per Perrin, J.) that at all events the defence should have alleged the issuing of a warrant, and not merely an order.

THIS was an action of trespass and false imprisonment. The defendants took defence separately. The defendant, J. R. Byrne, pleaded: first, that he did not assault the plaintiff, or force or compel him to go along divers or any public streets to a public prison, or imprison or keep him in prison, as by him in said summons and plaint is alleged; that before the committing the alleged grievance in the summons and plaint mentioned, that is to say, on the 31st day of May, 1852, the said plaintiff was arrested and taken in execution at suit of the defendant, John Talbot Byrne, for a certain debt of £21 3s. 10d., due by said plaintiff to said John Talbot Byrne, and the said plaintiff was on the same day, at suit of the said John T. Byrne, duly committed to the custody of the Marshal of the Marshalsea of our Lady the Queen in the prison of the Four Courts Marshalsea in the City of Dublin, and charged in execution for the said sum of £21 3s. 10d. at the suit of said defendant,

John Talbot Byrne, and the said plaintiff remained and continued in such custody so committed to prison, and charged in execution as aforesaid at suit of the said defendant, John Talbot Byrne, from thence and until and after the making of the several orders and committing the supposed grievances hereinafter mentioned; that the plaintiff did not, within twenty-one days after he was so committed and charged in execution as aforesaid, nor at any other time, make satisfaction to the said defendant, John Talbot Byrne, for such debt, for which he was so committed and charged in execution as aforesaid, and thereupon the said defendant, John Talbot Byrne, after the expiration of more than twenty-one days next after the said plaintiff had been so committed and charged in execution as aforesaid, and whilst the said plaintiff continued in such custody, on the 22nd day of June, 1852, applied by petition in a summary way to the Court for Relief of Insolvent Debtors in Ireland, according to the provisions of the statute in such case made and provided, for an order vesting the real and personal estate and effects of the plaintiff, being such prisoner as aforesaid, in the provisional assignee for the time being of said court, pursuant to the statute, and thereupon, by an order of said court, made the 22nd of June, 1852, it was ordered by the said court in said petition, pursuant to the said statute, that all the real and personal estate and effects of the said prisoner, the said now plaintiff, except the wearing apparel, bedding, and such other necessities of such prisoner and his family, and the working tools and implements of such prisoner, not exceeding in the whole the value of £15, should be vested in Christopher Hume Lawder, of the City of Dublin, gentleman, provisional assignee for the time being of said court, as by the said order of the said court remaining of record in said court will appear; and afterwards, on said 22nd of June, 1852, it was further ordered by said court that the plaintiff, so being such prisoner as aforesaid, should, within the space of fourteen days next after notice thereof had been received by him at the said prison, according to the rule of the court in that behalf, deliver into the said court a schedule of all his estate and effects according to the said statute in that behalf, or by said last mentioned order also of record in said court will appear; that afterwards, on the 23rd June, 1852, notice of said last mentioned order was given to and received by the said plaintiff at the said prison according to the rules of said courts in that behalf, by then and there delivering unto the said plaintiff a true and compared copy of said last mentioned order, duly signed and authenticated pursuant to the statute; that the plaintiff disobeyed the said order, and did not within fourteen days next after notice thereof received by him as aforesaid, deliver into said court said schedule as aforesaid, and did not deliver same or any schedule within the time aforesaid, or at any other time, and therein the said petitioner was guilty of a contempt of said court; that after the expiration of said period of fourteen days, and after the said plaintiff had been guilty of such contempt and offence as aforesaid, to wit, on the 22nd of July, 1852, the said defendant, as the attorney of the said

defendant John Talbot Byrne, and by his directions, brought the said matter under the consideration of the said court, and applied to said court to make such order therein as to said court should seem fit, and according to law, whereupon, on such application of defendant as attorney for said defendant, John Talbot Byrne, a certain further order was then and there duly made, and the said court having competent authority to make the same, it was ordered and adjudged by the said court that the said petitioner, for such his contempt and offence, should be and was thereby committed to the Gaol of the Richmond Bridewell, being the common gaol of the City of Dublin, there to remain without bail or mainprize until such time as he should have delivered into said court such schedule as aforesaid; and it was further ordered by said court that the Marshal of the Four Courts Marshalsea should, and he was thereby authorized and required on receipt thereof, to convey to said gaol of Richmond Bridewell the said plaintiff, and him to deliver to the governor of said gaol, who was thereby authorized and required to remove said plaintiff into his custody, and him safely keep as aforesaid, as by said last-mentioned order of record in said court will appear; that at the time of making said last-mentioned order, and of the committing of the supposed grievances hereinafter mentioned, the said plaintiff was a prisoner in the custody of the said Marshal of the Four Courts Marshalsea, Dublin, so committed and charged in execution as aforesaid, and that said gaol called the Richmond Bridewell in said order mentioned then was the common gaol of the City of Dublin, where the said plaintiff then was, and where the said plaintiff then usually resided; that the said last-mentioned order being made and in full force, that he, the said defendant, J. R. Byrne, then being one of the attorneys of said court, and acting as attorney for the said defendant, John Talbot Byrne, delivered a true copy of the said last-mentioned order duly signed and certified, and under the seal of the said court, according to the provisions of said statute, to the said Marshal of the Four Courts Marshalsea, Dublin, in said order named, to be acted on by said Marshal according to law, and the said Marshal, in pursuance of said order, subsequently conveyed said petitioner from the said Four Courts Marshalsea through and along certain public streets to the said gaol of the Kilmainham Bridewell, and there delivered him, in pursuance of said order, to the Governor of said Bridewell, to be detained pursuant to said order, and the said Governor of said Bridewell then and there received the said petitioner into his custody, and kept and detained him in said gaol called the Richmond Bridewell, pursuant to said order, for the space of time in said writ of summons and plaint mentioned, as justly he might for the cause aforesaid, and which are the several grievances in said writ of summons and plaint mentioned: that save as in this defence is stated he did not assault the petitioner, or force or compel him to go along divers public streets to a public prison, or imprison the petitioner, or keep or detain him in prison, as in said writ of summons and plaint alleged, and therefore he defends the above. The other defendant,

the client of the first defendant, pleaded on similar terms, with the needful variations.

The plaintiff demurred to the second defences of both defendants, upon the ground that the Insolvent Debtors' Court had no jurisdiction to order a prisoner confined in the Four Courts Marshalsea for a contempt, or otherwise, to be committed to the Richmond Bridewell or other gaol in the City of Dublin.

Exham and *J. T. Ball*, *Q. C.* in support of the demurrer.

T. Graydon and *The Solicitor General* contra.
Cur. adv. vult.

June 5.—*MOORE, J.*—This case comes before the court upon a demurrer taken to two defences. It was an action for false imprisonment brought against these two defendants, who have taken defence and pleaded separately, but in similar terms. [His Lordship fully stated the pleadings.] The first question, upon this demurrer, was with respect to the nature of the second defence, the plaintiff contending, that it was a plea admitting the commission of the trespasses and justifying them, and the defendants, on the other hand, urging that that defence was only a *special* plea of not guilty. We must accordingly first determine the nature of that defence, and for this the Common Law Procedure Act must be resorted to. Section 71 of that Act provides, that in actions for wrongs, there shall be but two modes of defences; namely, first, defences by way of denial, which shall take issue on some one or more material matter of fact alleged in the summons and plaint; and secondly, defences, which admit the matter complained of but rely on matter of avoidance, excuse or justification, which must be expressly pleaded. I think that the defendant has availed himself of the second kind of defence, and that this second defence confesses the trespasses and has attempted to justify them under the order of the Insolvent Court, in the same manner as would have been done by a plea of justification, under the old form. We are not, therefore, upon this demurrer, called upon to consider whether the facts as stated operate as a defence by way of denial, for I consider that the defence must be regarded as a confession by each defendant of the fact of the imputed trespass; and although I am of opinion that, if these facts be true, they would be insufficient to prove the commission of the alleged trespasses, the defendants would, under the terms of the first defence, have had the full benefit thereof, and it is, therefore, unnecessary to strain the second beyond the limits to which it properly extends. Taking this, therefore, as a plea of justification the question raised by the demurrer is, whether the order of the Insolvent Court, and the imprisonment thereunder of the plaintiff in Richmond Bridewell, were illegal. This court have already, in a former case, expressed their opinion that the Insolvent Court had no jurisdiction to make the order of the 22nd January for the committal of the plaintiff to Richmond Bridewell, and with regard to the construction of the 3 & 4 Vic. cap. 54, after the best consideration which I can give to that clause of the Act of Parliament and the reasons of the court pronounced in that case, I do not see any grounds for altering the judgment upon that point, which was

pronounced upon the argument on the return of the *habeas corpus*. I think, therefore, that, upon this demurrer, it must be conceded that the order in question was made *coram non judice*. That being so, the plea here has attempted to justify the arrest under a void and an illegal order. It is said that the Insolvent Court is a Court of Record, and that it made an order for the plaintiff to return his schedule, and that it had an undoubted power to commit the plaintiff for the contempt in not so doing; but that power of committal extended only to the Marshalsea which the Act directed. Richmond Bridewell was not that prison, and that the court had no more jurisdiction to commit to Richmond Bridewell than to any prison in England or Scotland. The want of jurisdiction is apparent on the face of the order. The case of *Kinning v. Buchanan*, (8 C. B. 271,) is a direct authority in favour of the plaintiff. That was an action of trespass and false imprisonment by order of the Sheriff's Court of London. The defendant sought to justify by the proceedings in the Sheriff's Court, alleging the recovery of a judgment against the plaintiff for £19 19s. and costs of suit; that the court below made an order for the payment of this sum by instalments; that one of these instalments having become due and proof of the default of the plaintiff having been made before the judge, an order was made for the commitment of the debtor for forty days to the debtors' prison of London and Middlesex, whereupon the judge issued his warrant of committal, which the defendant, as attorney of the judgment creditor, delivered to a serjeant-at-mace, by whom the plaintiff was arrested. At the trial the plaintiff contended that the order was illegal, inasmuch as it did not appear that the plaintiff had been previously summoned to show cause why the said order should not issue. The court held that the order in question was bad, and it was then argued that, inasmuch as the defendant had only acted as the attorney of the party who had obtained the judgment, in the execution of the order of a court of competent jurisdiction, he was, therefore, no trespasser. With respect to this argument the court thus pronounced its judgment, p. 291:—"It is true, that if an attorney does no more than to set a court of competent jurisdiction in motion on behalf of his client, he is no trespasser, notwithstanding that such court should, on his motion, do an act of trespass by its officers; and that he would, therefore, be entitled to a verdict on the plea of not guilty, if an action were brought against him in respect of such act of trespass. But where, by a special plea, like the one in question, he admits and undertakes to justify his concurrence in it, we are of opinion that he can only make out his justification by showing a legal authority under which he acted; and consequently that it is essential to the defence in the present case that the order relied upon should be a valid order." This case is analogous in all its points to the case before us. That was the case of an Inferior Court, but one which had a competent jurisdiction in the preceding suit. So here the Insolvent Court was a court of competent jurisdiction over the plaintiff in the matter of his insolvency. There the court had power to or-

der the payment of the debt by instalments; so here the court had power to order the plaintiff to return his schedule and, in default of his so doing, to commit him for contempt. There the party justified under an order which was illegal, because the debtor had not been previously summoned. So here, the order relied on is illegal for want of any jurisdiction in the court to imprison in Richmond Bridewell. So that this case is, in all its points, analogous to *Kinning v. Buchanan*. Here the objection appears on the face of the order, and as the court in *Kinning v. Buchanan* held that a party could justify only under a valid order, if I be right in thinking this order to be invalid, it is impossible that it can afford any justification. The principle of law relating to the protection enjoyed by an attorney, in such cases as the present, where he only acts on behalf of another, is established by several cases, and the same applies equally to the party for whom the attorney acts. If he only put the court in motion, the law applicable to that case is this, as stated in *Brown v. Chapman*, (6 C. B. 376): "If an individual prefers a complaint to a magistrate and procures a warrant to be granted, upon which the accused is taken into custody, the complainant in such case is not liable in trespass for the imprisonment, and that, even though the magistrate had no jurisdiction." These cases establish, that although under the plea of not guilty, or that which the Procedure Act substitutes therefor, namely, a denial of the wrongful act, the attorney and client may be protected, because they may be considered not to have committed the trespass complained of, still if they will justify, they must stand or fall by the validity of the authority under which they justify. But it is said that this case comes within the second resolution in the *Marshalsea case*, (10 Rep. 76), that "where a court has jurisdiction of the cause and proceeds, *inverso ordine* or erroneously, no action lies against the party who sues, or the officer or minister of the court who executes the precept or process of the court; but where the court has not jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the precept or process." This applies to two cases, first, where the proceedings are right but proceed in inverted order; and secondly, where the proceedings are erroneous. Now, if the court pronounces an order, which it ought not to do, it does in one sense proceed *erroneously*, but not so in the sense of the resolution. That resolution applies only to cases where the court having jurisdiction, applies it wrongly to the state of facts before it; as, for example, in a case where it gives judgment for the plaintiff, whereas it ought to have given it for the defendant: but it is nowise applicable to a case in which it has had no authority to make the order complained of, although it has had general jurisdiction over the subject matter of the proceedings, as in *Kinning v. Buchanan*. Baron Parke in his judgment in the celebrated case of *Howard v. Gossett*, (10 Q. B. 453,) thus lays down the law, "In like manner it is presumed with respect to such writs as are actually issued by Superior Courts, that they are duly issued, and in a case in which they have jurisdic-

tion, unless the contrary appears on the face of them; as it would, for instance, if a writ of *capias* for a criminal matter issued from the Common Pleas, or a writ in a real action, not as the Crown's case in the Exchequer; in all which cases the want of jurisdiction would appear." Thus we find it to have been the opinion of Baron Parke that an order of a court of the highest jurisdiction, if it appear upon the face of it to be an invalid order, affords no protection whatsoever, perhaps not even to the officer by whom it has been executed. I think that as the defendants have attempted to justify under this invalid order, they have failed in their justification, and that the demurrer to the second defence must be allowed.

PERRIN, J.—I concur with my brother Moore so far as relates to the allowance of this demurrer. I do not, however, go to the length of saying that the special plea discloses matter of defence under the general issue. I doubt very much whether, under the circumstances of this case, either the defendant or his attorney would, at the trial, be held to have sustained the plea of "not guilty." In this case no warrant to arrest the plaintiff was issued by the Insolvent Court. I may refer to the 96th section of the Act in order to show the necessity of that. I merely refer to that in support of the doubts which I entertain. I need scarcely add that, in my judgment, this demurrer must be allowed.

CRAMPTON, J.—I concur with my brethren who have preceded me in considering that the defence which has been demurred to is bad, and it appears to me to afford no answer to the plaintiff. Two defences have been pleaded by each of the defendants. One of them is a denial of the trespass; the other, which is the subject of consideration, is a special defence. It relies on an order made by the Insolvent Court, which I regard as a nullity, that court having had no jurisdiction to make it. This very point was decided by this court in *Re Stephen Fox Dickson*, (5 Ir. Jur. 245, Q. B.) after solemn argument; and, if I be not misinformed, the same view of the question was taken by the Court of Common Pleas. I might, therefore, say in the language used in *Carratt v. Morley*, (1 Q. B. 18,) that the warrant is only "waste paper." *Perkin v. Proctor*, (2 Wils. 382.) There must be jurisdiction in order to ground a warrant. This plea is somewhat curiously framed, for on its face there is no admission of the charge of the imprisonment, but I think that, according to the 71st sec. we are bound to take this as a plea of justification. There are but two modes by which a party can avail himself of a defence. He may do so either by denial or by avoidance, in which case he admits the trespass alleged. If I be right in considering this proceeding to be a nullity, the justification is plainly bad, and it affords no answer to the action. *Re Dickson* has been criticised, but I think that that case was well decided. It has been contended for the defendants, that although this plea may not be maintainable as a justification, it should be construed as a general issue or special plea, showing that the defendants were no parties to the illegal arrest; but by the Common Law Procedure Act the general issue has been taken away, and defendants can now only traverse the

material allegations in the summons and plaint, or plead matters of excuse. I cannot therefore take it, as it is said, to be a special statement, showing that the defendants were no parties to the imprisonment, for if so, under what section of the Procedure Act are the parties at liberty so to plead? That would, in fact, be putting evidence on the face of the plea under which issue is to be joined. It is certainly not pleadable in this way as evidence, and if it amount to a good defence, as matter of evidence, it would, at the trial, be admissible under the first plea, and the defendant having thus the benefit of it under the denial, it would have been an unnecessary defence. This demurrer must therefore be allowed.

LEFROY, C.J.—In this case I am placed in the difficulty of having to differ from my brethren with regard to the principal question at issue. With regard, however, to the question of the admissibility of this third species of defence; the parties are bound under the Common Law Procedure Act either to traverse or deny or to confess and avoid; but I cannot understand this new fanciful species of defence, which is neither a general issue nor a special plea, but a species of special general issue. I came prepared, however, to consider only the question as to the special justification which has been pleaded here, and which I hold to be a good and sufficient special justification. It has been objected that this justification rests upon an order which the judge of the Insolvent Court had no jurisdiction to make, and therefore, that having made that order without jurisdiction, the committal was null and void, and so the justification founded thereon must fail. However, after the fullest consideration which I have been able to give the subject, it appears to me that it involves two questions of great public importance, as lying at the very root of the jurisdiction of the Insolvent Court, on the one hand, and, on the other, going to the root of the great principle, that a man is not to be made a trespasser for acts which he has done by the authority of the law. I am of opinion that the order of that court was perfectly correct, but whether it were so or not, that the parties were protected for having acted under a judicial order of the Insolvent Court. I plead guilty to the charge of having formerly condemned an order of the present description, upon a motion *ex parte*. I must plead guilty to not having gone through the several sections of the Insolvent Act, as I have since done, and in doing which I have come to the conclusion that we were not justified in having treated the order of that court as a nullity. The question is, whether a Dublin insolvent has the peculiar privilege of being committed only to the Marshalsea, or to Kilmainham, whilst in every other county and city of Ireland, a party guilty of a species of contempt, which goes to the very root of the jurisdiction of the Insolvent Court, is liable to be committed to the common gaol of that county or city, from which the Dublin insolvent, guilty of a similar contempt, has a special exemption. It may have been the case that the Legislature thought fit, in its wisdom, to make such an enactment, but I may with some confidence assert, that if any other interpretation can, by any possibility, be given to this Act, it ought to be given thereto, and that the true meaning of this Act should

be, that in every county and city in Ireland (Dublin included), insolvents in contempt may be committed to the common gaol; but that in Dublin there being two peculiar prisons not called common gaols, the judge of the Insolvent Court, not the insolvent himself, should have the discretion of choosing for a place of commitment either the common gaol or the Marshalsea, and that this privilege should not be given to the insolvent simply because he may have happened to be an insolvent in Dublin. Let us consider the construction of the Insolvent Act, (3 & 4 Vic. c. 107,) with reference to the object of that Act, and the mode of carrying out its jurisdiction. In the first place, in case a party remains in gaol a certain time without paying his debts, the detaining creditor may apply by petition to the Insolvent Court to vest the whole estate and effects of the prisoner in the provisional assignee, (s. 19,) and the next step for the creditor to adopt is, to call upon the prisoner, by the order of the court, to return a schedule of his effects. All which the Insolvent Court has, in the first instance, to do, is to make a general order for vesting the effects in the provisional assignee; but then, where are those effects to be found? The court can know nothing of this subject, and hence jurisdiction is given to it to compel the debtor to furnish the required information to the court, and the Act seeks to enable the Insolvent Court to carry out that jurisdiction. The power to compel the furnishing of a schedule is a *sine qua non*, and accordingly it is enacted by the Legislature, with becoming vigour, (ss. 54, 57,) that in case any person shall disobey "any rule or order of the said court for enforcing the purposes and provisions of this Act," (and herein this case differs entirely from *Kinning v. Buchanan*, where the party affected received no notice,) "it shall and may be lawful for the court to order the person so offending to be arrested and committed as for a contempt of the said court to the prison of the Marshalsea of the Four Courts, Dublin, or to Her Majesty's Prison of Kilmainham, or to the common gaol of any county, city, or place where he or she shall be, or where he or she shall usually reside," (not of "any other county," &c.) "there to remain without bail or mainprize until such person shall have fulfilled the duty required by this Act," &c. It appears upon the face of this special justification that the plaintiff having made default in all the particulars required by the Act, after having been called on to return his schedule, wilfully refused to obey the order, and was thereon committed to Richmond Bridewell, "being the common gaol of the city of Dublin, where the said plaintiff was, and where the said plaintiff usually resided," (such was the language of the plea,) and then this description comes directly within the words of the Act, "common gaol of any county, city, or place, where he or she shall be, or where he or she shall usually reside." Even without the general words enacting that every insolvent so offending should be committed to the common gaol of the place where he usually resided, &c., it appears to me to be quite unintelligible that an insolvent whose place of residence happened to be Dublin, should, by a special legislative provision, enjoy an exemption beyond every other insolvent.

Is it not, on the other hand, the rational meaning to give to these words, that they should be read affirmatively, and that the Insolvent Court should have a general jurisdiction to commit to three several classes of prisons, two of which are special ones, existing in Dublin, and the remaining class consisting of the common gaols of the counties, &c., to which the prisoners respectively belonged? Why should the power of the court to commit to the Marshalsea or to Kilmainham, take away from it the power of inflicting the penalty of committing to the respective common gaols? Without giving to the Act this construction, you must take away the wholesome jurisdiction which the court would otherwise exercise with respect to the City of Dublin. Without that jurisdiction it would be impossible to give to the court that wholesome jurisdiction, in the absence of which every insolvent would be enabled to baffle the provisions of the Act, and to play the rogue, just as if no Insolvent Act existed. There is no appeal from the Insolvent Court; it can only review its own decisions once. Its jurisdiction is completely exclusive, the words of the Act being, that the prisoner shall remain in prison, "without bail or mainprize," till he complies with the provisions of the Act, or the court shall otherwise order. What jurisdiction is there in any court to discharge by *habeas corpus* a man committed for contempt? The law thinks better than this of the necessary jurisdiction which must be entrusted to the individual courts themselves. Therefore, both upon the construction of the Act of Parliament and the law of the land, with respect to contempts, it does appear to me that wrong would be done to the public if the order of this court to discharge the plaintiff from custody could be now maintained. Then with regard to the other grounds of argument, assuming the judge of the Insolvent Court to have made an erroneous order, the *Marshalsea case*, which has been referred to, was not the case of a court of superior jurisdiction, but, on the contrary, of a court of inferior jurisdiction; but it decides that a judge acting within the general limits of his jurisdiction will be protected, and that, not for his own sake only, but for the sake of the suitors. Is there any doubt that this court, in the making of this order, was acting in the special fulfilment of one of its most important functions, namely, in the punishment of a contempt? Was that or was it not a *judicial* order? If a party, against whom judgment be recovered, be arrested upon a writ of *ca. sa.*, and remain in prison until the reversal of that judgment by the House of Lords, he must patiently abide all the consequences of the law. The order made in this case was a judicial act, and the judgment of the court was therefore a justification to the person who acted under it, in conformity with the principle of law established by the *Marshalsea case*. As to the case of *Kinning v. Buchanan*, there was a total want of jurisdiction, by reason of the non-performance of a condition precedent. As, however, the majority of the court entertain an opinion contrary to what I have expressed, this demurrer must be allowed.

Judgment for plaintiff.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

HUGHES v. GUINNESS.—Jan. 25, 26, 1855.

Money lodged in court—Verdict under £20—Full costs—Form of entering judgment—Costs of different issues—16 & 17 Vic. c. 113, s. 243.

Where a defendant lodges money in court, it is to be considered as money recovered in the action, and the plaintiff will get his full costs, if the money so lodged and the verdict together make up £20.

Where money has been lodged, the judgment should be entered up for the amount of the verdict alone, if any, exclusive of the money lodged.

Where some of the issues carrying a verdict are found for the plaintiff, and some for the defendant, the defendant is entitled only to the extra costs caused by the issues found in his favour, and not to a share of the general costs of the action.

Quære, if a plaintiff's demand be reduced by a set off below £20, will he be entitled to full costs if the gross amount of his claim exceed £20?

In this case the plaintiff claimed a sum considerably exceeding £20. The defendant lodged £6 in court, and pleaded also a set off and other pleas. Four issues were framed—two of which were found for the plaintiff, and two for the defendant. The plaintiff established a claim to the amount of £30; but the defendant succeeded in reducing this to £23, by proving a set off of £7, and, as £6 had been lodged in court, the finding of the jury was for £17. On taxation the general costs of the action, and of the two issues found for the plaintiff, were allowed to him in full. The defendant was allowed only the extra costs caused by the two issues found in his favour.

Darley, for the defendant, now moved that the officer should be at liberty to review his taxation, and that so much of the plaintiff's costs as had accrued since the lodgment of money in court by the defendant should be reduced to one-half, and that the defendant might have substantial costs upon the issues found in his favour. The plaintiff is entitled to only half costs, since he has recovered less than £20 by the verdict. The word "recover" has always been held to mean *recover by final judgment*, so that money lodged was not considered to be *recovered*.—*Brooks v. Rigby*, (2 Ad. & Ell. 21); *Porter v. Pittman*, (2 Dowl. & Ry. 266); *Rosse v. Rhodes*, (2 Crom. & Mee. 379.) All these cases decided that the word *recover* in 43 Geo. 3, c. 46, sec. 3, which gave costs to a defendant when the plaintiff did not *recover* the amount of the sum for which the defendant was arrested, should be taken to refer to final judgment. In rules of court also, as well as in statutes, the word has this limited signification. In the English General Rules, Hil. Ter., 4 Wm. 4, there are the words "where the sum recovered or paid into court," and it was held, in *Savage v. Lipscombe*, (5 Dowl. P. C. 385,) that where there was a right of set off which would reduce the plaintiff's demand below £20, although it was not pleaded, and judgment had been actually marked for £26, still the sum *recovered*, in the

meaning of the General Rule, was less than £20, which clearly shows that *recover* could only mean by final judgment and execution. The same point was ruled in *Wallen v. Smith*, (3 Mee. & W. 138,) and *Taylor v. Rolfe*, (18 Law Jour. n.s. Q. B. 39.) On the issues found for the defendant he is entitled to substantial costs, that is, a proportionate share of the costs of the action.

Kernan contra.—The word "recover" in section 243 of the Common Law Procedure Act must mean by force of that action, and not by verdict of a jury exclusively. In this case the plaintiff has recovered more than £20 altogether. *Brookes v. Rigby* was decided on the ground that although it was the practice at the time when 43 G. 3, c. 46, was passed to enter up judgment on the record only for the sum finally recovered, and the rule of law was established on account of that practice, still the rule of law should not be altered, because by the new form of pleading a payment appeared on the record. The practice here is different, as it appears on the record that the plaintiff recovers both the money lodged and the sum found by the jury; therefore the English practice and rule are not applicable. [The court expressed a wish to see the record. When it was produced, it appeared that the judgment was marked for £23. The Chief Justice then informed the officer that the proper course was to mark the judgment only for the amount of the verdict.] *Taylor v. Rolfe* was decided on 3 & 4 Vic., c. 24, s. 2, where the words are "recovered by the verdict of a jury," which latter words are omitted in the Common Law Procedure Act. As to the costs of the issues found for the defendant, he has been allowed for so much of his briefs and copies as related to them.

Darley in reply.

Cur. adv. vult.

Jan. 26.—*PER CURIAM*.—In this case the plaintiff has claimed a large sum, and the defendant has paid into court a sum of £6, and has pleaded a set off. The case went to trial, and the plaintiff established a cause of action for £30, but the defendant succeeded in setting off £7, so that as £6 had been lodged in court, the verdict was for a sum under £20. However, the amount of the verdict, and either the set off or the money lodged in court, would exceed £20. The application now made to the court is, that the costs incurred by the plaintiff since the defendant lodged the £6 in court, should be reduced to one-half, as by the lodgment the plaintiff's just demand was reduced below £20. We omit altogether the question of set off, and shall consider merely the effect of the lodgment in court. The case turns on section 243 of the Common Law Procedure Act, which provides, that "in case the plaintiff in any action of contract, (except, &c.,) shall recover, exclusive of costs, less than twenty pounds," he shall be entitled to no more than one-half of the ordinary costs, unless the action has been brought for the purpose of trying a right to property more extensive than the sum sued for. There is no certificate;* but it is immaterial

* The 103rd General Order authorizes the judge at the trial to endorse on the record whether or not the plaintiff is entitled to full costs.

on what ground or why it was not obtained. The plaintiff has brought his action for a larger sum than £20, and the question now is, has he recovered £20? Cases have been cited on other Acts of Parliament, in which the word "recover" was held to mean "by the judgment of the court," and then it is argued that although the plaintiff has got all he sought, yet, as part of what he demanded was paid into court, he is not to get his full costs. We do not think this case comes within the proviso in section 243 of the Act, and therefore the first part of the motion must be refused. The second point is, that certain issues were found for the defendant, and that he was allowed only £4 costs on them, and he now seeks part of the general costs of the action. It is not the rule that he should recover more than the extra costs caused by the issues found in his favour. As this is the first case that has occurred since the Act, we shall not give any costs of the motion.

BALL, J.—If the opinion of the court were otherwise on the first point, a defendant might always deprive a plaintiff of half his costs by lodging enough to reduce the amount, which he knows the plaintiff must recover, to less than £20.

No rule.

NOTE.—At the conclusion of the judgment counsel cited *Fewster v. Baggett*, (9 Mee. & W. 20,) in which it was held, that upwards of £20 was recovered where £13 was paid after the action was brought, and £19 was lodged in court. The court considered it a case in point.

See however *Evans v. Great Southern and Western Railway Company*, (5 Ir. Jur. 329,) in the Exchequer; but *Crosse v. Seaman*, (10 C. B. 884; s.c. 20 Law Jour. n.s. C. P. 177; 11 C. B. 524,) and *Coch v. Malby*, (23 Law Jour. n.s. Q. B. 305,) are distinct authorities in favour of a plaintiff's getting full costs where there is a lodgment which, with the amount of the verdict, makes up a sum exceeding £20.—REF.

FITZGERALD v. ROWAN.—Jan. 16, May 8, 1855.

Trustees of Savings Banks—Liability to depositors
—9 G. 4, c. 92; 7 & 8 Vic. c. 83.

The plaintiff was a depositor in the Savings Bank at T., and had given notice of withdrawal of his deposit. Before the notice expired the bank failed, but a large sum of money came into the hands of the treasurer, who was also the principal acting trustee, for the purpose of paying off deposits for which notices of withdrawal were given. An action was brought in this court against the treasurer. Held, that there was no appropriation in law of the money received by the treasurer to the account of the depositors who had given notice of withdrawal which would be grounds for maintaining an action for money received to the plaintiff's use.

Held also, that under the Savings Banks Acts the defendant, as trustee, was not liable, as he was not guilty of any default.

Held also, that the proper course for a depositor was to refer the whole matter to arbitration, as directed by the Savings Bank Acts.

THE facts of this case are so fully stated in the

judgment that it is unnecessary to give a detailed account of them. The cause of the failure of the Tralee Savings Bank was not in any way attributed to the defendant, so that no proceedings were instituted on the ground of any default on his part. The case was tried before the Chief Baron at the Summer Assizes, 1854, for the county of Kerry, and a verdict had for the plaintiff. In last Michaelmas Term the defendant obtained a conditional order to enter up a verdict for the defendant.

Jan. 16.—Cause was now shown against the conditional order.

O'Brien, Sergeant, and Sir C. O'Loughlen, Q.C., for the plaintiff.

Deasy, Q.C., and Leahy, for the defendant.

The following cases were cited in argument—*Baron v. Husband*, (4 Bar. & Ad. 611); *Edwards v. Lowndes*, (1 Ell. & Bl. 81); *Allen v. Impett*, (8 Taunt. 263); *Roper v. Holland*, (3 Ad. & Ell. 99); *Cooke v. Courtown*, (6 I. E. R. 286); *Crisp v. Bunbury*, (8 Bingh. 394); *Courtown v. Goff*, (3 Ir. Jur. 182); *Mnre v. Garwood*, (4 Exch. 686); *Dawson v. Wrench*, (18 L. J., n. s., Exch. 229); *Reid v. Allan*, (19 L. J., n. s., Exch. 39); *Hasell v. Insurance Company*, (4 Exch. 525); *Fleming v. Self*, (24 L. J., n. s., Ch. 29); *Pardoe v. Price*, (16 M. & W. 451); *The King v. The Trustees and Managers of the Mildenhall Savings Bank*, (6 Ad. & Ell. 952.)

May 8.—This day the judgment of the court was delivered by the Chief Justice.

MONAHAN, C.J.—This case was tried before the Chief Baron at the Summer Assizes, 1854, and came before us last Term. The facts at the trial were very complicated, as they are reported by the Chief Baron. The Tralee Savings Bank was established several years ago, and the defendant was one of the original trustees. There were at first many trustees, but latterly only two or three of them acted. Mr. Thompson was the treasurer, and continued to act down to the year 1834, when Mr. Rowan became treasurer as well as trustee. The plaintiff was a minor, and several sums were lodged in the bank on his account and in his name. In the month of March, 1852, an action was commenced to recover these deposits, which then amounted altogether to £64. The last day on which the bank was open was the 3rd of April, 1848. The principal business transacted that day was the receiving notices from depositors, calling for payment. One of these notices was given by the plaintiff. The rule regarding notices was, that where the sum required did not exceed five pounds, a week's notice was sufficient, but where a larger sum was required a fortnight's notice was necessary. As the notice in this case was lodged on the 3rd of April, for the whole amount, the payment would not be payable till the 17th of April. However, notices were lodged by various depositors to withdraw a sum exceeding £700 on the 10th of April. Some of these notices being for sums under £5, were lodged on the 3rd of April, and others, for larger sums, a week before that. There were other notices also for the 17th of April. The course of business in the bank was, at the end of each day of business to send a docket to the treasurer apprising him how much money

would be required on the next business day ; a balance was struck between the amounts of receipts and payments, and a requisition was given for the sum sufficient to make up the amount demanded by the depositors. The Savings Bank Acts required that when the trustees had in hands a larger sum than was immediately wanted, they should lodge it in the hands of the Commissioners for the reduction of the National Debt, to be invested in the funds. In the interim between the 3rd and 10th of April, Mr. Rowan received £900 from Dublin, and lodged it in the Provincial Bank. He kept his own money and the funds of the Savings' Bank in one account, which, previous to this lodgment, was overdrawn. The manager, however, was always willing to give him credit. This lodgment turned the balance in his favour. At the trial the Chief Baron fell into a mistake, as he thought that there were two notices of withdrawal, and that a portion was payable to the plaintiff on the 10th of April and the rest on the 17th. Accordingly he thought that part of the £900 was appropriated to the several sums payable on the 10th, and that to the extent of the appropriation on foot of the plaintiff's notice for the 10th the defendant was liable, for the rule of law as to actions not lying against trustees of Savings Banks did not then apply. He also was of opinion that the arbitration clauses were not applicable, as the office was closed, and the statutes presupposed that there was some office open where notices might be served. We heard the case argued, and at the time expressed an opinion, which we still hold, that there was not any appropriation. No one could tell how many £5 notices would be lodged in time for the 10th, nor how much of the £900 would be left in the defendant's hands to pay the plaintiff on the 17th. Then it was alleged that the plaintiff could sue the defendant as a trustee, and not as a treasurer or individual, and that any depositor could sue a trustee. This is a general question, and will turn upon a consideration of the Savings Bank Acts. They are 9 Geo. 4, c. 92, and 7 & 8 Vic. c. 83. I may observe, that there was no evidence connecting the defendant, as a trustee, particularly with the case, at least more than any other trustee ; so that the plaintiff might equally well have sued any other of the trustees, or all of them together, if the trustees are liable as such. By section 8 of 9 Geo. 4, all the effects of the institution are vested in the trustees for the time being, to the use of the institution and the respective depositors therein, and these trustees may sue and be sued in their own names as trustee or trustees of such institution, without any other description. By section 9, "No trustee or manager shall be personally liable except for his own acts and deeds, nor for anything done by him in virtue of his office in the execution of this Act, except in cases where he shall be guilty of wilful neglect or

default." In this case no wilful neglect or default has been alleged against the defendant. By section 45, in case any dispute shall arise between the institution, or any of its officers, and any individual depositor, the matter in dispute shall be referred to arbitration. It has been held both in England and here, that arbitration alone is the remedy, no matter what difficulties may be in the way of it. By section 6 of 7 & 8 Vic. c. 83, passed 9th August, 1844, the protection afforded to trustees by the former Act was greatly extended ; and by section 14, a new mode of settling disputes was substituted, directing that the matter in dispute shall be referred in writing to the Barrister-at-law appointed under the said recited Acts, who shall have power to proceed *ex parte* on notice in writing to the said trustees or managers, left or sent by the said barrister to the office of the said institution. The Chief Baron thought that as the office was shut, and as there was no place to which the barrister could send the notice mentioned in the 14th section, the arbitration clause was not applicable. We think that opinion incorrect. We are clearly of opinion that it would be monstrous to exclude the arbitration clause where it was most needed, as in this very case, where there are complicated accounts. The case has stood for judgment for a long time, not because we had any doubt upon the merits of it, but to see whether these objections could be raised on the pleadings. Assuming that the action was brought against the defendant as a trustee, and in that character, we think it would be a good defence to say, that the matter should be referred to arbitration. There was a special count, that after the notice of withdrawal the defendant received money to the plaintiff's use, but that was not supported by evidence. There were also general counts for money had and received, and on an account stated. There was no evidence of an account stated. Assuming that the action would lie for money had and received, what sum could be recovered from the defendant ? The statute saves a trustee from individual responsibility, except for moneys actually received by him ; and as by section 8 of 9 Geo. 4, the moneys were vested in the defendant as a trustee, and for the use of the institution and respective depositors, he cannot be held to have received any money in his individual capacity, for which an action at law would lie. The only remedy would be a suit in equity, for if there was any relation between the parties it was that of trustee and *cestui que* trust. Another argument was raised on the Statute of Limitations barring all but the present plaintiff, but on that we have no evidence. We are clearly of opinion that the action for money had and received does not lie, and that the verdict had for the plaintiff should be set aside, and a verdict entered up for the defendant.

Rule absolute.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

TRINITY TERM, 1855.

MCKENNA v. THE MIDLAND GREAT WESTERN
RAILWAY CO.—May 31, June 1.*Railway Company—Profits—Dividends—Shares
Contribution—Interest—8 & 9 Vic. cap.
c. xix., (local and personal.)*

The petitioner, who was a shareholder in a railway company, had been in default as to the payment of calls made upon his shares, and the directors proceeded to declare them forfeited. He subsequently paid up to the directors the amount due upon these calls, and resumed his original shares. By sec. 7 of their Act of incorporation (8 & 9 Vic., c. xix., local and personal,) the company were enabled, before the completion of the line, to pay interest at four per cent. upon calls paid up, (provided that no such interest should be paid to any shareholder who should be in arrear as to any calls;) and under this section the directors had proceeded to pay interest, out of the proceeds of the railway to such shareholders as had paid up the calls made, but not to the petitioner, as having made default in payment, and he having presented a petition complaining that he had been deprived of a proportionate share of the profits of the railway, because the directors had applied the profits of the railway in payment of the interest upon the money paid up, to which he by his default had become disentitled, and praying that he might be declared entitled to the shares of the profits that had accrued. Held, that he was not entitled to relief under the circumstances.

THE petitioner in this case became the proprietor of certain shares in the Midland Great Western Railway Company in the year 1846, and continued the registered proprietor of such shares until the year 1853, but during this period he was considerably in arrear to the Company for sums due by him at foot of calls made upon these shares by the Company, in consequence of which the directors proceeded to declare his shares forfeited for non-payment of the calls, which having been effected, the petitioner, before the forfeited shares had been disposed of, entered into a negotiation with the Bank of Ireland for the purpose of effecting a loan to pay up the amount due to the directors, and accordingly, having executed a deed of assignment of these shares to the Bank by way of mortgage, he paid to the directors of the railway the total amount due by him for principal, interest, and costs due to them, and thereby became restored to his rights (as contended by him) as a shareholder of the Company, and entitled to recover from the Company all sums payable to an original shareholder as profits and dividends upon interest in the railway. The railway, as originally projected, was to extend to Mullingar and Longford, under the Act of Incorporation, and in the year 1847 a portion of it was opened for public traffic, and in the same year it was further opened to Mullingar; but

the extension to Longford had not been completed up to the time of presenting the petition.

Under the provisions of the Act of Incorporation the directors were enabled to pay interest at four per cent. to such shareholders as should have regularly paid up the calls upon their shares, but it was also provided that no such payment of interest should be made to any shareholder who should be in arrear for any calls or interest thereon upon any shares held by him in the Company, and the petitioner charged that in the year 1848 the directors had proceeded to declare interest at the rate of four per cent., to be payable upon sums paid by shareholders in respect of their original shares, and that they further declared that the sums so payable as interest were arising out of the income, profits, and receipts of the undertaking; and the petitioner complained that the directors improperly paid the interest upon the sums so paid up out of the income and profits of the railway, and that it was done for the purpose of depriving the petitioner of his share in the profits, (he not being entitled to interest, having been in default, but being, as he alleged, entitled to a share in the profits as joint proprietor,) and that in so doing the directors assumed a power which they did not possess of paying this interest upon the shares out of the profits, instead of deducting it from the capital of the Company, as contemplated by the original Act. The petitioner further complained that the directors continued to pay interest out of the profits of the railway up to the year 1851, and concluded by praying that he might be declared entitled to a proportionate share of the profits of the railway from the year 1848 to 1851, and that the directors should be ordered to pay him interest at four per cent. during that period, or that it should be referred to the Master to report to what portion of the profits the petitioner was entitled. The Secretary of the Company, in an answering affidavit denied any intention on the part of the directors to deprive the petitioner of his just share in the profits of the railway, alleging that they paid the sums as interest up to the year 1851, because they conceived that while the railway was incomplete, they were not authorized under their Act to pay over the proceeds in any other form; but that in 1851, when the line was completed to Galway, they deemed it right that the proceeds should then be paid as dividends upon the profits of the railway.

Christian, Q.C. in support of the petition.—The manifest object of the company in paying the dividends under the name of interest was to deprive persons, in the position of the petitioner, of a share of the profits, they being enabled to pay this interest under the provisions of the Act. [*Lord Chancellor.*—This appears to be a very absurd provision, enabling them to return to shareholders a certain portion of their capital under the name of interest; but supposing that to be so, what is to prevent them from applying the profits to make up the deficiency?] The object of this petition is to prevent the powers given to the company from being applied fraudulently, their object being to get rid of a certain number of their shareholders; for although they are enabled by the Act to pay a certain inte-

rest upon the shares, yet they are not enabled to withhold a division of the profits. The company will rely upon the 7th section, which enables them, until the railway be completed, to pay interest; but it must be regarded as virtually completed, when it was opened to Mullingar. This interest was clearly payable out of the principal money, and not out of the profits, for it was payable before any profits could have accrued.

Brewster, Q. C., (with him *H. Martley, Q. C.*) contra.—The original Act, 8 & 9 Vic. c. cxix., is entitled, "An Act for making a Railway from Dublin to Mullingar and Longford," and the 7th section* provides, that the directors may pay interest upon the shares paid up, if they think fit, until the railway be completed, which has not yet happened, the line not yet being open to Longford. This court cannot compel a company of this kind to declare a dividend; but the mode of their doing so is directed by the provisions of the Act. It is not the case of an ordinary partnership, but it is a corporation under particular rules laid down by the Legislature. The expense of taking an account in such a case would be enormous. In *Brown v. The Monmouthshire Railway and Canal Company*, (7 Railway & Canal Cases, 682,) a bill was filed by a shareholder to prevent the directors from declaring a dividend until the railway was completed, and this court held that they could not interfere to prevent the misapplication of the income of the company, it being a subject for internal management and direction. In page 195 Lord Langdale says, "As to the duties which the governing body of such a company owes to their constituents—the shareholders—this court does not attempt to direct the performance of all such duties, but, on the contrary, leaves to the companies themselves the enforcement of all the duties arising out of matters, which are the subject of internal arrangement." In *Turner v. The Dublin and Belfast Railway Company*, (3 Ir. Ch. Rep. 526,) the court refused to hold that a shareholder was entitled to a dividend, except upon shares paid up. [*Lord Chancellor.*—I will not say, that the court could not grant an injunction in this case, but the question is, whether I have any power to interfere as to the distribution of these dividends.] It is said that this interest is payable only out of the capital paid, but there is nothing in the Act to support such a position; besides section 121 of the Companies Clauses Consolidation Act, (8 Vic. cap. 16,) provides that the company shall not make any dividend whereby the capital stock shall be in any way reduced, and the

entire argument is founded on an assumption that profits have been actually realized. It is not contended that the petitioner has not disintituled himself to interest. The 7th section does not indicate from what fund the interest is to be paid.

F. Fitzgerald, Q. C. for petitioner.—In *Turner v. The Dublin and Belfast Railway Company* the court treated the Company as a partnership, and therefore a division of the profits may be enforced. It is admitted by the return of the Company that the line is productive, and will this court authorize a proceeding, by which a shareholder is to be fraudulently deprived of his rights? There was no legislative provision necessary at the time of the passing of 8 & 9 Vic. c. cxix. to compel the Company to divide the profits before the completion of the works; but even under the provisions of the Companies Clauses Consolidation Act, which is incorporated with the present Act, they are bound to make an equal division. The language of s. 7, referring to the opening of the line, means until it be fit for public traffic.

Deasy, Q. C. in reply.—Certain sums had been paid by the petitioner upon all those shares, and therefore, but for the provisions of section 7 of the original Act, he would have been entitled to some dividends upon these calls. The Company were bound by the provisions of 8 Vic. c. 16, s. 120, to prepare a report showing the profits of the railway, and this is to be the foundation of their credit before the public. It has been contended that the company were not entitled to distribute dividends upon the profits until the completion of the railway, but if they assumed to do so at any period of its progress, such division should be made equally, and not in such a form as to exclude some of the shareholders, particularly as there are no negative words in the 7th section of the 8 & 9 Vic. c. cxix., limiting the provisions of the Companies Clauses Consolidation Act, which require that the proceeds should be equally distributed. [*Lord Chancellor.*—Supposing that the company paid this interest upon the shares out of the capital, is there anything to prevent them from recouping the capital to that amount out of the profits?]

June 1.—*LORD CHANCELLOR.*—I have been much astonished at the nature of the application in this case; it has been laid before the court with considerable ingenuity, but it appears to me to be altogether without foundation. This gentleman appears to have been a shareholder in the railway; he was in default in the payment of his calls, and he allows the directors of the company to proceed to declare his shares forfeited, as they were perfectly entitled to do. It appears that, by the provisions of the original Act of Incorporation, these directors were enabled to pay to the shareholders interest upon their advances at the rate of 4 per cent., and as these payments might be made before the undertaking would become profitable, it would appear that this interest was payable out of the capital advanced by the shareholders; but the Act does not provide that this interest shall be paid out of this capital alone, or that it shall not be payable out of any other fund in the hands of the directors. Such being the case, it was in the power of the directors

* Section 7 enacts, "that it shall be lawful for the directors of the said company, until the said railway shall be completed and open to the public, to pay interest at any rate, not exceeding four pounds per centum per annum, on all sums called up in respect of said shares, from the respective days on which the same shall be paid, such interest to accrue and to be paid at all times and places as the directors for the time being shall appoint for that purpose: provided always, that no interest shall accrue to the proprietor of any share upon which any call shall be in arrear, in respect of such share, or of any other share to be holden by the same proprietor during the period while such call shall remain unpaid."

to have paid this interest out of the money advanced by Mr. McKenna for the promotion of the scheme, but instead of doing so, it appears that they have kept Mr. McKenna's money safe for him, and have appropriated to this purpose a portion of the proceeds of the concern—not the actual gains of the company, but a portion of their income. It appears to me that it would be a strange proposition, to contend that if the directors had paid this interest to the persons who had advanced their money out of the capital so advanced, that they could not afterwards replace what they had so deducted out of the proceeds of the railway. It would be hard to found an equity upon the case made by Mr. McKenna, his argument being, "You have saved my capital, instead of having paid it away in interest, and I have thereby been damnified." I think he has altogether failed to make out a just case, sufficient to enable this court to give him relief. No injury appears to have been done to him by the proceedings of the directors in this case. He complains that his capital has not been intrenched upon by the directors for the purpose of paying this interest, which he contends they were not entitled to pay out of the proceeds, but it is quite clear to me that they must be entitled to do so unless there be an Act of Parliament to the contrary, which does not appear to be the case; on the contrary, such a proceeding appears to be consistent with the statutes in force upon the subject. The expense of reconstructing the account of the profits of this concern between all the parties concerned would be enormous; besides, there appears to have been several other parties in default, and therefore in the same position as Mr. McKenna. Another thing to be considered is, from whom is this money to be recalled; is it to be recovered from those who have already been paid? In the present suit I have none of these parties before the court, and therefore could make no decree to bind them. Upon the whole I cannot understand this proposition to have been established, that the directors were not authorised to pay this interest out of the fund from which they have paid it. Besides this, the application appears to me utterly unfounded, and the complaint made by the petitioner unjust, and contrary to common sense. I must, therefore, dismiss this petition with costs.

Decree accordingly.

IN RE EDWARD DOHERTY, A BANKRUPT; EX PARTE CONNOR.—June 3.*

Bankruptcy—Revival—Renewal of commission of bankruptcy.

A commission of bankruptcy will be renewed though after the lapse of upwards of thirty years, no proceedings having been taken in the meantime, the bankrupt also being dead for several years.

THE object of the petition in this case was to obtain the renewal of a commission of bankruptcy in this matter, in order that an assignee might be ap-

pointed for the purpose of reviving a suit in this court. The affidavit in support of the petition stated, that Edward Doherty had granted an annuity to Bernard Custer and Elizabeth his wife for their joint lives, and the life of the survivor, and had conveyed, charged with the annuity, premises in the City of Londonderry to a trustee to secure the annuity; that in the year 1814 a bill had been filed by Custer and wife against the grantor for a receiver; that a receiver had been appointed and was still in receipt of the rents and profits of the premises; that the clear annual proceeds after payment of all outgoing had been paid to Custer during his life, and after his death to his widow, up to the date of the assignment hereinafter mentioned; that Doherty became a bankrupt in the year 1822, but that the suit never was revived, nor any notice taken of the bankruptcy in the proceedings in Chancery; that Doherty died in the year 1828, and that no other defendant was ever brought before the court; that Elizabeth Custer, the surviving grantee of the annuity, being administratrix *cum testamento annexo*, and sole residuary legatee of her husband, by deed bearing date the 29th day of August, 1854, assigned all her interest in the annuity, and all arrears due thereon, to petitioner, and that the legal estate in the premises was also conveyed to a trustee for petitioner; that a large sum was now due to petitioner, and that the premises were an insufficient security for the accruing gales and the arrears now due; that searches had been made, and inquiries instituted, but that it did not appear that any assignees had ever been appointed, but it was alleged that petitioner had been informed by the former trustee, who was also solicitor in the proceedings in Chancery, that assignees had been appointed, but that they were long since dead; that it now became necessary to revive the suit, and that petitioner had been advised that an assignee should be appointed to the bankrupt, and for this purpose that the commission should be renewed.

Dowse moved the prayer of the petition.—Applications of this nature have been granted by this court, even after a greater lapse of time than has accrued in the present case—*In re Kellett, Ex parte Cole*, (3 Ir. Jur. 3.) [*Lord Chancellor*.—Have you any authority to establish that a commission may be renewed when the bankrupt is dead?] *Ex parte Hobbes, In re Tanner*, (Bucks' Bankruptcy Cases, 134,) is in point. In that case the bankrupt was dead, as were the assignees, and also the commissioners, for several years.

LORD CHANCELLOR.—Upon the authority of that case I will make the order as prayed for.

Decree accordingly.

ROLLS COURT.

[Reported by R. W. GANBLE, Esq. Barrister-at Law.]

KELLY v. MOORE.—Nov. 23 and 29, 1854.

Practice—Costs—Taxation—Disobeying order of Reference—Attachment.

Where costs are referred for taxation the petitioner

* *Ex relatione.*

(the client) may lodge in the office the copy of the costs furnished to him by the solicitor, and may issue a summons to tax, and the summons will be dealt with in the taxation according to the result and directions of the order.

If the solicitor lodge a copy of the costs for taxation pursuant to order, he is not allowed the costs of such copy, unless he has first served notice on the client to lodge the copy of the costs served on him and he has refused to do so.

If either the client or the solicitor, after having been served with notice, refuse to attend the taxation, the Master will be directed to proceed with the taxation ex parte, but the Taxing Masters feel a difficulty in carrying out this rule in the absence of the necessary documents.

Where, after the usual order of reference to tax was made, neither party lodged the costs nor issued a summons to tax, and a motion was made for an attachment against the solicitor for thus disobeying the order of reference, the court made no rule on the motion, and let each party abide his own costs.

A PETITION had been presented in this case under the Solicitors Act, praying that a bill of costs of the respondent should be referred for taxation, and that the respondent might be ordered to furnish a list of the credits to which petitioner was entitled on foot of sums paid to the respondent, and to Mr. Myles Keogh for account of the respondent, and that the respondent might be ordered to verify said lists of credits by affidavit, the petitioner undertaking to pay whatever sum should be found due to respondent upon taxation, and that the petitioner might be directed to hand over all title deeds relating to petitioner's property, and that the respondent might be restrained from any further proceedings at law for said costs. An order was made on this petition bearing date the 3rd of May, 1854, referring the costs for taxation in the usual manner, and directing the respondent to furnish a list of credits to petitioner. Six bills of costs had been furnished to the petitioner before the presenting of this petition. The respondent then furnished to the petitioner the list of credits to which petitioner was entitled, pursuant to the order made on the petition, but did not leave with the Taxing Master the bills of costs for taxation, nor the papers necessary for such taxation. The petitioner, on the other hand, did not lodge with the Taxing Master the bills of costs that had been furnished to him.

Hughes, Q.C., with whom was *O'Driscoll*, now moved that an attachment might issue against the respondent for his neglect and contempt in not complying with the order of the 3rd of May, 1854, by his not proceeding to tax the costs as directed by that order, and furnishing the list of credits in proper time as required, and contended that it was the duty of the respondent to lodge the costs for taxation, and attend with the papers; that the petitioner could not have facilitated the taxation by lodging the bills of costs with which he had been furnished, for nothing could be done without the papers, all of which were in possession of the respondent.

Nov. 29.—The following order was made:—

"It appearing that the list of credits was furnished within the time mentioned in the order of the 3rd of May, 1854, after service thereof, and the court having inquired from the Taxing Masters whether if the petitioner had lodged the six bills of costs furnished to him by the respondent previous to the order of the 3rd of May, 1854, in the Taxing Master's office, the Taxing Master would have proceeded to tax the said costs at the instance of the petitioner, or whether, as asserted by the petitioner, the respondent was bound under the order of the 3rd of May, 1854, to lodge other copies of the costs, and proceed to have same taxed; and the court having requested the Taxing Master to state the practice, and having received an answer as follows: 'In reply to the inquiries of his Honor the Master of the Rolls, on the petition notice in this matter, dated the 21st day of November, 1854, I beg respectfully to say that a petitioner who has obtained an order that his solicitor should tax his costs, may bring in and lodge in the office the costs as served upon him, and issue a summons for their taxation, and such summons is dealt with in the taxation according to the result and the directions of the order. This course has been pursued in other instances. If the respondent (the solicitor) lodge a copy of the costs pursuant to the order, we do not allow him for such copy, (being bound to furnish a copy of his costs to his client,) unless he shall have previously by notice required the petitioner (the client) to lodge the copy costs served upon him (which is properly the costs to be taxed,) and that the client neglects to do so. By sec. 2 of 13 & 14 Vic. cap. 53, it is enacted that "upon such reference, if either the attorney or solicitor whose bill shall have been delivered, sent, or left, or the party chargeable with such bill having due notice shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte*." It frequently happens that the solicitor whose costs are for taxation, exhibits a tardiness in attending and vouching his costs, delays consequently arise, but up to this period the Taxing Masters have not exercised the discretion given them by the above section to tax the costs *ex parte*, that is, in the absence of the solicitor whose costs they are, the solicitor having been induced in one way or another to come in and vouch and complete the taxation, the Taxing Masters feel much difficulty in exercising this discretion when the solicitor (whose costs they are) will not attend, and in the absence of all the documents in the cause or matter necessary for the taxation which are in the hands of the solicitor for the costs, and therefore respectfully solicit from his Honor an intimation to guide them in proceeding, if it should appear to them to be necessary in any particular case so to do under the above section.—THOS. REILLY, the Taxing Master

in retaliation on said costs, and the court having considered the said certificate of Thos. Reilly, Esq., the Taxing Master in this case, the court doth make no rule on this motion, and it is therefore ordered, that if the respondent or petitioner shall not attend on the taxation in this case on being duly served with notice, the Taxing Master shall proceed *ex parte*, and let the petitioner and respondent abide their own costs of this motion."

MURPHY v. LYNDE.—May 7, 10.

Practice—Purchaser discharged—Bad title—Costs—No fund in court.

A purchaser, discharged from his purchase on account of the title being bad, is entitled to be paid interest at 5 per cent. on his purchase money, from the time of lodgment, and to be paid his costs thereby incurred; and if there be no fund in court, he is entitled to an order for payment thereof, and of his costs of the motion against the plaintiff in the suit, with liberty to the plaintiff to apply to be repaid out of any funds to be realized out of the estate.

The plaintiff's costs of the motion made costs in the cause.

THIS was a motion on behalf of James Doyle, who, by an order of the 11th December, 1854, had been discharged as a purchaser of certain premises, and it had been referred to the Master to inquire and report the amount due to the said James Doyle for interest and costs, and what funds were applicable to pay the same. The Master had made his report pursuant to that order, and had found that the sum of £77 13s. 1d. was due to the said James Doyle for interest and costs in consequence of said purchase, and also found that the nett profit rent payable out of the house and premises in Drumartin, over which a receiver had been appointed, and the produce of the sale thereof, if any, were the only funds applicable to pay said interest and costs; that the gross rent of the house was £50, and £33 1s. 8d. had to be deducted therefrom for head-rent, interest, taxes, receiver's fees, &c., leaving a profit rent of only £16 18s. 4d.; the Master also certified that there was a balance of £99 11s. 3d. due to the receiver, besides the costs of passing his account, as well as miscellaneous costs not yet taxed.

Hughes, Q.C., (and with him *David Sherlock*.) now moved that the plaintiffs in the cause be ordered to pay the said James Doyle this sum of £77 13s. 1d. so found due to him by the report, or that the receiver be directed to pay him the said sum, with interest thereon, out of the rent which should from time to time come to his hands as such receiver, and for the costs of the motion. It is laid down in Sugden's Vendors and Purchasers that "if there be no funds in court the plaintiff will, in a common case, be ordered to pay the purchaser, in the first instance, his costs, charges, and expenses incurred by investigating the title, together with the costs of the application, and this although the

plaintiff be only a legatee, but he will be entitled to recover them only in the suit." As a general rule, then, the purchaser, when discharged from his purchase on account of the title being bad, is entitled to interest on his purchase money and his costs, and if any fund was in court, is entitled to be paid out of it—*Reynolds v. Blake*, (2 Sim. & St. 117.) But here there is no fund in court, yet the purchaser should not be a loser, but should be reimbursed by the plaintiff, and let the plaintiff seek it over against the estate. The case of *Smith v. Nelson*, (2 Sim. & St. 556,) was similar to the present, for in that case there were no funds in court, and the Vice-Chancellor said, "That it was not consistent with principle that the right of the purchaser to be indemnified for expenses improperly occasioned to him by the suit, should depend upon the circumstance whether there did or not happen to be funds in court at the time of the Master's report," and he ordered the costs to be paid by the plaintiff to the purchaser without prejudice to the question, how such costs should be ultimately satisfied. The present case is ruled by this authority, and the purchaser should therefore get his costs at once from the plaintiff, as there were no funds in court—*Barry v. Johnson*, (2 Y. & Col. 564.)

White contra.

MASTER OF THE ROLLS.—There is no case referred to in Mr. Dobbe's Book on Sales which is exactly in point, but the case of *Smith v. Nelson*, cited by counsel, applies to the present case. The court clearly has a right, if the estate is sufficient, to order the receiver to pay the amount out of the funds in his hands; but the case of an application for an order on the plaintiff to pay, has never been before me heretofore; I will therefore inquire into the practice, as there may be an unreported case.

May 10.—The following order was made:

"Be it so for payment of said sum of £77 13s.

1d., together with the costs of this motion when taxed and ascertained, to said James Doyle by the plaintiff, as in notice, within one fortnight of the service of this order on said plaintiff, with liberty to the plaintiff to apply to be repaid said sum out of any fund to be realized in this cause, or to be received by the receiver, and let the plaintiffs have £5 for their costs of appearing on this motion, as part of their costs in this cause."

IRWIN v. BAKER.—May 27, 28.

Will—Husband and wife—Tenants by entireties—Settlement.

Bequest of the dividends of a fund "to J. T. and S. his wife, and the survivor of them, for the term of their natural lives," and after their decease to pay the fund and all interest due thereon to the children of the said J. T. and S. his wife, share and share alike. J. T. became insolvent. Held, that J. T. and S. his wife had been, prior to his insolvency, entitled to the dividends by entireties, that the wife was not entitled to any equity of a settlement, but only to have the fund kept in court to secure her title to the dividends by survivorship;

The dividends in the meantime were directed to be paid to the insolvent's assignee.

THE petition in this case was filed by the only surviving children of Mr. George Irwin and Sarah his wife. It stated that Edward Hughes by his last will and the codicils thereto, bequeathed to the two daughters of his wife, viz., Mary Anne Trueman and Sarah C. Trueman, two respective sums of £1000 stock, to be payable after the decease of his said wife, but not to vest until the said Mary Anne and Sarah should attain the age of twenty-one years, or marriage with consent as therein. Sarah married with consent in 1815, after she had attained her age; Mary Anne died in 1828, unmarried, but having attained her age of twenty-one years, and previous to her death, made and published her last will and testament in writing, bearing date the 29th day of February, 1828, whereby she devised to A. Baker the sum of £500 bank stock, then standing in her name, also the sum of £500, of like stock, standing in the name of Jane Jackson and Jane Trueman, as trustees of the will of Thomas Trueman, deceased, upon trust that he, the said A. Baker, should pay the interest and dividends thereof to the use of testator's mother, the said Jane Hughes, for her life, and after the decease of the said Jane Hughes, "then that he should pay said interest and dividends to the use of the said George Irwin and Sarah Chamley his wife, and the survivors of them, for the term of their natural lives, and after the decease of the said George Irwin and Sarah Chamley his wife, and the survivors of them, upon trust that he the said A. Baker, his executors and administrators, should pay and distribute the said stock and all interest and dividends which should then be due thereon, unto and equally between all the children of the said George Irwin and Sarah Chamley his wife who should be then living, share and share alike, as tenants in common and not as joint tenants," and testator after reciting that she was entitled under the will of said Edw. Hughes hereinbefore named to a certain legacy or sum of £500 payable to her on the decease of her mother, the said Jane Hughes, and which the petitioner stated was a moiety of the sum of £1000 in said will mentioned to be paid on the event aforesaid, the said testatrix then gave and bequeathed the same to the said A. Baker upon the same trusts as thereinbefore mentioned, concerning the said sum of £500 bank stock, and appointed A. Baker executor of said will. Mary Anne Trueman died in 1828, and her will was proved by the said A. Baker, who, on the 27th of May, 1828, transferred said two sums of £500 and £500 to his own name, and then continued to pay the dividends of same to the said Jane Hughes, up to the time of her death in 1853. Jane Hughes was the sole surviving executrix of Edward Hughes, and exercised dominion over the assets of said Edward Hughes, and allowed a sum of £2252 6s. Government stock, part thereof, to continue in the name of the said Edward Hughes until the death of the said Jane Hughes. Jane Hughes made her will in 1850, and appointed Sarah Chamley Irwin executrix, who proved the will and obtained probate, and then, as executrix of the surviving executrix of Edward Hughes, is willing to transfer the said £2252 6s.

stock, standing in the name of said E. Hughes, to the proper credit. The petitioner then submitted that this stock, as portion of the assets of the said Edward Hughes, was applicable to the payment of the legacy of £500 bequeathed to Mary Anne Trueman, and so bequeathed to the said A. Baker in trust. George Irwin, the father of the petitioner, was discharged as an insolvent in October, 1851, and Thomas Farrell was appointed his assignee. The petition then submitted that the petitioners, or such of them as should be alive at the death of the survivor of said George Irwin and Sarah C. Irwin, were entitled in equal shares to the reversionary interest in said two sums of £500 and £500, bequeathed by the will of the said Mary A. Trueman, expectant on the decease of the survivor of them, the said George Irwin and Sarah Irwin. The petition further stated that Sarah Chamley was willing to transfer said sum of £500 to the said A. Baker, and that petitioners feared that same might be appropriated by him to his own costs. The petition then prayed for an account against the said A. Baker, on foot of the said sums of £500 and £500, and that the same should be applied pursuant to the trusts of the will of the said Mary A. Trueman, and that the said Sarah C. Irwin might be directed to pay said sum into court to the credit of the matter, and that the same should be disposed of pursuant to the trusts of the will.

Hughes, Q.C., for J. Rowland, assignee of the insolvent, George Irwin, moved that the Accountant General of the court may draw on the Governor and Company of the Bank of Ireland in favour of the said J. Rowland as such assignee, or of his attorney lawfully authorised, for the sum of £48 12s. 2d., cash, being the dividends on the sum of £1,359 18s. 1d. Government new 3 per cent. stock now in bank to the credit of this matter, entitled in the said Accountant General's books A. Irwin and others, petitioners, A. Baker and others, respondents, and that the said Accountant General may, from time to time until further order, draw on the Governor and Company of the Bank in favour of the said J. Rowland, or other, the assignee, to be appointed by the Insolvent Court of the estate and effects of the said George Irwin, or their respective attorneys thereto lawfully authorised for the future accruing dividend of said stock. The principle which governs this case was very fully discussed in the case of *Atcheson v. Atcheson*, (11 Beav. 485,) where the bequest was, "To R. S. Atcheson, his wife and children, £14,000;" R. S. A. and his wife being together entitled to one-fourth of the fund, R. S. A. claimed to be entitled to one half of this one-fourth in his own right; but it was held that the fund must be retained with a direction to pay the dividends to the husband, during the joint lives, with liberty for the survivor to apply, and his Honor in giving judgment says, "It is alleged that the husband and wife must in some way be entitled to the whole legacy for present enjoyment, and I conceive that such must have been the intention. I think that the gift to the two must have been for their common and immediate benefit in the relation of husband and wife;" and then he says, "It is plain that if the husband should be

held entitled to the whole in his own right it would be the same thing as if the wife's name were struck out of the bequest, and the legacy given to him alone; he does not claim this, but only a moiety. On the other hand, it is equally plain that she is entitled to a settlement only out of that to which the husband is entitled in her right, and that if she be held entitled to a settlement out of the whole, it would be the same in effect as holding that her husband was entitled to the whole in her right, or as if his name was struck out of the will and the legacy given to her alone. This in effect she does claim, or in the alternative that the legacy may not be divided but preserved to give her the chance of succeeding to the whole by survivorship. I do not think that she is entitled to a settlement out of the whole of the joint interest, because he is not entitled to the whole in her right. If it was a case of joint tenancy I think that, upon severance, the claim of the husband might be sustained. But the joint interest given to husband and wife in this way, or the joint tenancy between them, if it can be so called, is so modified by the unity of the persons in law, the consequent right of the husband and wife by entireties, and the contingent right of the survivor to the whole, if not previously disposed of by the husband, that it does not appear to me to be subject to the ordinary incidents of joint tenancy..... Under all the circumstances I think that all which this court can do for the protection of the wife, and to give her any separate benefit of the legacy, is to preserve her right to it by survivorship by preventing the husband from defeating it by alienation in her lifetime." The fund must, therefore, remain in court, and the insolvent assignee of the husband will be entitled to the dividends, the same as the husband would himself have been.

Hayes, Q.C.—That case went upon the fact that the husband and wife were tenants by entireties; but here there is no tenancy by entireties. Devices of this kind are now always construed in strict accordance with the intention of the testator. In *Warrington v. Warrington*, (2 Hare, 54,) the bequest was "to his nephew W. and E. his wife;" E. being niece of testatrix, it was held that the husband and wife took a share each. This case was noticed by Lord Justice Knight Bruce in *Wylde's case*, (2 De Gex M. & G. 726,) and in some measure followed by him, at all events *Warrington v. Warrington* is not overruled by it. *Paine v. Wagner*, (12 Sim. 184,) was somewhat similar to the present, and ought to govern it; there, after recommending certain premises to be sold, the testator appointed that they should be divided share and share alike, "Mrs. M., Mr. and Mrs. W. and children, likewise H. H.;" and it was held that Mrs. W. was entitled to an equal share, as tenant in common, with her husband and her children, living at testator's death, and with Mrs. M. and H. H. Thus Mrs. W. was entitled as tenant in common with her husband, and not as tenant by entireties, and so they should be held here, and each should take their own shares. [*Attorney General v. Bacchus*, (9 Price, 30, and on appeal, 11 Price, 347,) was also cited.]

Hemphill.—The case of *The Attorney General*

v. Bacchus is not an authority in this case. It was cited in *Atcheson v. Atcheson*, and the Master of the Rolls there said he would not act upon it as it was a revenue case, and ought not to influence the rights of parties. There is clear authority that the husband and wife, under the words of this will, took by entireties. *Wylde's case*, which has been mentioned, was this, the bequest was among J. C. and C. his wife, and W. L. in equal shares and proportions, and it was held to give one moiety to J. C. and C. his wife, and the other moiety to L. All that Lord Justice Knight Bruce there speaks doubtfully of *Warrington v. Warrington*, and says that his decision may possibly be consistent with it. In *Gordon v. Whiddon*, (11 Beav. 170,) the bequest was, "to Capt. G. his wife and children;" there being two children each took one-third absolutely, and the husband and wife one-third between them. The same rule is laid down in *Coke Littleton*, 187, a. The estate then of the husband and wife is an estate by entireties, and such may be extended by a judgment creditor of the husband—*Crofton v. Bunbury*, (2 Ir. Ch. Rep. 465,) and is liable here.

The MASTER OF THE ROLLS said that as there were a good many authorities which were not exactly similar he would take time to consider it.

May 28.—The following order was made:—

"Be it so, the court being of opinion that the said George Irwin and his wife were entitled, prior to his being discharged as an insolvent, to such dividends by entireties, and his said wife, under such circumstances, not being entitled to any equity of a settlement, but only being entitled to have the fund kept in court to secure her title to the dividends by survivorship."

COURT OF BANKRUPTCY.

BEFORE MR. COMMISSIONER MACAN, Q.C.

IN RE THOMAS FERRALL.—May 25, 1855.

Judgment—Registration of, as a mortgage—13 & 14 Vic. cap. 29.

The affidavit to register, as a mortgage, a judgment obtained in an adverse suit, did not specify the title, trade, or profession of the plaintiff, and did not specify the amount of costs recovered by the judgment. Held, that the omission of the costs was not a valid objection, inasmuch as no costs were specially given by the judgment, and that besides the word "costs" in the 8th requirement of the 6th section, properly referred to costs as such, ordered to be paid by any "decree, order, or rule." Held also, that the affidavit not stating, pursuant to the 6th requirement of that section, either the title, trade, or profession of the plaintiff, was inoperative to create a mortgage.

In this case a charge had been filed on foot of a judgment recovered against the bankrupt on certain bills of exchange, and an affidavit of such judgment

filed and registered, in order to convert it into a mortgage, under the 18th & 14th Vic. c. 29. The affidavit was entitled in the cause and court in which judgment was obtained. The title did not set out the addition of the plaintiff, and the affidavit commenced as follows: "T. P. L. of — House, in the County of Dublin, aged fifty years and upwards, the plaintiff in this cause, maketh oath and saith, that he this deponent, by the name and description of T. P. L. of — House, in the County of Dublin, did, on the 12th day of August, A.D. 1854, and in or as of Trinity Term in the said year of our Lord 1854, obtain a judgment in her Majesty's Court of Exchequer in Ireland against the defendant in this cause, by the name and description of Thomas Ferrall, of Lower Ormond-quay, in the County of the City of Dublin, auctioneer, for the sum of £80 14s. 1d. sterling, besides costs, as by the records of the said court may fully appear;" and concluded by stating that "the sum of £80 14s. 1d. so secured by said judgment as aforesaid, still remains justly due and owing to deponent." The assignees, by their discharge, submitted that the registration was wholly inoperative as a mortgage, the affidavit not complying with the requirements of the statute by stating the "title, trade, or profession" of the plaintiff, and the "amount of costs" recovered by the judgment.

D. C. Heron for the chargeant.—The affidavit is substantially correct; the object of the Act was to show to the public the specific lands of the debtor that were charged. Here the description of the lands, &c., of the debtor is correct, and the addition of the word "gentleman," or "esquire," would afford no information to the public, nor is it necessary for their protection. Mere technical or formal errors ought not to vitiate proceedings, and none of the forms in the books of practice contain the addition of the plaintiff. The point is now to be decided for the first time, and if it be a good one will affect a vast amount of property. In *Re Fletcher* the opinion of this court was not finally given. Secondly, as to the costs not being inserted. In this case the judgment was entered up two days after its recovery, and before the taxation. Nothing can be added to the sum stated in the affidavit, that sum alone is the charge on the lands.

William Harty for the assignees.—A judgment mortgage is a mere creature and creation of the statute, and derives its validity and vitality from it alone. Under the 7th section it is the registration of "*such affidavit*" as is prescribed by the 6th sec. that operates to transfer to and vest in the creditor the lands, &c., of the debtor, and unless the affidavit contains the precise statements required by the 6th section, it is not "*such affidavit*" as is operative under the 7th section.—*In re Ryan*, (3 I. C. R. 33); *In re Fletcher*, (24 L.-T. 204.) Here neither is the "title, trade, or profession" of the plaintiff specified, as required by the 6th section, nor is the "amount of costs" recovered stated.

MR. COMMISSIONER MACAN.—With respect to the omission of the amount of the costs, which is urged on the part of the assignees as an objection to this affidavit, it is familiarly known to both professions that in most cases, in entering up the judg-

ment, a blank is left on the roll for the purpose of inserting the amount of the costs when taxed, and cases frequently arise when it is for the convenience or advantage of the plaintiff to forego costs altogether, in order to issue execution at once, and therefore, although the judgment, as in the present case, is for the debt and costs, yet no costs are inserted, and none therefore are to be added to the amount of the debt or sum recovered; and although, in this case, the affidavit states that it was a judgment for debt and costs, yet in the latter part it distinctly states that the debt, £80 14s. 1d., was the amount recovered and ordered to be paid by such judgment. But entirely independent of this answer, it appears to me that the word "costs," is the 8th requirement of the 6th section, does not properly mean the taxed costs thus to be added to the sum recovered by the judgment, but is intended to refer to and embrace those cases in which a plaintiff or party obtained a "decree, order, or rule" for costs as such, and registered an affidavit of such "decree, order, or rule," for the purpose of making those costs a special lien by way of mortgage upon the real or landed property of the person ordered to pay those costs. I think therefore that this objection to the affidavit is not sustainable. With reference to the other objection it is to be remembered that under this Act of Parliament it is not the judgment that is to be registered, but the affidavit, and it is the registry of that affidavit that is to be operative, if at all, to create the statutable mortgage. I concur with the observations that the mortgage is a mere creation of the statute, and therefore all the conditions of the Act of Parliament must be strictly complied with. Neither this court nor any other court can take upon itself to determine, whether one requirement of the statute is more important than another. Were such a principle to be adopted, no certain construction could be given to the Act, as one judge might think one requirement of the statute unimportant, while another might deem it indispensable. Without repeating my observations in *Re Ryan*, I continue of opinion that this provision of the statute is subversive of the great principle of the bankrupt and commercial law, namely, that the assets of the insolvent trader ought to be distributed equally among all his *bona fide* creditors. Special liens by way of mortgage are not to be advanced in this or any other court, more especially when that special lien is acquired by the sole act of the creditor, without the consent, knowledge, or even privity of the debtor, and here, as elsewhere, the Bankrupt Statutes are to be so construed as best to advance the rights and remedies of the general creditors. In the present case neither the title nor the trade nor profession of the plaintiff is stated. His known place of abode is given, but it now appears that his son, who resided there, had the same names. I consider, therefore, that this omission is fatal to the registry, that the affidavit required by the Act never was made or registered, and that therefore this claim of special lien by way of mortgage totally fails.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

BRAND v. GREENLY.—June 6, 1855.

Interest—Trust fund—Money “chargeable out of lands”—Statute of Limitations, 3 & 4 W. 4, cap. 27, sec. 42.

By deed bearing date July, 1823, certain lands were conveyed to trustees, subject to a power enabling one of the parties to borrow or take up at interest the sum of £100,000 on the security of these lands, and to charge all or any of the lands in question with the payment of that sum, with a proviso that the lands should stand in the hands of the trustees as a security for that sum, with power to them to raise the sum by mortgage. In the year 1830, by deed of that date, the donee of the power, in consideration and for securing the payment of the sum of £5,800 advanced by J. H., assigned to the latter, and his assigns, the principal sum of £100,000, together with all lien and securities, right, title and interest thereon, upon trust to recover payment of that sum, and after retaining the sum of £5,800, or so much as should be due, together with all interest thereon, to pay over the residue. This deed contained a clause of redemption upon payment of the original sum of £5,800, with interest. Held, that interest upon the sum of £5,800 was payable from the date of the deed of 1830, and was not limited to six years by the provisions of 3 & 4 W. 4, c. 27, sec. 42.

THE petition in this case, which was filed for the purpose of recovering arrears of interest upon a sum of £5,800, stated that an indenture bearing date the 23rd of July, 1823, and made between the Right Hon. W. W. Pole, then Baron Maryborough, and afterwards Earl of Mornington, since deceased, of the first part; the Hon. W. P. Wellesley, the present Earl of Mornington, of the second part; and the present Earl of Raglan and Sir C. W. Flint of the third part, certain lands, called the Pole Estate, were conveyed to the parties of the third part, their heirs and assigns, upon trust for the said W. W. Pole for life, and after his decease for the said W. P. Wellesley for life, and after his decease for the benefit of his children or grandchildren as he should appoint, and in default of appointment for the use of the first and other sons in tail male, with divers remainders over; and it was thereby provided, subject to the above and other trusts, that it should be lawful for the said W. P. Wellesley, during his life or that of Lord Maryborough, to borrow or take up at interest any sum not exceeding £100,000, on the security of the above lands, for his own use and benefit, or for the benefit of any other person or persons whatsoever, and to charge all or any of the said lands with the payment of such sum, with lawful Irish interest, and for the payment of which the said lands should stand as security in the hands of the trustees, and the survivor of them, and the heirs of such survivor, with power to them to raise the same by mortgage, or in any other manner except sale,

and with a proviso that such sum of £100,000, or any part thereof, should not be raised or levied, although it might be charged, during the lifetime of Lord Maryborough. This indenture also, reciting that another property, called the Forbes Estate, had been made liable to a similar charge of £100,000, to be raised in like manner, declared that only one sum of £100,000 should be raised upon the two estates. Prior to the year 1830 certain sums had been charged in pursuance of this power and paid off; but by indenture bearing date June 26, 1830, made between W. P. Wellesley of the one part, and John Hinde of the other, for the purpose of securing a sum of £5800 advanced by the latter, the said W. P. Wellesley assigned to J. Hinde, his executors, administrators and assigns, the principal sum of £100,000, together with all liens and securities for the same, and all his right, title and interest therein, upon trust to recover and obtain payment of the same, and when recovered, then after payment of all costs and charges incident to such proceedings, to retain the sum of £5,800, “or so much thereof as shall be then due and owing, together with all interest thereon,” and in the next place to pay the residue of the principal sum and interest so to be raised to W. P. Wellesley, his executors, administrators and assigns, with a proviso for redemption in case the said W. P. Wellesley should repay the sum of £5,800, with interest, within a year after the decease of Lord Maryborough, and with a covenant for the payment of that sum within one year after the decease of Lord Maryborough, and in the meantime that the said W. P. Wellesley would “pay or cause to be paid half yearly unto the said John Hinde, his executors, administrators and assigns, lawful interest on the said sum of £5,800, without any deduction, defalcation or abatement whatsoever.” The principal sum of £5,800, and all interest due thereon, became vested in the petitioner by means assignments, and the sum of £100,000 was also duly vested in the respondent, upon certain trusts, but subject to the prior charge of £5,800 as created by the above-mentioned deed. A petition having been presented in the Incumbered Estates Court for sale of the estate charged with the sum of £100,000, the petitioner claimed payment of the sum due to him under the deed of the 26th June, 1830, and all the interest that had accrued due thereon since that period, which demand the respondent resisted, upon the grounds that the sum of £5,800 being a charge upon lands, the petitioner's claim for interest thereon was limited by the Statute of Limitations to six years arrears of interest, prior to the presenting of the petition for sale of the estate. The present petition prayed a declaration that, under the mortgage deed of 1830, the petitioner was entitled, at the time of the allocation of the funds in the Incumbered Estates Court, to the entire accumulated arrears of interest upon the sum due to the petitioner from the date of that deed, and for an account.

Christian, Q.C. in support of the petition.

Rogers, Q.C. (with him *F. White*) contra.—The question is, whether or not this sub-mortgage is a charge upon lands, as if it be so, no more than six years arrears can be recovered. This case must

be ruled by the decision in *Vincent v. Going*, (7 Ir. Eq. Rep. 463.) [Lord Chancellor.—This sum was not payable until the death of Lord Maryborough.] It was payable before that period, but could not be raised out of the lands until then. The fact of the sum of £100,000 having been raised, does not make the sum of £5,800 less a sum chargeable out of lands. The sum of £100,000 was assigned in trust to be raised out of lands, and the sum of £5,800 formed a portion of that sum. The petition in the Incumbered Estates Court was for paying off incumbrances, and amongst others this sum of £5,800. If it had been necessary to have raised the sum of £5,800 in this court, it would have been first requisite to have raised the original sum of £100,000. In England the person entitled to the charge of £5,800 might eventually have obtained possession of the land, if the prior incumbrancer did not redeem. [They also cited *Stronghill v. Buck*, (14 Q. B. 781.)]

Bali, Q. C., (with him *J. Murphy*.) was heard for other parties.

Battersby, Q. C. in reply.—The statute does not apply in this case, for the sum of £5,800 was charged upon another sum of money, and not out of lands. *Phillips v. Manning*, (2 Myl. & Cr. 309,) was a similar case. In *Ward v. Arch*, (12 Sim. 472,) a testator left his real and personal estate to trustees in the year 1795, in trust to sell and pay certain annuities; they entered into possession, and a bill having been filed in 1837 for payment of the arrears of the annuities, the trustees insisted that the claims of the annuitants were barred by the Statute of Limitations, (3 & 4 W. 4, c. 27, s. 42,) which is relied upon in this case, and provides that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of land, or in respect of any legacy, should be recovered but within six years after the same respectively should have become due; but it was held that the possession of the trustees prevented the operation of the Statute of Limitations. In *Young v. Lord Waterpark*, (13 Sim. 204,) a term was vested in trustees under a marriage settlement for the purpose of raising £10,000 for younger children, and subject thereto for the first and other sons in tail; and more than six years after the sum of £10,000 should have been paid, the younger children filed a bill for the purpose of raising that charge; and it was similarly held that the relation of trustee and *cestui que trust*, which existed in that case, rebutted the effect of the Statute of Limitations. This is a stronger case than *Gough v. Bult*, (16 Sim. 323,) in which the same principle was upheld; for in that case the testator directed his trustees to raise a legacy by sale of his real estate; but this is not a suit against the owner of the lands, nor against the original trustees, but against other trustees who have in their hands a sufficient sum to pay the demand. In *Hunt v. Bateman*, (10 Ir. Eq. Rep. 360,) the rule is thus stated by Pennefather, B., p. 381, "If the trustee be either in possession, or bring his remedy within such time as to enable him to recover the possession, or to recover a debt or charge out of these lands, the debt or charge becomes the debt or money of his *cestui que trust*; that I take to be

the principle in *Young v. Lord Waterpark*, which seems to me to be very intelligible." [He also cited *Wise v. Gore*, (7 Ir. Jur. 241.)]

LORD CHANCELLOR.—I cannot distinguish the present case from the decisions that have been cited by Mr. Battersby; and I do not, therefore, consider that this sum of £5,800 is to be regarded as a sum of money charged upon or payable out of lands. Here is a sum of money chargeable against funds in the hands of trustees, under an express trust to be applied in a peculiar manner; and there is nothing to prevent a party from taking a case out of the operation of the Statute of Limitations by an arrangement of this nature. I must, therefore, make a decree in favour of the petitioner.

Decree accordingly.

O'KELLY v. CHAMBERLAIN.

Devise—Residuary estate—Lapsed legacy—Personal estate—Heir-at-law.

A testator by his will gave his personal, and a portion of his real estate to trustees, directing that they should convert them into money; and out of the fund so to be realized he bequeathed two legacies (among others) to persons named in his will, and after other bequests he directed that the residue of this fund, after payment of his debts and the legacies bequeathed, should be divided into twelve equal portions, and paid to certain persons named, among whom were the above-mentioned legatees and the testator's heirs-at-law. The proceeds of the sale of the testator's personal estate, and of the portion of his real estate so directed to be sold, left a surplus fund after payment of the debts and legacies created in the will, with the exception of the two above-mentioned legacies, the persons who would have been entitled to the latter having died in the lifetime of the testator, and their legacies having thereby lapsed, and questions arose as to the proper mode of disposition of these lapsed legacies, as also of the portions of the residuary fund to which those legatees would have been entitled in case they had survived the testator. A reference to the Master having been directed, he found by his report that the two legacies that so lapsed formed a part of the residuary fund that remained after payment of the bequests created by the will, composed of the real and personal estate directed to be sold in the proportion of the proceeds of the personality to that of the real estate; that the lapsed shares in the residuary estate, to which the above-mentioned two legatees would have been entitled in case they had survived the testator, were to be divided between the heir-at-law of the testator and his other next of kin, in the proportion that the residue of the personal estate bore to that of the real estate; that the two lapsed legacies formed part of the general residue of the fund composed of the real and personal estate, and were divisible among the surviving residuary legatees in the will named. Exceptions by the heir-at-law—that the Master should have found that the lapsed legacies formed

portion of the testator's real estate as to which he died intestate, and as such should go to the heirs-at-law in equal proportions, and that the same rule should be applied to the lapsed shares of the residuary estate—overruled.

Roberta v. Walker, (1 Rus. & Myl. 753,) approved of.

THOMAS SWORDS, testator, devised all his real and personal estate to trustees, upon trust, to sell a portion of his fee simple estates and personal property; and he made the following bequests (amongst others), to be paid out of the fund so to be realized: To Catherine Casey and Eliza Casey the sum of £800, to be equally divided between them on their attaining the age of 21 years, or marriage, but in case either of them should marry during her minority, contrary to the consent of persons named, the other to take the entire sum of £800. To Jane Kieran the sum of £400, notwithstanding her coverture; and the testator also bequeathed to Jane Kieran and Catherine Casey a certain proportion of his residuary estate, consisting of the surplus of the proceeds of his personal and real estate so directed to be sold, which he had directed to be divided into twelve equal portions, and paid to these legatees and other persons mentioned in his will, among whom were also named John B. Fottrell and P. Cavanagh, the testator's heirs-at-law. The sale of the lands directed to be sold produced the sum of £4250, which, together with the personal estate of the testator, left a surplus fund after payment of the legacies bequeathed, with the exception of the bequests made to Catherine Casey and Jane Kieran, who died in the lifetime of the testator, (each at the time of her death being entitled to a legacy of £400,) and the question in the present case was in reference to these two legacies of £400, and to the portions of the residuary estate of the testator so bequeathed; whether these sums were to be regarded as a fund to be divided between the surviving legatees of the residue according to the provisions of his will, or whether the testator was to be considered as having died intestate as to these sums, and that in such case as against the co-heirs of the testator, the trust for the sale of the real estate directed by the testator's will to be sold, was not to be considered as a conversion of that estate into personalty, except so far as the purposes of the will might require for payment of the bequests actually made. The Master in his report found that the residue, consisting of the personal estate of the testator, and the produce of the portion of his real estate directed to be sold, amounted to £1265 6s. 8d.; that the produce of the part made up of the sale of the real estate was in the same proportion to the part of the residue composed of the personal as £4,226 10s., the net proceeds of the sale of the real estate, is to £15,632 5s. 4d., the amount of the personal estate; that the two legacies of £400, bequeathed respectively to Catherine Casey and Jane Kieran, and which lapsed by their deaths, formed part of the residue so composed of the personal estate and the real, in the aforesaid proportion. As to the lapsed shares of the residue—that they were to be divided between the two respondents,

J. B. Fottrell and P. Cavanagh, (heirs-at-law of the testator,) and the other next of kin, in the same proportion that the residue aforesaid of the real estate bore to that of the personal estate; that the two lapsed legacies formed part of the general residue of the real and personal estate of the testator, and were divisible among the surviving residuary legatees in the will named. To which the following exceptions were taken: 1st, that he should have found that the sum of £1265 6s. 8d. was a portion of the produce of the sale of the real estate; 2ndly, that he should have found that the amount of the two legacies of £400 should be considered as portion of the testator's real estate as to which he died intestate, and, as such, should be equally divided between his heirs-at-law; 3rdly, that he should have found that the lapsed shares of the residue should be treated as portion of the real estate as to which he died intestate, and, as such, should be equally divided between his heirs-at-law.

F. Fitzgerald, Q. C. and H. Ormsby were heard in support of the exceptions.

Martley, Q. C., (with him *E. Lawless,*) for the residuary legatees.

Beytagh for the next of kin.

[The cases relied upon in the argument will be found in the judgment of the court.]

May 25.—**LORD CHANCELLOR.**—This case has stood over for some time, as it involved the consideration of several decisions. The question raised was upon the will of Thomas Swords, and the construction to be applied to it in reference to a fund created by the testator for the payment of certain debts and legacies. The testator by his will devised his real and personal estates to trustees upon trust to dispose of a portion of his fee simple property, and out of the proceeds of it, and of his personal property, he directed his trustees, after seeing to the payment of his debts and other charges, to pay certain annuities to several persons named in his will; and, amongst others, to two persons named Catherine Casey and Jane Kieran, who died before the death of the testator; and, after giving several other legacies, the testator concluded his will by a general direction that in case his personal estate should not be sufficient to pay all these charges, that the legacies should abate; but in case that there should be a surplus, after payment of these debts and charges, he bequeathed portions of this surplus to Jane Kieran and Catherine Casey, and other persons named in his will, the entire being divided into twelve equal parts. He thus created for the purposes of the will (whatever may be the meaning he intended to convey by these words) a fund out of the proceeds of his real and personal estate, and gives directions to his trustees to pay certain debts and legacies created under the will, and then to divide the remainder between certain persons named as legatees; in other words, he gives some pecuniary legacies, and then makes a general residuary bequest. The executors proceeded to sell a portion of the real estate as directed by the testator, and paid all the legacies, except the two bequests of £400 each to Catherine Casey and Jane Kieran, whose legacies lapsed by their having died before the decease of the testator. These two

persons were also included among the residuary legatees, and therefore their rights are of a twofold character, first, as to the legacies of £400 each, and second, as to their right to a share of the residue. These questions have been already presented to the consideration of the Master, and he has found in his report that these legacies of £400 each, bequeathed to these two persons, and which lapsed by their death, form part of the residue so composed of the personal and real estate of the testator, in a rateable proportion, having regard to the respective values of the real and personal estate of the testator; in other words, he has decided that this fund is to be regarded as a general mixed fund, and that out of it are to be taken, *pro rata*, all the legacies, and that the heir at law has no right to contend that the real estate is to be exonerated from the payment of these legacies. To this portion of the report, however, the heir at law has excepted. The Master has also found that the residuary clause in the testator's will includes these lapsed legacies, to which finding also the heir at law has taken exception, claiming these legacies. The first and second exceptions are based upon the principle, that in cases of this nature the personal effects of a testator are to be exhausted before the real estate can be applied, but the words of the will do not seem to import any such doctrine. The will appears to proceed upon an understanding that the heir at law is to have a certain preference, but there is nothing in it amounting to the distinction that I have contended for. No duty appears to have been laid upon the executors to make such a distinction under the will, nor is it according to the principles of natural justice. There may be some decisions leading to such a distinction, and difficulty may arise in trying to reconcile such cases, if they are to be reconciled; but whether that be so or not, I must consider to what class of cases this case belongs, and having determined that question, I cannot depart from the authorities by which it is governed. There are cases which seem to depend upon such a distinction as that contended for here by the heir at law, and *Chitty v. Parker*, (4 B. C. C. 411,) is an early decision upon that subject. In that case the testatrix left her real and personal estate to her executors, expressing a desire that it should be all sold and turned into money as soon as possible, and she then bequeathed several pecuniary and specific legacies; but several of the legatees having died in the lifetime of the testatrix, her personal estate proved more than sufficient to discharge all the legacies, and the next of kin claimed not merely the undisposed of residue of the personalty, but also that the real estate should be converted into personalty for their benefit. This the heir at law resisted, on the ground that such a proceeding was not necessary for the payment of debts and legacies; and Lord Loughborough decided in favour of the heir at law, there being no person entitled to claim such fund as a gift; holding that between the next of kin and heir at law there was no equity. In that case, however, there was no bequest of the residuary estate, and whether or not that was a sound distinction, it appears to have been the ground upon which the court held that the next of kin was not entitled. *Flint v. Warner*, (16 Sim. 124,) was a

similar case. There the testatrix expressed a desire to have her real and personal estate sold and converted into money, out of which she bequeathed certain legacies, directing that the surplus should be disposed of as she should, by any future will, direct. She did not however make any subsequent will, and her real estates were sold; but the personalty at the time of her death proved sufficient to pay her debts and legacies, and it was held that the heir at law was entitled to the money produced by the sale of the real estate. There was no residuary bequest in that case either, which appears to have been the ground of decision, for in page 129 the Vice-Chancellor says, "The case then stands thus: the testatrix has directed her real estate to be sold, and the net proceeds to form part of her personal estate, but she has not made any gift of that part. As, then, it is not given away, there is nothing to take it from the heir, and the consequence is that I am bound to say that the heir is entitled to it." In *Fitch v. Weber*, (6 Hare, 145,) the testatrix had made a similar disposal of her real estate for the purpose of creating a fund, the surplus of which she directed her trustees to dispose of as she should by any future codicil direct; but she made no codicil, and there being no disposition of the residuary estate, it was held that the heir at law was entitled to the undisposed of proceeds of the real estate. In all these cases the question was in reference to the application of the residue undisposed of by the testator after payment of debts and legacies; but the question which arises in the present case is untouched by any of these decisions. In *Gordon v. Atkinson*, (1 De Gex & Sm. 478,) the testator directed his freehold estate to be sold and converted into personalty, and then bequeathed his personal estate in trust for four persons as tenants in common; but, by a codicil, he revoked the latter gift as to one of the tenants in common, who was also the testator's heir at law, and it was held that the heir was entitled to so much of the lapsed residue (one of the four having died) as consisted of real estate. But one of the most important decisions as bearing upon the present case is *Ackroyd v. Smithson*, (1 B. C. C. 503,) which is very similar to the case before the court. There the testator directed his executors to sell his real and personal estate, and to pay out of the proceeds certain legacies and annuities, and if there should remain any surplus, that it should be divided between his legatees in proportion to their several legacies. That case closely resembles the disposition made by the testator in the present case, for some of the legatees were also entitled to a portion of the residue under the will, as in this case. It appears that two of the legatees died in the lifetime of the testator, and their legacies thereby lapsed, as also their shares in the residuary estate. A bill was filed by the testator's next of kin against the surviving legatees and the heir at law, claiming the legacies given to the deceased legatees, and also their shares in the surplus, and the Master of the Rolls being of opinion that the surviving legatees took the entire surplus in proportion to their legacies, dismissed the bill; but that decision was reversed upon appeal by Lord Loughborough, who directed an account.

to be taken of the personal estate and the money arising from the sale of the real estate, and that the share of the deceased legatees in the overplus should be divided between the next of kin and the heir at law; that is to say, so much of the shares as consisted of personal estate to go to the next of kin, and so much as was made up of the proceeds of the real estate to go to the heir at law. It does not appear that there was any reference made to the lapsed legacies, but only to the shares in the residuary estate. Now that decision imports that something had been taken out of the personal estate, otherwise the entire would have gone to the heir; and the Master's report in the present case appears to have been made on the authority of that case. But the first case which decided the principle as to the lapsed legacies in the present case was *Roberts v. Walker*, (1 Rus. & Myl. 753,) and that was in accordance with the Master's report in this case. In that case the testator had created a mixed fund of real and personal estate, which he directed to be applied to the payment of his debts and legacies; some of the latter lapsed, and Sir J. Leach held that the portion of the fund that would have been applicable for that purpose belonged, as far as it was composed of real estate, to the heir, and as far as it was composed of personal estate to the next of kin, and he directed a reference to the Master accordingly. That case was decided by Sir J. Leach after his decision in *Phillips v. Phillips*, (1 Russ. & Myl. 649,) which was a conflicting authority, and has been overruled, and it is said that, therefore, the case of *Roberts v. Walker* is not to be regarded. In *The Attorney General v. Southgate*, (12 Sim. 77,) Vice Chancellor Sir Launcelot Shadwell certainly did express considerable doubt as to the correctness of Sir J. Leach's decision in *Roberts v. Walker*; but his own decision in that case was overruled by the Lord Chancellor upon appeal, who decided that the testator's debts and legacies were payable out of the mixed fund composed of the produce of the freehold, leasehold and personal estate in proportion to the relative values of each. The latter case did not entirely involve the consideration of the questions decided in *Roberts v. Walker*; but it was, to a certain extent, in support of the latter decision. Another case in which I find *Roberts v. Walker* observed upon is *Blann v. Bell*, (5 De Gex & S. 658,) and there the court treats it as an authority. It is also followed in subsequent cases. In *Robinson v. The Governors of the London Hospital*, (10 Hare, 19,) although the case is not mentioned by name in the judgment of the court, yet the Vice Chancellor, Sir J. Turner, seems to refer to it indirectly. He says, p. 23, "There was a long series of cases in this court antecedent to *Boughton v. James*, (1 H. L. Cases, 406,) in which it was held, that where the real and personal estate was driven into one mass, and made subject to one general set of charges, these charges were to be borne by the real and personal estate, *pro rata*, according to their relative values." *Taylor v. Taylor*, (6 Sim. 249,) is another case deciding the general proposition, and may be regarded as overruling *Phillips v. Phillips*. In *Young v. Hassard*, (1 Jon. & Lat. 466,) the liability of the real and personal estates

to the payment of legacies, in proportion to their relative values, was recognized, and Sir E. Sugden refers to *Roberts v. Walker*, in his judgment, as an authority. In *Dunk v. Fenner* the disposition of the testator's real and personal estate was similarly directed, and the decision was to the same effect as that in *Roberts v. Walker*. The same principle is recognized in *Shallcross v. Wright*. There was in that case no residuary estate created by the will, but Lord Langdale followed the decision in *Roberts v. Walker*. He says, p. 509, "The question is, what is the nature of the particular fund? whether it is to be considered as a general and common fund made up of the produce of the real and personal estate, which is to be applied in common in satisfaction of the funeral expenses and debts, or whether, notwithstanding the care the testator has taken to bring the constituent parts into one mass, it ought to be considered as subject to the general rule of law, by which the personal estate is the fund first applicable to the payment of debts, &c. I cannot so construe this will while the case of *Roberts v. Walker*, and other existing cases, depending on that principle, remain unreversed. I ought not, in this place, to reverse that which I consider to be, at this time, the rule of this court." *Walton v. Walton*, (14 Ves. 322,) does not touch the question raised by the present case. *Foudrin v. Gowsey*, (3 Myl. & Keen, 383,) was a decision to the same effect. In that case the testator, who was an alien, directed all his property to be sold and converted into money, and after charging the mixed fund with payment of debts and legacies, gave the residue to aliens residing abroad, one of whom was his heir-at-law, and the principle recognized in the foregoing decision was upheld, the residue of his interest in lands being held to belong to the Crown, and that of his pure personal property to the aliens. In *Stocker v. Harbin*, (3 Beav. 484,) the testator devised all his real and personal estate to trustees to be converted into real estate for payment of his debts, and to take the sum of £1,000, which he gave to the plaintiff, out of that fund. He subsequently revoked this legacy by a codicil not properly attested so as to pass real estate; and it was held, that under the will the testator had made out of his real and personal estate a common fund for the payment of this legacy, and that the revocation being inoperative as regarded the real estate, the plaintiff was entitled in the proportion which the real estate bore to the personal. In page 484 Lord Langdale says: "The legacy being given out of a mixed fund, constituted of both real and personal estate, I think that the real and personal estate ought to have contributed to the payment in proportion to their respective amounts." In *Christian v. Foster*, (2 P. Coop. 348,) the real and personal estate of the testator was devised to a trustee to be converted into money for the payment of his debts and legacies, and upon other trusts which failed for want of an object to receive the proceeds of the two estates so blended into one fund; and a question then arose as to this mixed fund so standing in the trustee's hands, the next of kin claiming the entire upon the ground that the testator had converted the realty into personalty, and the heir-

at-law claiming that portion of the fund that arose from the sale of the real estate, and the Master of the Rolls had previously declared the heir-at-law entitled to so much, and that the next of kin should have so much of the fund as arose out of the sale of the personal estate, directing the costs to be paid rateably out of the realty and personalty, according to their value. The decision of Lord Cottenham, which was pronounced upon an appeal from the Master of the Rolls, was only in reference to the costs—the question being, whether the decision of the Master of the Rolls was to be supported, and whether the costs should be separated, and so much as had arisen on account of the real estate paid out of the real estate, and so much as had arisen on account of the personal estate out of the personalty; and his Lordship upheld the decision of the Master of the Rolls upon the authority of a case decided by Lord Eldon—*Walter v. Maunde*, (19 Ves. 429,) to which I need only refer. *Ackroyd v. Smithson* was alluded to in the Lord Chancellor's judgment, and *Roberts v. Walker* had not been cited in the argument, but is referred to in a note to the case. The only other authority to which I need refer is *Green v. Jackson*, (5 Russ. 55,) the circumstances of which were entirely similar to those of the present case. I must, therefore, upon the authority of these decisions overrule all the exceptions that have been taken to the Master's report.

Exceptions overruled.

COURT OF EXCHEQUER CHAMBER.*

TRINITY TERM, 1855.

ERROR FROM THE QUEEN'S BENCH.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

BLOUNT AND OTHERS (IN ERROR) v. EVANS.

May 30.

Landlord and Tenant—Covenant for Payment of Rent and Receiver's Fees—Splitting of cause of action.

A lease contained a covenant by the lessee to pay rent, "with sixpence in the pound receiver's fees." An action was brought upon this covenant, alleging for breach thereof the nonpayment of £32 6s. 2d., on account of the receiver's fees, reserved and made payable by the lessee in question. The declaration contained no averment that the rent had been paid or otherwise satisfied. Judgment having been given upon the demurrer for the defendant, Held, affirming the judgment of the court below, that the reservation of the rent and receiver's fees was indivisible, and that a separate action was not maintainable for the receiver's fees.

THIS was an action of covenant. The declaration stated an indenture dated the 5th of March, 1712,

* *Coram* Lefroy, C. J., Monahan, C. J., Torrens, J., Perrin, Ball, Moore, Jackson, J. J., Pennefather, B. and Greene, B.

whereby the Bishop of Down and Connor, who was seised in fee thereof, demised to Hector Graham, his heirs and assigns, the manor, town, and lands of the lordship of Lea, with the appurtenances, *habendum* from the 1st of November, 1711 for a certain term of lives at the yearly rent of £500, late Irish currency, for the first two years of said term; £600 for the next two years, and £700 for every other year of said term of lives, being equal to £646 3s. 1d. present currency, "with sixpence in the pound receiver's fees," to be paid half-yearly on every first day of May and first day of November, by even and equal portions. The declaration then set forth the covenant to pay the aforesaid yearly rents and receiver's fees at the several days and times mentioned, in such manner as thereinbefore appointed, for the payment thereof; and also a covenant for perpetual renewal by the lessor. It also set forth a renewal of said lease, dated the 31st of October, 1827, from the then Earl of Portarlington to George Evans, with a covenant by Evans for payment of rent and receiver's fees, at the time specified in the original indenture of 1712. The declaration then averred the devolution of the lessor's and lessee's interest upon the present plaintiffs and defendant. Breach—the nonpayment of the sum of £32 6s. 2d. due to plaintiffs on account of the receiver's fees, reserved and made payable by the indenture of the 31st of October, 1827, for two years ending the 1st of May, 1850.

The second count of the declaration varied from the first in treating the indenture of the 31st of October, 1827, as the original lease. The third count set forth the original lease, and proceeded upon a covenant contained in a renewal thereof by the plaintiffs to the present defendant, dated the 28th of June, 1850, and the fourth count went upon the last-named indenture.

The defendant demurred to this declaration, assigning several causes, both general and special. It contained, among the rest, the following ground, namely, that it was not stated in any of the counts of said declaration that the defendant paid any portion of the rent reserved by the said indentures of demise of 1827 and 1850 respectively, or any part thereof, nor was it averred how the defendant became liable to pay same, or that said rent was satisfied otherwise than by payment. The demurrer was argued in the Court of Queen's Bench in

Term, 1854, and judgment was given in favour of defendant upon the ground of demurrer just mentioned, whereupon the plaintiffs now brought error to reverse said judgment.

Lawson and Rogers, Q.C., for the plaintiff in error.

M. Mahon and Napier, Q.C., for defendant.

[They cited the following authorities: 1 Saunders, 201, n.; *Hutchins v. Chambers*, (1 Burr. 509); *Clotworthy v. Clotworthy*, (Cro. Car. 436); *Bayley v. Hughes*, (Cro. Car. 137); Com. Dig. Pl. c. 84; *Walby v. Philips*, (2 Ventris, 129); *Clooney v. Watson*, (4 Ir. Jur. 41); *Dickenson v. Harrison*, (4 Price, 482); *Denton v. Richmond*, (3 Tyr. 530); *O'Leary on Tithe Rentcharge*, 536; *Keppel v. Bailey*, (2 M. & K. 536); *Morris v. Atkins*, (Har. 326); *Kirkham v. Buckley*, (1 Lev. 109.)]

LEFROY, C.J.—We are unanimously of opinion that the judgment of the court below ought to be affirmed. My brother Pennefather does entertain some doubt, but not sufficient to cause him to desire that the case should stand over. The question is, as to what is the meaning of the reservation in the lease—"Yielding and paying therefore and thereout to the said (lessor), his heirs and assigns, yearly and every year during the subsistence of the said term, &c., the yearly rent of £700, &c., &c., together with sixpence in the pound receiver's fees, on the days and times," &c. The whole sum of £700, late currency, together with sixpence in the pound receiver's fees, was to be payable half-yearly, in May and November. Now it is very true, and this is the difficulty which has occurred to the mind of my brother Pennefather, that if a party has in one contract agreed to pay three distinct sums of money, the party entitled to the benefit of that contract is not bound to go for all at once—he may proceed for them separately or all together; but in this case how can you ascertain one of these items without the other? In every respect, these two sums, the rent and the receiver's fees, are so mixed up together, that no duty on the part of the tenant, or right on that of the landlord, in reference to either, can be deemed to arise independently of the other. If we apply to this case the principle of *Dickinson v. Harrison*, (4 Price, 282,) we shall only come to the same result. The nature of the reservation here is a rent service to be paid out of the land. Taking it to be a rent service, the law is entirely adverse to the splitting up of rent services by several distresses or actions. The landlord is not entitled to bring two actions in respect of each half-year's gale. The case does not come within the principles of the case in the Exchequer, where the contract was for the payment of distinct sums of money. We are, therefore, of opinion that the judgment of the Court of Queen's Bench should be affirmed.

Judgment affirmed.

COURT OF QUEEN'S BENCH.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

EASTER TERM, 1855.

ASHWORTH AND ANOTHER v. BROWN AND OTHERS.—May 11.

Grant—Several fishery—Patent.

Where a several fishery in a navigable river has been appropriated by the Crown prior to Magna Charta, a grant in Letters Patent to A. and his heirs of all the salmon fishing, pike, eel, and other fishings of and in the river in question, enure to pass the several fishery.

THIS was an issue directed by the court (for their information, with respect to the merits of an application for a certain writ of prohibition,) to try whether Edward and Thomas Ashworth, the plaintiffs, were entitled to a several fishery in the river of

Galway from Lough Corrib to the sea, or in any or what part thereof from Lough Corrib to the sea. The writ had been moved for on behalf of the defendants in the issue, to restrain the justices of Galway from adjudicating upon a complaint which had been preferred against them for trespassing upon the plaintiffs' fishery, the defendants alleging that the title was in dispute. The plaintiffs had purchased the fishery, in the Incumbered Estates Court, for a sum of £5000. Upon cause being shown against the making absolute of the conditional order for a prohibition, the court, instead of putting the defendants to declare in prohibition, directed the above issue, by consent, as the most convenient course. At the trial, at Galway Spring Assizes, 1850, before Mr. Sergeant Howley, the principal document relied upon by the plaintiffs in proof of the existence of the franchise in the *locus in quo*, were letters patent, 29th May, 1667, 21 Car. 2. This patent recited that the Crown, retaining a gracious sense of the many services performed by Sir George Preston, and also of his great sufferings, in consideration thereof had already granted, by letters patent, under the Great Seal of Ireland, dated the 27th July, in the 13th year of Car. 2, unto the said Sir George Preston and his heirs several mills, weares, and fishings in said letters patent mentioned, which were afterwards, by the 14 & 15 Car. 2, c. 2, sec. 152, and the 17 & 18 Car. 2, c. 2, sec. 55, Irish, confirmed. By which said letters patent he, the said Sir George Preston, had obtained as to some part of the said mills, &c., the benefit of the royal meaning, but as to several parts of the said grant the said Sir George Preston had been disappointed by decrees made in the Court of Claims in Ireland, on behalf of some former proprietor or proprietors, and for want of more particular expressions than were in the said former grant, and that amongst other particulars in said former grant said Sir George Preston did enjoy all that the fishery of pike and salmon and other sea fish and eels in the great Salmon Weirs, in the River of Shannon called Lough Weare, meared and bounded as in said former grant was expressed; and also that by said former letters patent the Crown had granted to said Sir George Preston and his heirs, by general words therein contained, all and singular the fisheries in the sea in and belonging to Connaught, and also all and singular the mills upon the River of Shannon which had devolved or fallen unto the Crown by the delinquency of, or forfeiture, attainder or rebellion of any of the former proprietors thereof, and were not possessed by any person or persons by warrant from the declaration for the settlement of the Kingdom of Ireland, (contained in the 14 & 15 Car. 2, c. 2.) The patent then granted to said Sir George Preston all that the aforesaid weare, commonly called the Lax Weare in the River of Shannon, mearing on the River of Shannon, (setting out the mearings,) and also all and singular the fishings of salmon, pyke, and eyles, and other fish in the said River of Shannon, to be taken with nets or otherwise in all parts of that river, so far as the County of the City of Limerick, &c., and also all the salmon fisheries, pyke, eyle, and other fishings of and in the river of Galway, in the county

of the town of Galway, in the province of Connaught, and also all that the salmon fishing, pyke, eyle, and other fishing of and in the waste or river in or near Wyne Island in the County of Galway in said province, &c. (general words,) to have, hold, occupy, possess, and enjoy all and singular the premises with them, and every of their rights, members, and appurtenances, &c. unto him the said Sir Geo. Preston, his heirs and assigns for ever to the only use and behoof of him, the said Sir George Preston, his heirs and assigns, for ever, yielding and paying, &c. (a quit rent of £5 a-year.) In order to show the prior existence of the franchise in question, copies were given in evidence of sundry former grants by patent as evidence of acts of ownership by the Crown.* Upon the construction of this patent of Car. 2, the learned judge in his charge to the jury stated his opinion to be that it conveyed a several fishery in the Galway river, and that the question, therefore, for the jury was, to what extent and within what limits that right was granted; that if the jury were satisfied that it was a navigable river, the presumption was in favour of the public and against a claim of exclusive enjoyment by an individual; that the Crown could not, since *Magna Charta*, have granted to a subject a several fishery in a navigable river; but that it was for them to say whether there had not been, prior to *Magna Charta*, an appropriation by the Crown and a sei-

* The following are extracts from these patents;—

10 Richd. 2.—To all to whom these presents come, know ye, that we, with the assent of Richard Norton and Thomas Woodhouse of Kilkenny, have granted to Richard Parry, Burgess of the town of Bristol the salmon fishery of the town of Galway in Connaught, which was of Edward de Mortimer, late Earl of March and Ulster, during the minority of Roger, his son and heir, for two years, paying £20 a-year. [Nothing is mentioned in this Patent about Richard De Burgho and Henry Blake, as stated in Hardman's History of Galway, p. 291.]

27 Henry 8.—Grant to our beloved and faithful Thomas Martin of Galway, to have two places in the water of Galway, between the bridge of the town and sea, wherever it shall seem best to him, for three nets for salmon and other fishes, as was the custom to take them there, to have and to hold the said two places on the aforesaid water to the said Thomas, and his assigns, during pleasure, paying yearly to us, at our Treasury in Dublin, 3s. 4d. sterling. [End of this patent.]

30 Hen. 8.—Grant to Roger Challoner of Mill, called Martin's Mill, on the water or river of Galway, in our hands as an escheat, also the fishery of the river of Galway in our County of Connaught, and we give to the said Roger the license of fishing and taking all and singular the fishes of every species within the water and places of the aforesaid river of Galway by nets, spears, casting nets and other instruments of every kind, by whatsoever they may be best taken, and we reserve the three places given as aforesaid to Thomas Martin to hold to said Roger for 40 years.

24 & 25 Henry 8.—Grant to Richard Martin of Galway three places in the river of Galway, between the bridge of the town and the sea, wherever it shall seem best to him, for three nets to take salmon and pyke, paying 6s. 8d. per annum.

4 & 5 Philip & Mary. States an inspection of the grant to Roger Challoner, and recites that patent and an *insperimus* at the request of John Challoner.

25 Hen. 8.—Grant to Jeanette Lynch of Galway, widow, and Anthony Lynch, to have three nets on the water of the river Galway, between the bridge of that river and the sea.

zin of the fishery. His Lordship had previously been called on by the defendants' counsel to direct the jury that the patent in question did not pass a several fishery. The jury found that the plaintiffs had a right of several fishery from Lough Corrib to the sea. A conditional order was subsequently granted to set aside this verdict, upon the ground that the patent did not operate to pass a several fishery.

Fitzgibbon, Q. C. and *P. Blake, Q. C.* (with whom was *M. Morris*,) showed cause.

Brewster, Q. C. and *W. H. Bourke, Q. C.* (with whom was *D. C. Heron*,) contra.

The following cases were cited:—*Bann case*, (Sir J. Davies' Rep. 145); *Gabbett v. Cluncy*, (8 Ir. L. Rep. 299); *Holford v. Bailey*, (13 Q. B. 486.)

CRAMPTON, J.—We are of opinion in this case that the conditional order must be discharged. The question before the court is a very narrow one, excluding all questions of fact mooted at the trial. We are limited to the consideration of the single question which arises upon the ground upon which alone we granted the conditional order, namely, whether the patent did convey a several fishery. That lets in the question only, whether the words of the patent of Car. 2 are large enough to pass a several fishery. I think that they are large enough for this purpose. I quite adopt the position of Mr. Bourke that if the Crown had not a several fishery vested in itself, at the time of the making of this grant, the grant could not operate to convey a several fishery; but this question, as to the antecedent right of the Crown to a several fishery, has been settled in the affirmative by the verdict of the jury founded upon parol and documentary evidence, and, as I have already stated, we have limited the present discussion to the abstract point as to whether the words of the patent were sufficiently large to pass that several fishery. The use of the former patents which have been observed on, was not to make out title to the particular fishery, but to show that, from the earliest period, the Crown had exercised rights consistent with the existence of a several fishery, and inconsistent with any other estate of the Crown than a several fishery, founded in fact upon the appropriation by the Crown of the fishery before *Magna Charta*. Then the case of *Holford v. Bailey*, (13 Q. B. 426,) shows that the word "several," as applied to the word "fishery" is not necessary to pass a several fishery, but that equivalent words will answer the same purpose. The original decision in that case by the Queen's Bench was otherwise. In the declaration there the plaintiff had not contented himself with declaring for a "sole and exclusive" fishery, but he added a count for the invasion of a "several" fishery, and the jury on that count found a verdict against him. The rules of pleading in England were opposed to the ringing of changes in pleading on the same subject-matter, and it is possible that the court may hence have drawn the inference that the second count meant something different from the first. The case ultimately went to the Exchequer Chamber, and we have been referred to the words in which Parke, B. delivered the opinions of the judges, in which the doctrine is laid down that a several fishery may pass

either by the term "several fishery" or by equivalent words; and that "sole and exclusive" is equivalent to "several." That being so, we now come to the examination of the words of the present grant, namely, "All the salmon fishing, pike, eyle and other fishings of and in the river of Galway, &c." Certainly these words are very extensive, and I think that it is plain that a several fishery may have passed by these words, which is all that we have to decide upon the construction of this patent. I was struck by one of Mr. Burke's arguments with respect to this extensive patent, that when the Crown came to grant the Limerick fishery it made use of the same words of grant as in the Galway one, but then superadded other words to show that it excluded other persons, save the grantee, from the benefit of the fishery, but there was a particular reason for fortifying the grant of Limerick beyond that of Galway, namely, that the Court of Claims had actually made an adjudication in favour of certain claims as to the river of Limerick, and to reverse this adjudication a prerogative course was taken by adding the words to which I have adverted. I think that this is the true view of the case. I will further add that we have limited the argument to the simple question of the construction of the letters patent, having before us evidence sufficient, in our opinion, to show that the jury were right in having come to the conclusion which they arrived at. However we will not prejudge the pending motion, respecting the granting of the prohibition. The verdict of the jury ascertains the limits of the fishery to extend from Lough Corrib to the sea. It is enough for us at present to say that the plaintiffs have established their right to that verdict.

PERRIN and MOORE, J.J. concurred.*

Cause shown allowed.

[In the ensuing Term the conditional order for the writ of prohibition was discharged, the court being of opinion that the plaintiffs had virtually established their right of fishing by the finding of the jury.]

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

M'KEAN v. GRAY.—May 24, 26.

Declaration of trust—Nudum pactum—Slave compensation money—Charge upon lands—
3 & 4 W. 4, cap. 37.

A testator by his will, after charging his real and personal estate, which consisted chiefly of slaves in Jamaica, with the payment of his debts, bequeathed to his executors the sum of £2000, in trust to pay the interest thereon to his daughter B. M., (the petitioner,) for her life, and after her death the principal to go to her children; and he directed that the principal and interest should be raised out of the yearly profits of the estate, and that the person for the time being in possession of the property should pay the charge. Subject to this and some other legacies, he devised his estate

to his son, T. W. S., and his assigns, for ever; and the latter entered into possession, and continued seised until his death, when he devised the property to his daughter, M. K., still subject to the above legacy. The respondent having married M. K., became entitled to the estate in right of his wife, and wrote a letter to the petitioner on the subject of the legacy of £2,000, containing the following language: "The property owes you and your family £2,000 currency. So long as I am in possession you shall be paid your interest, and when the property yields it, the principal; as I wish never to pocket a farthing till every one is paid." Under the 3rd & 4th Wm. 4, cap. 37, (the Slave Compensation Act,) the respondent had previously put in his claim for compensation, as owner of the estate in right of his wife, but not in any other character, no counter claims were lodged on behalf of the petitioner, or any person representing her charge, and a large sum of money was awarded to him as compensation. A petition having been presented for the purpose of establishing the charge of £2,000 upon the estate, and of rendering the compensation money liable in the hands of the respondent to this demand; Held, that the act of the Compensation Commissioners, in awarding this sum to the respondent, did not conclude the rights of the petitioner as against the sum granted to the respondent in lieu of the estate originally liable to that charge.

Held also, that the letter written by the respondent to the petitioner amounted to a declaration of trust in reference to the rents and profits of the estate, and therefore that the respondent was liable to satisfy the demand of the petitioner as to the legacy of £2,000 out of the sum awarded to him as compensation money.

THE testator in this case, Richard Sill, a planter possessed of an estate called Greenpond, and other personal property in the island of Jamaica, made his will in the year 1795, and by it, after charging all his real and personal estate with the payment of his just debts, he bequeathed to his executors the sum of £2,000, in trust to pay the annual interest thereon to the use of his daughter, Barbara M'Kean, for the term of her natural life, the principal sum to be raised out of the net yearly profits of the estate, and the interest to be for her separate use, the principal to go over to any children she might have: and in default, to the testator's other children; and he directed this money to be paid by the person who for the time being should be in possession of his estate. He also bequeathed two other sums of £2,000 to other children, and subject thereto he devised and bequeathed every part of his estate to his son, Thomas Walker Sill, his heirs and assigns, for ever. In the year 1797 the testator died, leaving three daughters and his son, Thos. W. Sill, who, upon the testator's death, entered into possession of the estates and the slaves thereon, and continued in possession till his own death, having previously paid all the debts of Richard Sill, and in the year 1826 he died, having bequeathed all his real and personal estate to his

* Lefroy, C.J. was absent.

daughter and only child, Margaret Kennedy, but subject to all his debts. In the same year a deed of trust was executed between Margaret Kennedy, Barbara M'Kean, her husband, and other parties, reciting that T. W. Sill, as residuary devisee, had entered into possession of the estates of R. Sill; that the debts of the latter had been paid, but that T. W. Sill had not paid the legacies, and that the sum of £870 was due for interest upon the sum of £2,000 bequeathed to Barbara M'Kean, and that T. W. Sill was indebted to persons named Hogg, and Greene, and others, and by that deed the estate and slaves upon it were assigned by Margaret Kennedy to trustees for six years to manage the estate, and pay the debts; but the term of six years expired before the debts due to Hogg and Greene or the legacy of Barbara M'Kean could be paid off. About the same time Margaret Kennedy married the respondent, Robert Gray, who, in right of his wife, entered into possession of the estate and of the slaves upon it, and wrote letters to Mrs. M'Kean upon the subject of the charge of £2,000, one of which was as follows:

"Dublin, 31st December, 1853.

"Dear Mrs. M'Kean,—I duly received your letter of the 31st inst. Everything I have done for Greenpond strengthens your security; and I beg to assure you it is not my inclination, nor is it in my power, to take any step that can weaken it. I do not understand compound interest. The property owes you and your family £2,000 currency. So long as I am in possession you shall be paid your interest, and when the property yields it, the principal, as I wish never to pocket a farthing till everyone is paid." The petition prayed that the sum of £2,000, and interest thereon, should be declared to be well charged upon the estate of Greenpond, and the slaves upon it, at the death of the testator, Richard Sill, and that the respondent, Robt. Gray, should be declared to have gone into possession as trustee for payment of the legacy, and that an account should be taken of the rents and profits, and of a sum which the respondent had received as compensation money for the slaves upon the estate, and that out of that sum the respondent should be ordered to pay the demand of the petitioner, and for a sale of the estate. The respondent chiefly relied upon these facts—that at the time of the death of T. W. Sill, the slaves then upon the estate, for the manumission of which the compensation money alluded to had been received, were the estate and property of T. W. Sill, and that the Act of Assembly, (50 Geo. 3.) provided that such slaves should be considered as assets in the hands of the executors, in case the personal estate of any deceased person should be insufficient for payment of his debts, and that the surplus should be treated as residuary estate; that in the year 1846 the respondent received from the West Indian Compensation Commissioners a large sum of money upon the manumission of the slaves upon the Greenpond estate, under the provisions of 3 & 4 W. 4, c. 37, having lodged before the Commissioners his claim as husband of Margt. Kennedy; that counter claims were also lodged under the provisions of that Act by Hogg and Greene, to pre-

vent the effect of which the respondent himself paid off their demands, for which he claimed credit, and submitted that the petitioner, not having lodged her counter claims before the Commissioners, was not entitled to be paid out of the compensation money awarded to the respondent. The compensation money paid to the respondent amounted to £3,000, and the chief question in the present case turned upon the applicability of this fund to the payment of the petitioner's charge of £2,000. The case came before the court upon exceptions taken by the respondent to the Master's report, a bill having been previously filed in this court, under which an order of reference had been made.

Brewster, Q. C. in support of the exceptions.—The 47th section of 3 & 4 Wm. 4, c. 73, the Act for the Abolition of Slavery in the West Indies, enables the Commissioners to make general rules for regulating the distribution of compensation money among slave owners, and by sections 53 and 55 directs that parties having any claim, mortgage, judgment, charge or other incumbrance upon such slaves should make their claim before the Commissioners; and under the General Rules 1, 4, 5 and 6, made in pursuance of this Act, the Commissioners were enabled to decide as to the rights of parties to compensation money, not merely owners, but claimants. 5 & 6 W. 4, c. 45, was the next Act passed on this subject, and it provided (s. 14,) that where there was a litigated claim, the fund in dispute should be invested until the award of the Commissioner should be made. [*Lord Chancellor*.—Suppose a party were to have obtained possession of this compensation money by fraud, others having a just claim to it, could not it be followed in his hands (as in the case of a legatee,) in this court, even though he had obtained the award of the Commissioners?] The Act of Parliament binds all the world, as much those who have not appeared before the Commissioners as those who have. There has been an adjudication against the petitioner in this case, and she cannot contend that she had no notice. Where funds are provided by Act of Parliament in substitution for another species of estate which is destroyed, such money is to be received in the manner provided by Act of Parliament. In this case the state purchased the slave property. [*Lord Chancellor*.—What would become of the rights of remainderman in such cases? Does not section 10 of the latter Act provide for such cases?] Not after the decision of the Commissioners. Such a case might be set up if fraud were alleged, but that is not so in the present case. *Hill v. Reardon*, (2 Sim. & Stu. 431; s. c., 2 Russ. 608), is analogous to the present case. That was an application to the Court of Chancery for relief against the decree of the Commissioners appointed for awarding compensation for the property of British subjects confiscated in the French Revolution, and it was held that this court could not review the decision of the Commissioners, or alter the distribution of the fund. Lord Eldon for some time struggled against such a decision, but after full consideration of the case he felt bound to hold the decision of the Commissioners conclusive. *Lloyd v. Lord Trimleston*, (4 Sim. 297,) was a still

stronger case upon the construction of the same statutes; but it was held that, where the claim was made by the party in his real character, the award of the Commissioners was conclusive, and that this court had no right to interfere at the suit of a party claiming to have a better title. [*Lord Chancellor*.—Was not Mr. Gray a trustee for this money under the terms of this letter? Even supposing that he should not have put in a claim on account of his *cestui que trust*, that letter made him responsible as trustee.] It does not declare him to be a trustee, but only treats him as in possession of a certain estate subject to a certain charge. All classes of claimants should have lodged their claims, and whether they have lost their right by default or otherwise is immaterial.

Martley, Q.C. contra.—It is not contended that the respondent is a trustee to all intents and purposes, but only so far as the estate goes; and the decree originally made in this court in the present case decides this question: and he having taken the estate with notice of the trusts must be regarded as liable to account as a trustee. As to the sum which the respondent claims to be entitled to set off, that is a question for the office. It is admitted that, as far as concerns the public question of a sale of the slaves, the decision of the Commissioners was final; but there is another question behind that. If the petitioner had submitted her claims to the Commissioners they would have been bound by the decision of a court of competent jurisdiction, but not having done so her rights are not concluded. The second Rule of the Commissioners under the 47th section of 3 & 4 Wm. 4, cap. 73, provides "that the compensation monies to be awarded in respect of such slave or slaves shall be deemed to be of the same nature, and impressed with the same character for all purposes whatsoever so far as the same can be so taken and applied, as the slave or slaves in respect of whom such monies shall be allotted, and shall be subject to the same rules of distribution, and to the same charges and liability as the same slave or slaves respectively would have been subject to, according to the several estates and interests of the parties entitled thereto." The decision in the *Baton de Bode's case*, (2 L. J., n. s., 402,) only decides that there was but one tribunal competent to decide the question of compensation between France and English subjects. In *Lloyd v. Lord Trimleston* the Vice Chancellor in delivering judgment says, page 311, referring to the decision of Lord Eldon in *Hill v. Reardon*, "That learned judge says, 'in a case of trust or fraud I have not the least doubt of the jurisdiction of the court to interfere.' He by no means represents that the court will overhaul the judgment of the Commissioners, and go into the question for the purpose of determining whether, according to the law of France, they have made a right decision; and although Lord Eldon does say that the court has a jurisdiction, I do not understand him to say that it will exercise it to that extent." There is a manuscript case, *Brown v. Munroe*, decided in England on the 16th of March, 1852, but not reported. [*Christian, Q.C.*, objected to having a case cited which did not appear

in the authorized reports. *L. rd Chancellor*.—I do not see why I should not allow such a case to be mentioned. It will be for the court to say what authority it bears; but at any rate it may be alluded to as matter of inquiry.] In that case it was held that an annuity charged upon an estate in Jamaica was chargeable upon the compensation money given for the estate, no claim or counterclaim affecting it. In *The Earl of Clarendon v. Barham*, (1 You. & Coll. C. C. 688,) a party entered into possession of an estate in Jamaica, and in 1835 preferred his claim for compensation money, no counter claim was lodged, and he obtained a sum of money as devisee and owner of the estate; and it was contended that he was not liable to pay out of that sum a charge created on the estate by way of mortgage; but the court held, upon argument, in which *Hill v. Reardon* and *Lloyd v. Lord Trimleston* were both cited, that the compensation money was so liable.

Christian, Q.C. was called upon by the court in support of the exceptions.—It would be dangerous to interfere with the power placed in the hands of Commissioners of this nature, the more especially since the establishment of the Incumbered Estates Court in this country, as it might induce incumbrancers in that court, who were not before the court at the time the property was sold, to disturb the proceeding hereafter, especially in cases where the owners have become purchasers leaving some of the creditors unpaid. When the present case was previously before this court, the Lord Chancellor (Sir Edward Sugden) expressed a strong opinion as to the finality of the Commissioners' decision, and sent the case into the office for the purpose of ascertaining under what order of what court this compensation money was paid. There would have been no object in such a reference, if upon the face of the proceedings before the court, which are the same now as then, a clear trust had appeared to have been created. I admit that we must establish an exclusive jurisdiction in the Commissioners under this Act, in reference to persons in the position of these parties, whether they appear before them by counter claim or not, and equally conclusive in both cases. But it cannot be contended that the decree of the Commissioners will absolutely vest the property in all cases, as where executors hold upon trust. The 40th, 41st, and 42nd sections of the 3 & 4 W. 4, c. 73, give the Commissioners full jurisdiction to inquire into and decide the rights of parties, and section 47 prescribes the classes of parties litigant, and empowers the Commissioners to make rules for facilitating their decisions as to the rights of such parties, and sections 53 to 56 give these rules the authority of an Act of Parliament, and make them binding on all persons affected by them. But these rules were only as to matter of procedure, not of principle; and therefore the third rule, when it provides that the compensation money is to be subject to the same trusts as the slaves for which it was awarded, only means that the Commissioners are to deal with it in such a manner, but does not purport to govern the application of the money after it has been awarded. The second class of rules (under section 55) were also for directing their pro-

cedure; and Rule 5 makes it absolutely necessary that a counter claim should be lodged by incumbancers within four months from the lodgment of the claim. It is admitted that if the rights of the parties had been determined by the Commissioners, their decision would have been conclusive; and section 6 provides that where no counter claim has been lodged within the time specified, the Commissioners might proceed "to award compensation according to the several claims, upon the application of the parties or their agents." In *Hill v. Reardon* Lord Eldon had before his mind the peculiar object of the statute then before him, viz. the settlement of international rights, and not, as here, the decision of conflicting claims between parties. It cannot be contended here that the respondent went into possession as a trustee under the will. That is proved by the decree made in this case. He may have been liable as legatee, but that is one of those cases provided for under the Act, and therefore closed by the order of the Commissioners. This letter can be regarded as no more than personal courtesy, informing the creditors that he intends paying them when he is able; but it contains no consideration, and therefore cannot create an obligation. The decision in *The Earl of Clarendon v. Barham* was chiefly decided upon another point. The object of the provisions of 5 & 6 W. 4, c. 45, s. 10, was to give the Commissioners indemnity, and to enable parties to prosecute for the wrongful detention of their money in certain cases; as where a party had received a sum under a power of attorney, and appropriated it; but it did not refer to such cases as the present. [He also cited *Dundas v. Blake*, (11 Ir. Eq. Rep. 138.)]

Cur. adv. vult.

May 26.—LORD CHANCELLOR.—I have considered the cases that have been referred to in the argument, and still continue of the same opinion; although the question is one of some difficulty. It was urged that if I should be disposed to decide in favour of the claim, such a decree would be liable to produce much inconvenience: but I conceive that a decision the other way would be much more prejudicial. I was much struck by the language of Lord Eldon in *Hill v. Reardon*, where, referring to the decision of the Vice Chancellor that such a claim could not be entertained, he says, "When I first read the judgment of the Vice Chancellor I confess it startled me, not from any conviction that it was erroneous, but because it gave a shock to the notions which I had previously entertained with respect to cases of this kind; and if the 59 Geo. 3, c. 51, is to have the operation which that judgment seems at first to ascribe to it, I cannot help thinking that Parliament has enacted what it would have hesitated to enact, if it had been aware of the true effect of the law which it was making." The question in the present case is, whether a sum of money which it is admitted has been received by the respondent, who was the owner of this estate, as compensation money under the provisions of 3 & 4 W. 4, c. 73, is to be regarded as having been received by him in such a way and under such circumstances as that he shall be entitled to appropriate it to his own use discharged from the demand of the peti-

tioner. In fact the court is to consider, as in the case of *Hill v. Reardon*, what is the position of the respondent with regard to the estate. This case turns chiefly upon the special circumstances under which it has arisen, and the construction of this Act of Parliament, and does not involve much consideration besides; therefore the question now before me resolves itself into two branches—the construction of this Act of the Legislature, and the nature and character of Mr. Gray's possession of this estate at the time of his receiving the compensation money from the Commissioners, awarded under the provisions of the Act of Parliament. This compensation money was portion of a larger sum set apart by the Legislature, and divisible among several islands in the West Indies, and the proprietors of slaves in those islands, of which the original owner of this property (Richard Sill) was one. It appears that he being owner of an estate of this nature, made his will in 1795, and thereby bequeathed this property to his son Thomas Walker Sill, and also by his will bequeathed to his executors the sum of £2000, in trust to pay the interest to his daughter Barbara M'Kean during her lifetime, and upon her death the principal money to go over to her children: therefore, so far as the provisions of this will are concerned, his executors would have been accountable for the proper application of this money, irrespective of the provisions of the Compensation Act. Such are the provisions of the will, and in the latter part of it the testator provides that this money is to be paid by the persons who should be for the time being in the possession of the real estates out of the rents and profits. It appears that Thomas Walker Sill succeeded to the testator's estates, and continued in possession until his death, having previously given his daughter in marriage to Gray, the respondent in the present case, and having previously bequeathed to her his real and personal estates and thereby Gray (the respondent) became seized of the estate, subject to the charges created under the will of Richard Sill. Now it has been contended that this will only created a charge upon the estate, and did not raise a personal trust of such a nature as that the respondent should become liable as trustee, so as to come within the decision in *Dundas v. Blake*, in reference to the Statute of Limitations. That may be so; but it may also be that the words of the will, to which I have referred, may do more than create a mere charge upon the estate of the testator, inasmuch as he directs this money to be paid by the person in receipt of the rents and profits of the estate. This provision may, perhaps, carry the case beyond that of a mere charge upon the estate; but, in addition to that, there is something further to be considered in reference to the possession of the respondent, as to this estate. He having married the daughter of Richard Walker Sill, the estate became his in right of his wife. There does not appear to be any peculiar law as to the devolution of such property in that country. However, Thomas Walker Sill had made his will, and under that he had rendered this estate liable to the payment of his debts; and it appears that he owed certain judgment debts to two persons of the name of Hogg and Green, and that they insisted

upon their rights. But prior to their claims there existed this charge of £2000. In order to liquidate these debts, a deed of trust had been executed, to which Margaret Kennedy and Barbara M'Kean and her husband were parties; but it does not appear that her children were parties to this deed, therefore, it may be a question how far they were bound by it: however, I will pass by this question at present. The possession of the estate was under that deed vested in trustees; there is however no reference to their conduct in the present suit; but when the term vested in them was approaching its termination, Mr. Gray thought that it would be desirable to enter into possession of these estates, and he proposed to do so, by paying off certain debts that were due to persons who had executions upon the estate; and as to these sums it appeared to me during the argument that he was entitled to credit; however that may be, it appears that he got into possession of the estate. Having obtained that position, he appears to have opened a correspondence with the family of the M'Kears, and one of his letters appears to me to be of particular importance in considering his liability in the present case. He was at this time in possession of the property, having, I believe, the legal estate, and he writes as follows. [His Lordship read the letter of December 31, 1853.] He thereby declares his intention to be, to pay the interest upon this debt of £2000, and the principal, when the estate produced sufficient to do so, stating that he had no intention of appropriating any portion of it until these demands were satisfied. Now I do not mean to say that this letter would enforce a personal obligation upon him to pay the money; but it certainly is a statement that as long as he was in possession of the estate he would hold himself liable to pay out of the proceeds the interest of this money, and the principal, when forthcoming; and upon the whole it appears to me to be a very proper letter. His position was this—being owner of an estate charged with a certain incumbrance, for the payment of which he was not personally liable, he writes a letter, by which he declares that he holds possession of the estate for the purpose of paying off that charge, as well the interest as the principal, out of the rents and profits. Now it appears to me that this letter contains in itself a declaration of trust, altogether apart from the question of *nudum pactum*, which has been relied upon as defeating the effect of this document. It appears to me to amount to a plain declaration of trust as to this estate. It appears that the respondent continued in possession until he found that the estate was in fact a *damnosa hereditas*, for although the proceeds were considerable, yet he did not realize any profit out of it, and it even appears that he offered to some parties to take it off his hands. It was under these circumstances that the former bill was filed in this court by the petitioner, praying for an account. That bill came to a hearing, and it appears that the Lord Chancellor reserved the question as to the liability of Gray, but directed that an account should be taken of the rents and profits of the estate, while Gray was in possession, affirming the principle that he was accountable to the petitioner; and that this compensation money which he had received was

not in fact his own, but that the petitioner was entitled to a portion of it; in other words, that the estate in his possession was clothed with a trust for payment of this money to the petitioner; and whatever be the proper meaning of the word, I doubt whether the term "trust" is inapplicable to the position of the respondent as owner of the estate, whether as devisee of the property under the will of Thomas Sill, or as holding it liable to his own engagement, does not appear material, but it appears to me that he was held so liable in this court under that decree, and the validity of it is not questioned. Now as to the application of this compensation money, it has been contended that it was open to the petitioner, when this case was at the hearing, to have argued this matter, and I am told that the court was rather against making this money liable to this demand. Had the decree been upon these grounds I should treat the decision with deference, and be bound accordingly; but nothing of the kind appears from the decree itself; upon the contrary, it appears to me that the decree goes upon the assumption that the respondent must be, to some extent, liable to account for this money, for it directs the Master to ascertain in what manner he got this money, and therefore, so far from concluding the case, as has been suggested, it appears to go rather in the contrary direction. Therefore the respondent here is bound to account, and then comes the question whether or not this sum is to be excluded from this account, for it is admitted that if this money had come to him in any other way than as compensation money, he would have been liable to account to the petitioner, although he might have sold without notice of the claims of the children; and therefore the question comes to this, not whether the respondent is to account for the proceeds of this estate, but whether this compensation money which he has received has come to his hands in such a way as that he is not to be held accountable for the application of it. Now Mr. Gray must be regarded as devisee of this estate, just as much as if he had taken it under the will of the testator, Richard Sill. Under that will it was charged with this sum of £2000, and in addition to this charge upon the estate for payment of this money, there was a direction that it should be paid by the person for the time being entitled to the rents and profits of the estate. There was therefore something more than a mere charge of this sum upon the estate. Again, Mr. Gray signs the declaration to which I have alluded, or in other words he gives an express declaration of trust as to the proceeds of the estate. Now if he had sold this estate, it is admitted that he would have been liable. What has happened? The estate has been sold, and he has got the purchase money, and the only question is, whether, on account of the manner in which it has been sold, he is not liable to account for the purchase money. It would, so far, appear to have been as much a purchase of the estate as if the respondent had himself sold it. A sum had been set apart for compensation to the owners of slave property, and that being so, Mr. Gray, as the Act directed, made his claim, but without any reference to his title under the will except in reference to Mrs. Gray, in whose right he claimed the estate.

No question was raised as to his right, and the compensation money was awarded to him in that character, and the question now is, whether or not his creditors have lost their rights? That depends to a great extent upon the provisions of this Act of Parliament, and I am asked to decide that he is the absolute owner of this money; but when I am called upon to decide a proposition so much opposed to the principles of equity, I should require to be shown very strong language indeed to justify such a decision; but so far from that, I find, on comparing these two Acts, almost an express declaration to the contrary. No doubt, some of these rules were for the guidance of the Commissioners in their procedure, but it cannot be contended that this was their sole object; and in the case reported in 3 Knapp, P. C. Cases, the court says, p. 244, that the alteration made in one of these rules was for the purpose of giving a more extensive jurisdiction to the Commissioners than they had previously; and the 6th rule was accordingly moulded for that purpose by the addition of the words, "but shall be subject to all equities." No doubt that rule was, to a certain extent, for the purpose of guiding the mode of procedure, but the case is not confined to that, nor can I conceive that the Commissioners intended to set aside all rules of law and equity. Supposing the above words that were added to the 6th rule had been in the section of an Act of Parliament, what would have been the effect of it? It would amount to a declaration that the Commissioners were to be the persons to declare who was entitled to the compensation money, but that after their award the monies were to be subject to all the equities that might affect them in the hands of the persons to whom they were awarded. No doubt the object of this rule was for the guidance of the Commissioners when they had proper materials before them; but it cannot be said that the effect of it was to conclude the matter before them in all other cases, as, for instance, here, where the trustee, upon making his claim, did not mention the rights of his *cestui que trusts* before the Commissioners. Apart from the effect of this rule we must consider the effect of section 10, of the second Act, (5 & 6 W. 4, c. 45,) which provides that nothing therein shall "prevent or prejudice any person or persons from prosecuting such claim against the person or persons to whom payment shall have been made by the Commissioners as aforesaid, under the provisions of this Act," and which must apply to cases of this nature. This proviso, (and I read it as applicable to the provisions of both Acts,) clearly contemplated, not claims that could not have been brought under the notice of the Commissioners, but claims that might have been submitted to their adjudication, and that, but for the operation of that provision, might be considered as concluded; and it therefore saves the right which any person might have asserted against the person in possession of this compensation money, if he had come by it in any other way than this; that is to say, that he should not be barred from proceeding to enforce his rights any more than he would if the owner of the slave estate had sold it himself, and thus obtained the purchase money. Taking that view of

this case, as to the law and construction of these Acts, and considering the natural justice of the thing, and that the owner of this estate was bound in conscience to have received this money subject to the charges existing against the estate, and taking an equitable view of the entire case, and considering that Gray was clearly owner of an estate liable to the payment of this charge, and that being so he writes to Mr. McKean the letter alluded to, makes his claim as owner of the estate, and gets this compensation money, which must be considered as representing the *corpus* of the estate, is it to be said that, under these circumstances, the petitioners have lost their rights, and that Mr. Gray is to be allowed to put this money in his pocket, discharged from their claims? I should require very strong language, indeed, to lead me to such a conclusion. As to the authorities cited in *Hill v. Reardon*, as well when it was before the Vice Chancellor as when the Lord Chancellor came to consider it, it was admitted that in some cases the court had the power of laying hold of this money; and in page 629 Lord Eldon says, "I can fancy one hundred cases in which the decision of the Commissioners would not only not be a bar to the person claiming equitable rights, but would even operate in support and in furtherance of them. The decision of the Commissioners or of the Privy Council, in favour of a person claiming as an executor or trustee, could never preclude those who claimed to be his *cestui que trust* from coming here to assert their rights." He thus shows that such a demand is to be regarded as an adverse claim, not closed by the decision of the Commissioners; and in page 631, he says:—"The first question is, whether an award made in favour of A B by the Commissioners acting under the conventions between France and this country, is not only to be conclusive, as between the subjects of this country and the French Government, but is also to destroy all demands in equity which these persons might have against A B, if he had received the money otherwise than through the channel of such award. My opinion is, that the conventions and Act of Parliament have no such effect." As I have already observed, if this sum of money had come to the possession of the respondent in any other way than through the award of these Commissioners, the petitioner's demand could not be resisted, and, therefore, the question is, whether these rules and Acts of Parliament have the effect of barring such claim. Perhaps the case of the French Compensation Commissioners was a stronger one than the present, for in that case the property was, as it were, lost to every one, who had been entitled to it, whereas, in the present case, it was not at any period lost to any one. So far the case may be considered as more favourable to the rights of the petitioners than the other case; but besides this, there is nothing in the rules or Act of Parliament to exclude the rights of these parties, or enable Gray to hold the property discharged of this claim. *The Earl of Clarendon v. Barham*, (1 Y. & C. 688,) is a strong case upon this subject, although there was some distinction between it and the present case. The facts were as follows:—[His Lordship stated the facts of the case.] The Vice-Chancellor says

in page 703: "He might probably have been required by any of the incumbrancers to take possession as an incumbrancer, or to devote the rents and produce of the property, or to allow them to be devoted, to the direct discharge of the incumbrances; but such a requisition was never made, and I am not prepared to say that he either intended, or was placed in a position in which by contract or duty he was bound to apply any portion of what he received from the property for crops or annual profits towards the liquidation of his own or any other incumbrance upon it." This is strong language, showing that the mere fact of his being an owner was not sufficient of itself to discharge him from this liability; but Gray was quite in a different position as to his possession of the property. In page 705 he says: "If the compensation money in respect of the Mesopotamia slaves, subjected with the estate to the charges executed by the settlement, had been received by Mr. J. F. Barham, it would, I think, as between his £10,000 and the other of those charges, have been incumbent on him to apply it in reduction of the capital of his £10,000. It represented part of the *corpus* of the property charged." In that case J. F. Barham was owner; but, as to this compensation money, it was held, that he was liable to pay the sum charged upon the lands out of it, as representing the *corpus* of the estate; therefore that case must be considered as going farther than the present one, for we have here the respondent in possession of the estate under a contract of his own creation, by which he agreed to apply the rents and profits in a certain manner, an element that did not exist in the case cited; but still he was held liable so far as the compensation money went. That case, therefore, carried the principle even farther than it is sought to be applied in the present case; and under these circumstances, considering the nature of Mr. Gray's possession, it cannot be said that he holds this estate adversely to the rights of the petitioner. I must, therefore, grant the prayer of the petition, as I consider that this compensation money should be applied as if it consisted of the rents and profits of the estate.

Decree for petitioner.

ROLLS COURT.

[Reported by R. W. GAMBLE, Esq. Barrister-at Law.]

NEWCOMBE v. THE DUBLIN AND WICKLOW RAILWAY COMPANY.—Nov. 28, 30, 1854.

Railway—Trespass—Injunction—Compensation—Railways Clauses Consolidation Act.

A railway company entered upon certain lands, without giving previous notice to the occupier holding under a lease, and without his consent, but having agreed with the owner of the lands, and they deepened a drain thereon, which had been in connection with the railway, but was not marked on their plans, but which was necessary for the maintenance of the railway, and was executed with as little injury as possible. The occupier presented a petition, praying an injunction to restrain

the company from committing waste, and from keeping the drain open, or keeping possession of the premises. Held, that the court ought never to interfere to restrain a company by injunction from doing a thing which has been already done; that if a company enter upon lands without giving the requisite notice, where notice is required, the proper course is to proceed at law for the trespass, as this court cannot in such a case properly estimate the amount of damages.

The motion was directed to stand over, to enable the petitioner to bring an action of trespass, first, to establish that the entry of the company on the lands without notice was not warranted by any statute, and secondly, to ascertain the amount of damages.

Quere, whether a company intending to execute any of the works mentioned in the 16th section of the Railways Clauses Consolidation Acts, when such works are not set out in the plans, can, for this purpose, enter upon lands not on the plans, without giving previous notice to the occupier of the lands.

A CAUSE PETITION had been filed in this case under the Chancery Regulation Act by R. J. Newcombe, against the Dublin and Wicklow Railway Company, praying that the company might be restrained by injunction from continuing to commit further waste on the petitioner's premises, and from continuing to keep open a certain dyke or trench cut across petitioner's avenue, and from continuing to retain possession of said premises, or from keeping any stones, soil, or earth thereon. The affidavit of petitioner stated that he was in occupation as tenant of certain premises called Edenville in the County Dublin, under an agreement for a lease at £105 per annum, for a term of which 70 years were unexpired, which rent had been since abated to £60 per annum. A portion of the line of the Dublin and Wicklow Railway Company between Kingstown and Dalkey intersected the said premises. The powers for making this line were originally vested in the Dublin and Kingstown Railway Company, under these powers were afterwards transferred by the 9th & 10th Victoria, chapter ccviii., to the Dublin and Wicklow Railway Company. The provisions of the Lands Clauses Consolidation Act, 1845, and the Railway Clauses Consolidation Act, 1845, were incorporated with the Kingstown & Bray Extension Railway Act. The Dublin and Wicklow Railway Company proceeded to make the line, and deposited the necessary maps and schedules pursuant to the Railway Act (Ireland), 1851, and the intersection of the petitioner's lands appeared on said maps. Joseph Fishbourne was appointed by the Company as arbitrator between the Company and the several owners of the lands through which the railway passed, and he made his draft award finding the petitioner entitled to the sum of £25 as compensation for the lands taken from him by the Company. The draft award was lodged in July, 1854, but no final award was lodged, and the Company, on the 2nd of November, 1854, entered upon the petitioner's lands without his consent, and committed waste by cutting a trench at right angles with the line of railway, and across the petitioner's avenue that leads from his dwelling-house. This trench

was not specified in the maps, nor made the subject of compensation. The company claimed a right to make the trench under the provisions of the Railway Clauses Consolidation Act, 1845, but they did not serve any notice of their intention to use the premises for any of the purposes permitted by this Act. The Company had already cut the trench 400 feet in length, and were continuing it, and were throwing up the spoil-banks on the land at each side. On the 8th of November the petitioner served a notice on the Company, calling on them to say by what authority they entered the lands, and were committing the waste, and whether they were prepared to compensate petitioner for same, and, if so, to what amount. In answer to that the Company, by their solicitor, made a verbal offer of £5 as compensation. The affidavit of the Company's engineer stated that in execution of the works of the railway between Kingstown and Dalkey, it was necessary to change the level by deepening the cutting adjoining the petitioner's lands; that, previous to this alteration, the water in the cutting adjoining these lands had been carried off by a drain constructed by the Dublin and Kingstown Railway Company through the petitioner's lands; that in consequence of this alteration it became necessary also to alter the level of this drain, and to reconstruct it at a lower level, so as to carry off the water from the cutting so deepened; that an arrangement had been made with a Mr. John Swansea, on behalf of the owners of the lands, for liberty to enter them to make these drains, but that no liberty was obtained from the petitioner, as he was supposed to be tenant from year to year; that in the construction of these works as little damage as could be was done, and only such as was absolutely necessary for the construction and maintenance of the railway, and that the company were at all times ready to make compensation for all damage actually done; that the sum of £5 was more than sufficient. There was also an affidavit of Mr. Swansea, showing that the matter was in doubt whether petitioner held under an agreement for a lease or as tenant from year to year, and that he, on the part of the owners, had given liberty to the company to enter the lands for the purpose. The petitioner's affidavit stated that he had used every means, in the first instance, to prevent the company from proceeding with the works, and had locked his gate, when they knocked down their own boundary wall, and proceeded; and that he subsequently applied to the police, when he found he could not prevent them from proceeding with the work.

Hughes, Q.C., (with him *O'Hagan, Q.C.*), moved the petition, which prayed that the company should be stayed by injunction of the court from continuing to commit any further waste, and from continuing to keep open the trench cut across the petitioner's avenue, and from continuing to retain possession of the premises so entered on, and from keeping the spoil stones and earth upon the petitioner's ground. The works in the execution of which the injury has been done to the petitioner, are not on the Company's plans, and we therefore say that the Company were not authorised to execute them without giving notice to the petitioner. They pretended that they were entitled to make the

trench for temporary purposes, but then they should have served notice; they had no right under the Act to enter to make this drain, and should be restrained by injunction. The 16th sec. of the Railway Clauses Consolidation Act only gives a right to make certain works, but not to enter on the lands; the right to enter or take the lands was given by subsequent sections, and in every case a notice to the owner was required. The provisions of the Land Clauses Consolidation Act, except the 16th and 17th sections, were not applicable.

Deasy, Q.C., appeared for the Company.

S. Ferguson followed on the same side, and submitted that an injunction could not issue in this case, because every thing which the Company intended to do on the lands had already been done—*Fouks v. Wills*, (5 Hare, 199); *Deere v. Guest*, (1 My. & Cr. 516); *Blakmore v. Glamorganshire Canal Company*, (1 My. & K. 182); *Coulson v. White*, (3 Atk. 21.) The rule is, that every common trespass is not a foundation for an injunction from the court when it is only contingent and temporary; but when it continues so long as to be a nuisance, the court will interfere by injunction to restrain the person from continuing it. Moreover, the Company were entitled to enter on the lands and make this drain without serving any notice, and they have not outstripped the provisions of the Act. The 16th section of the Railway Clauses Consolidation Act provides, that, subject to the provisions and restrictions in that Act or the special Act, or any Act incorporated therewith, it shall be lawful for the Company, for the purpose of constructing the railway or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works." Then follows a provision that the Company may make all descriptions of works "within the lands described in their plans, or mentioned in their books of reference or any correction thereof;" then is given a power to alter the course of any rivers (not navigable), brooks, streams or other waters, then "that they may make drains and conduits, into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway." Then follows a clause as to houses and offices, and then that "they may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead, and they may do all other acts necessary for making, maintaining, altering or repairing and using the railway: provided always, that in the exercise of the power by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special Act and any Act incorporated therewith provided, to all parties interested, for all damages by them sustained by reason of the exercise of such powers." When the company, therefore, found it necessary for the purposes of the railway to lower the drain, they clearly had power to do so under the section. As to the drain itself injuring the land, it is impossible but that a deeper drain must be of more service to the land than a shallower one. This being a work necessary for the railway, the court will not grant an injunction to stay it—*Tower and others*

v. Eastern Counties Railway Company, (3 Rail. Cas. 374.) In that case the Lord Chancellor says, that "Although in the latter cases the jurisdiction has been acknowledged and sometimes exercised, both where the nuisance was of a public and where it was of a private nature, the injunction has been to restrain, to prohibit, not to abate, to prevent irreparable mischief, not to undo what has been done." And further on in his judgment, at page 138, he says: "Lord Hardwicke said he had never known an order to pull down made on motion, and but rarely by decree, and Lord Thurlow in another case, though pressed by the order made by himself in *Robinson v. Lord Byron*, and urged to direct that a ditch should be filled up, as well as the further digging restrained, would only grant the prohibitory part of the motion, and refused the ordering part." Let us now consider whether, under the 33rd section of the Railway Clauses Consolidation Act, the company was bound to give notice. This section enacts that if such lands are required for certain purposes therein enumerated, the company shall, before entering thereon, give three weeks' notice in writing to the owners and occupiers; but the present case is not included among these purposes. The section then goes on: "that in case the said lands are required for any of the other purposes hereinbefore mentioned, the company shall (except in the cases aforesaid) give ten days' like notice thereof, and the company shall in such notices respectively state the substance of the provisions hereinafter contained respecting the right of such owner or occupier to require the company to purchase any such lands, or to receive compensation for the temporary occupation thereof as the case may be." Neither of the notices required by this section apply to the execution of any power in the construction of the railway. The three weeks' notice there mentioned only applies to those cases of land required for spoil banks, &c., mentioned in the preceding part of the same section, and the ten days' notice only applies to the temporary occupation of lands near the railway during the construction thereof, to which the 30th and subsequent sections apply. And this notice is not required for works done under the 16th section; this is the section under the provisions of which we say that these works were executed, and the only restriction imposed upon the company is, that they are bound to execute the works without doing any unnecessary damage, and to make compensation. The framework of the Railway Clauses Consolidation Act is this, the first class of powers given to the company commenced at section 6, and all the sections from this to section 30 are conversant about the construction of the railway, and works connected therewith. In the sections from section 6 down to section 16 certain directions are given about the construction of the railway itself; then the 16th section and subsequent ones deal with works connected with or necessary for the railway, the prior sections refer to the making of certain stations, &c., and notice is required to be given of their completion, and of liberty to inspect them. Then for the works permitted to be done under the sections from 16 to 30, under which the works come

that have been done in this case, no notice is required to be given by the company, except in section 18 they are required to give forty-eight hours' notice when the supply of gas or water is cut off. The sections from 30 to 45 relate to the temporary occupation of lands for spoil banks, &c., near the railway during its construction, and with regard to these notice is required; but the works in this case are not included under these sections. It is by the 33rd section that this notice is required; but *such lands* in the first part of the section applies only to the cases mentioned in that section, and the words "*said lands* required for any other purposes hereinbefore mentioned" refer only to the lands required for the purposes mentioned in the 32nd section, viz, lands taken for spoil banks and materials, and, not as contended for, both to the cases in the 16th and 30th sections. These words must be referred only to those cases about which all these sections from the 30th are conversant; the word "*said*" must be referred to the preamble which precedes the 30th section—"With respect to the temporary occupation of lands near the railway during the construction thereof." The last words of the section then conclusively show that this is the proper construction, for they require "that the company shall in such notices respectively state the substance of the provisions hereinafter contained respecting the right of such owner or occupier to require the company to purchase any such lands, or to receive compensation for the temporary occupation thereof as the case may be." This power is given by the 42nd section in all cases where the company enter on the lands for the purposes mentioned in these sections. The 43rd section then provides that the company shall pay compensation for the lands so temporarily occupied, by paying for the crops and damage within a month, and paying a rent half-yearly during the occupation; this plainly implies that these sections apply only to lands thus occupied during the construction of the railway. The powers given by the 16th section are general for the making of any necessary works, and the company are not confined to the lands actually required for the railway, nor are they restricted to temporary occupation during the construction of the line. This is a drain necessary for the proper upholding of the line, and they have a perfect right to go in and clean it or alter it without giving any notice—they are only required to do as little damage as they can; if there was a trespass by going on to the other lands it is most trivial, and is covered by the £5 offered by the company.

MASTER OF THE ROLLS.—From the map furnished in this case, and from a knowledge of the locality, it is evident that when the level of the railway between Kingstown and Dalkey had to be lowered in order to meet the continuation of the line to Bray, the drain which had been made for draining the line at the higher level was of no use; it is evident also that there must be a drain somewhere to drain the line; it is clear also that the company were entitled, under the Railway Clauses Consolidation Act, to make or alter this drain. The 16th section, under which this power is given, says

nothing about notice. The 30th and subsequent sections provide for compensation for the temporary occupation of lands; but where, as here, the drain is one necessary to be made under the 16th section, the only question is, whether it should be made after notice, or whether they could make it without giving notice; but in the end it resolves itself into a question of compensation, for a Court of Equity will not compel a company to replace an old drain which they have already taken away, and in the place of which they have made another; the only thing the company could do is, to fill up the drain which they have made. Sometimes the court employs an engineer to see if the drain made could be properly closed; but the court never grants an injunction to restrain a party from doing a thing which they have already done. It has been contended that the 3rd section of the Lands Clauses Consolidation Act has been repealed by the Railway Clauses Consolidation Act. But that has nothing to do with the present case. "The purchasing and taking of lands" has a technical meaning in the Act, and does not apply to the entry on lands for an easement. If the construction of the 16th sec. is as contended for by the petitioner, an action of trespass would lie, and then he should not come for relief to a court which from its very construction could not properly ascertain the amount of compensation. I will not direct an issue in this case; if I did so, and the petitioner got less than £5 compensation, he would have to pay the costs of these unnecessary and ill-advised proceedings. This motion must stand over; for I cannot grant a mandatory injunction when the company may have filled up the entire trench, or may be in the act of doing it. The course adopted in England is, that if the company omit to serve the necessary notice, (and that there is no opposition to their entering on the land,) and afterwards a dispute arises as to the amount of compensation, the company must bring into court the amount which they offer. I do not offer any opinion as to whether the 16th section is governed by the 33rd section. According to the practice in England, I will direct the money to be brought into court, and the respondents may make any offer pending the suit, and if a less amount of compensation is given, it will save them from subsequent costs. If this sum is now lodged in court, and the plaintiff accepts it in full for all damages, he may save the costs; but if he goes on after this, he does so at the peril of costs. I consider it improper to bring petitions in this court for paltry sums of this kind, even though it should be successful, and I think that I should in any case make both parties pay their own costs, and then the plaintiff will have no benefit from the suit.

Nov. 30.—The following order was made:

The petitioner in this matter, insisting by his counsel that the entry of the respondents on the lands of Edenville to make the drain in the petition and affidavits mentioned was contrary to the provisions of the Railway Clauses Consolidation Act, and was not warranted by the provisions of that or any other statute, no previous notice having been given by the re-

spondents to the petitioner, and the petitioner insisting that he has sustained damage, and is entitled to compensation from the respondents to the amount of £20 at the least, and the respondents insisting by their counsel that they were entitled under the provisions of the said Railway Clauses Consolidation Act to enter upon the lands of Edenville without serving any notice on the petitioner, and further insisting that any damage which the petitioner has sustained does not exceed £5, which the said respondents have always been and are ready to pay to the petitioner, and the petitioner by his counsel declining to accept the same; let the motion stand over to enable the petitioner, if so advised, to bring an action of trespass against the said respondents to establish—first, that the entry of the respondent on the lands of Edenville was not warranted by said statute, or by any other statute; and, secondly, to establish the amount of damages to which he, the petitioner, may be entitled, and the court doth reserve further order and the question of costs.

[An action at law was subsequently brought in this case for entering plaintiff's close, and cutting a drain across his avenue without making sufficient provision for carrying off the water, and for thereby intercepting the communication between the plaintiff's house and the road, and for depositing spoil upon and otherwise injuring the surface of plaintiff's lands, and for substituting this drain for another drain that was beneficial to plaintiff's lands, and for remaining in possession of said plaintiff's lawn for upwards of six weeks while making said drain, and in order to enable them to complete a portion of their line of railway, and that the defendants did not, previous to their said entry, give notice in writing of their intention so to enter to the plaintiff, who was occupier of said lands, whereby the plaintiff was deprived of the use of his dwelling-house, and suffered damage. The defendants pleaded that they had paid into court the sum of £10, which they alleged was sufficient compensation for the damage; but did not plead that they had a right to enter without notice. The issues were settled before Chief Justice Monahan, and the only issue left to the jury was, whether the £10 was sufficient compensation for the damage. The jury found for plaintiff £60 damages, in addition to the £10 lodged, and then the following consent was entered into, and made a rule of court: "In the matter of Ralph J. Newcombe, petitioner; the Dublin and Wicklow Railway Company, respondents.—By consent of the parties in this matter, Ralph John Newcombe, the petitioner, and the Dublin and Wicklow Railway Company, the respondents, testified by their respective solicitors signing hereof, it is hereby consented to and agreed upon, that all further proceedings in this matter shall be stayed, except so far as may be necessary for giving effect to this consent, and that the respondents, the Dublin and Wicklow Railway Company, shall pay to the petitioner his costs in this matter, including the costs of this consent, and of making same a rule or

order of this honourable court; and further, that it be referred to one of the Taxing Masters of this honourable court to tax and ascertain the said costs, and that this consent be received and made the rule or order of this honourable court. Dated 26th April, 1855.—WILLIAM CAREY, Solicitor for the Petitioner. THOMAS H. GUINNESS, Solicitor for the Dublin and Wicklow Railway Company.”]

WYBRANTS v. WYBRANTS.—Feb. 1855.

Practice—Receiver—Sale—Rents—Tenancy under the court.

Where lands are let in Chancery for seven years pending the cause, and the lands are sold in the Incumbered Estates Court, the tenancy does not determine till the Receiver has been discharged by the Side Bar Order.

Where the gale days in the lease from the court were the 1st of February and the 1st of August, and the sale was on the 6th of July, and the conveyance to the purchaser was made on the 26th of July, an agreement was then made between him and the tenant to commence a new tenancy from the 6th of July. The receiver was discharged on the 28th of July, but having previously received from the tenant the portion of the gale up to the 6th of July, he was directed to pay this amount over to the purchaser.

CERTAIN lands of Tubberdaly, over which a receiver had been appointed by the Court of Chancery, were set up and sold in the Incumbered Estates Court on the 6th day of July, 1854, and on that day Mr. William Nesbitt was declared the purchaser. The purchase money was paid on the 20th July, 1854, and the deed of conveyance was executed on the 26th July. Part of the lands had been let under the court to a Mr. Henry Clarke, by a lease bearing date the 11th May, 1854, to hold for seven years pending the matter, yielding and paying unto the Master the yearly rent of £565 by two even and half-yearly payments on the 1st day of February and 1st day of August in each and every year, and “also yielding and paying unto the said Master or his successors, or such person as should be appointed receiver or receivers of the rents of the said premises as aforesaid, a proportionable part of the said rent for and in respect of the period which shall elapse from the half-yearly day of payment next preceding the termination of this demise, up to and until the termination thereof, such proportion of rent to be payable on the day of the termination of this demise.” The said H. Clarke paid to the receiver the sum of £239 18s. 6d., as for his proportion of the rents of these premises from the 1st February, 1854, being the gale day preceding the sale, up to the 6th July, 1854, when Mr. Nesbitt was declared the purchaser, and had made an agreement to become tenant to the purchaser from that day. The Receiver, on the 8th February, 1855, had passed his final account, giving credit for the said £239 18s. 6d., and was directed by the Master to lodge the same to the credit of the matter within a fortnight; and by a Side

Bar Order of the 28th July, the Receiver was discharged off the lands.

A. Norman, on behalf of Mr. Nesbitt, the purchaser, now moved that the Receiver might be directed, out of the sum of £306 3s. 10d., to pay to the said purchaser the said sum of £239 18s. 6d., being the proportion of the gale of rent of the lands to which Mr. Clarke was tenant, which had accrued from the 1st February, 1854, to the day of sale on the 6th July, 1854. It is now settled that the purchaser of lands in the Incumbered Estates Court is entitled to all rents accruing from the gale day prior to the sale, he paying interest on his purchase money from fourteen days after the day of sale. This practice is settled by the certificate of the Incumbered Estates Court in the cases of *Hoops v. Kingston*, (5 Ir. Jur. 221,) and in *Walcot v. Condon*, (6 Ir. Jur. 382); but a portion of that rent has been received from the tenant by the receiver, viz., that portion of the gale which was accruing from the prior gale day, (viz. the 1st Feb.) to the day of sale in July. If this portion of the rent had not been paid to the receiver, the purchaser would have been clearly entitled, under the rule of the Incumbered Estates Court, to have received it on the 1st August, 1854, as making a portion of the gale which fell due on that day. In *Hoops v. Kingston* the receiver was directed to pay back the money to the tenant, but we submit that when the purchaser is entitled to receive it, the court should direct the receiver to pay it to him. The receiver did not exceed his authority or commit any error in receiving the money from the tenant, for in the case of *Jameson v. Farrer*, (3 I. E. Rep. 513,) an attachment was ordered against a tenant, on the application of the receiver, for a portion of the gale of rent accruing up to the day of sale of the lands. In *Jackson v. Jackson*, (3 Ir. E. Rep. 591,) the Court of Exchequer, on the application of the purchaser, granted a conditional order against a tenant who had given up possession, ordering him to pay this portion of a gale to the purchaser. The court, in the case of *Walcot v. Condon*, declined to make such an order, but it is therefore the more necessary, when the money has been paid to the receiver, that, for the protection of the purchaser, the receiver should be directed to pay it over to him, and not to return it to the tenant, as was done in *Hoops v. Kingston*.

Pilkington for the tenant.—The case of *Jameson v. Farrer* does not apply; that was an application by a receiver against a tenant under the court, to enforce the payment of a portion of a gale of rent up to the day of sale, the rent which here has been already paid by the tenant to the receiver. The question arose in that case in consequence of the tenant not having executed the lease from the court, but he was held bound to pay the apportionment notwithstanding. The case of *Jackson v. Jackson* was to the same effect, only that the application was by the purchaser against the tenant, but the sale was out of court, and there was an agreement that the tenant should pay the purchaser, the court only confirmed the sale. In *Walcot v. Condon* the court did not decide this point, neither does the case of *Creed v. Creed* rule it, as that case only

decided that a tenant under the court was entitled to emblements when put out of possession in the middle of a gale. No question was raised as to apportionment, but if the purchaser was entitled to this portion of the gale of rent, he would have been entitled to set it off against the emblements. This matter was discussed before Sir William M'Mahon in the case of *Kiwan v. Blake*, (1 Hog. 151.) and he laid down several General Rules, one of which is that "a purchaser who pays in his purchase-money is entitled to the rents from the gale day previous to the lodgment of three-fourths, if the purchase be completed within the current gale from the bidding." This evidently applies to a current gale, and a continuing tenancy, but the case made by the purchaser here is that the tenancy determined on the 6th of July, and that there was a new tenancy from thence. We submit that the purchaser is entitled only to rents that fall due during his possession after he has fully acquired his right.

Adair, for the receiver, moved a notice for his discharge.

MASTER OF THE ROLLS.—I think it is a mistake to suppose that the tenancy determined on the 6th of July; the tenancy did not determine till the 28th of July. It was not the conveyance that determined the tenancy; the court is in possession until the receiver is discharged. The words "pending the cause" in the lease means up to the time when the purchaser is put into possession. I could issue an attachment against any purchaser who went into possession before the receiver is discharged. The side-bar rule, entered up for that purpose here, was not entered up till the 28th of July. When the case of *Walcot v. Condon* was before me, I ascertained that the practice of the Incumbered Estates Court was different from the practice in this court, for there the purchaser must always lodge, along with the purchase-money, a sum for interest upon it from fourteen days after the day of sale, and then I was of opinion that when it was so lodged with interest from the fourteenth day after the sale, it should be taken as if lodged upon that day. A difficulty may arise here; but perhaps it is only a nominal one. The purchaser under this practice is entitled to rents falling due after the lodgment, that is, after he has in effect lodged the money, viz. after the fourteenth day from the day of sale. Now the sale here was on the 6th of July, and on this motion you have treated the tenancy as if it determined on that day, that is, before the end of the fourteen days, and before the purchase money can be taken to be lodged. If the purchaser becomes entitled, and the tenancy determines on the same day, the tenant is then bound to pay the portion of rent due up to the determination of the tenancy. But here the tenancy did not in fact determine on the 6th of July, but on the 28th of July, for it is only when the purchaser has obtained possession of the estate that the jurisdiction of the court over it altogether ceases, and it cannot then interfere with the rents, but the receiver continues in receipt of the rents till the purchaser is put into possession, and when he is, the receiver cannot interfere with the lands.* When

proceedings are taken in the Incumbered Estates Court for the sale of the lands, the parties cannot, pending that cause, enter the side-bar rule to discharge the receiver, and the receiver, up to the time when he is so discharged, has a right to levy the rents by distress upon the lands, and this court would not be bound to recognize the sale in the Incumbered Estates Court until the receiver was so discharged. The tenancy then continued up to the 28th of July, and the tenant would be liable in an action at law for rent falling due on that day. Then, as the purchaser in the Incumbered Estates Court is entitled to the rents accruing from the prior gale day, I may direct the receiver to pay over so much of that rent as has been received by him, to the purchaser, who must abide his own costs. The petitioner to have his costs as costs in the cause.

The following order was made:—

"Be it so on original notice, and declare the petitioner entitled to his costs of appearing on said original notice, as part of his costs in the matter, and let the said purchaser abide his own costs of said original motion; and be it so on cross notice, and let Thomas R. Hardy be likewise at liberty to deduct out of his balance the sum of £7 12s. as and for the costs of said cross notice and of vacating his said recognizance, and let said Thomas R. Hardy have ten days from the date of the order to invest and transfer the residue of said balance, as directed by the Master's certificate at foot of his said final account."

KING v. FIELD.—May 3, 1855.

Practice—Security for costs.

An officer in the navy of the East India Company service will be required to give security for costs.

Henderson moved on behalf of the respondent that the proceedings in this case be stayed until the petitioner, who was described in the petition as an officer in the navy of the East India Company service, and at present residing in Bombay, do give security for costs. *Powell v. Bernard*, (1 Hog. 144); *Murphy v. Thorpe*, (10 Ir. L. Rep.)

R. Osborne, for the petitioner, submitted that as the respondent had vested in her as trustee the lands of the petitioner within the jurisdiction, and received the rents of same, for an account of which the petition was filed by the *cestui que trust*, the court would not grant the application. *Fisher v. Bunbury*, (S. & Scully, 625); *Gouran v. Barnett*, (Sa. & Scully, 651); *Long v. Tottenham*, (1 Ir. C. R. 127); *Blakeney v. Dufaur*, (2 De G. Mac. & G. 775.)

The MASTER OF THE ROLLS stated he would not make any order until he ascertained by whom the commission of the petitioner was signed.

[His Lordship subsequently made the order in the terms of the notice.]

MINCHIN v. DILLON.

BYRNE v. DILLON.—June 8, 1855.

Receiver—Extending to other lands—Petition under 5 & 6 Wm. 4, c. 55, and 3 & 4 Vic. c. 105—Costs.

When a receiver has been appointed under the Judg-

* See Dobbs on Sales, p. 97.

ment Acts to pay the amount of a judgment out of certain lands, he may be extended to other lands to pay the same judgment, on motion upon notice. If a receiver petition be presented for this purpose, the Taxing Master will be directed to tax the costs of the petition as costs of a motion.

A PETITION under the Judgment Acts had been filed in this matter on the 21st of April, 1855, stating that the petitioner was the owner of a judgment of Michaelmas Term, 1815, for the penal sum of £400, and that in 1853 he had presented a petition under the Judgment Acts, and by an order made in the cause of *Minchin v. Dillon*, the receiver appointed in that cause over the lands of Old Leighlan and its subdenominations, being the lands of the respondent Francis Dillon, had been extended to pay the petitioner the amount due on foot of his judgment; that there had been a report finding the amount due to petitioner, and finding the priorities of the several creditors on the estate, and there was no likelihood of the petitioner being paid for many years the amount due to him; that the respondent was owner of other lands not included in this cause, over which another receiver had been appointed, but who was now discharged. The petition now prayed that a receiver might be appointed over those other lands, and that the receiver now over the lands in the first cause be extended over these lands also, upon his giving additional security. An order had been made by the Lord Chancellor upon the petition as follows: "Let notice be served on the respondent, and on any person in receipt of the rents of any part of the lands and premises as a creditor; that unless in ten days after service thereof cause shall be shown to the contrary, an order will be made pursuant to the provisions of the said Acts of 5 & 6 W. 4, c. 55, and 3 & 4 Vic. c. 105, for the appointment of a receiver to receive the rents and profits of the lands and premises mentioned in the petition preferred on the 21st day of April, 1855, by the petitioners in this matter to the Right Hon. the Lord High Chancellor of Ireland, viz. the lands and premises in the schedule hereunto annexed, or a competent part thereof, to pay the sum of £406 3s. 2d. stated to be due to the petitioner, exclusive of costs, on foot of the judgment in the petition mentioned, that is to say, a judgment for the sum of £440, late currency, obtained by Mr. Darby in Michaelmas Term, 1815, against the respondent.

M. O'Donnell, for the petitioner, now moved that notwithstanding the cause shown by the respondent, a receiver might be appointed over the other lands, or a competent part thereof, to pay the petitioner the amount due on foot of his judgment. A petition had been filed in this matter to extend the receiver to the other lands, though it might perhaps be done by motion on notice; for in *Clendenning v. Lord Oranmore*, (9 Ir. Eq. Rep. 150,) it was decided that a judgment creditor having obtained a receiver under the Judgment Acts over certain lands of his debtor may, after the lapse of more than a year, get a receiver under the Acts over other lands of the debtor without reviving his judgment. But, as the practice does not seem quite settled, we thought it best to proceed by petition here.

June 8.—MASTER OF THE ROLLS.—It is quite

unnecessary to file a petition for the purpose of appointing a receiver over additional lands for the payment of the same judgment. The practice of the court has always been, when a petition has been presented on foot of a judgment to appoint a receiver, suppose over Whiteacre, and the creditor afterwards discovers that the debtor has lands of Blackacre, he has only to serve a notice, and apply for an order to appoint the receiver over Blackacre, and it is usual to make such order. A second petition would only be the cause of incurring an unnecessary expense. Moreover, if an order were made on a second petition for appointing a receiver, it might be referred to another Master, and no notice might be taken of the first petition, and then a second receiver might be appointed, so that any such practice would be the cause of great inconvenience.

"Let James Dillon, the receiver appointed in this cause, and extended to this matter, be appointed over the lands and premises in the said petition mentioned, called the Forty Acres, Carlow, and Dublin Road, Carlow, upon his entering into additional security by recognizance before the Master in this cause and matter, or before a Master Extraordinary in the country, to be first approved of by said Master, in the sum of £340, conditioned to account, as in such cases usual, for payment of the said sums of £203 1s. 7d. and £203 1s. 7d. now due to the said petitioners for principal and interest, together with their costs on foot of the judgment in said petition mentioned and the costs of the motion. But, a petition having been unnecessary, let the Taxing Master tax the costs as the costs of a motion."

INCUMBERED ESTATES COURT.

[Reported by R. W. OSBORNE, Esq., Barrister-at-Law.]

IN RE JOHN BINDON SCOTT'S ESTATES.

May 21, 1855.

A solicitor bidding at a sale in the Incumbered Estates Court, and signing his name in the book "in trust," without disclosing the name of his cestui que trust, under the circumstances of this case held personally liable for the deficiency which arose on a resale of the same lands.

THIS case was an appeal from the ruling of Mr. Commissioner Hargreave. The facts of the case, as disclosed by the affidavits, were as follows: The O'Gorman Mahon being desirous of purchasing two lots of the Scott property, called Knoppogue and Masnery Lane, which was advertized to be sold on the 2nd of November, 1854, verbally instructed Mr. H. G. Grady to bid for same to the extent of £13,000, informing him, that he and his wife were entitled to £20,000, which was in the funds in the name of the trustees of his marriage settlement. The O'Gorman Mahon also showed to Mr. Grady a letter signed by him and Madame O'Gorman dated from Paris, and directed to the three trustees of his marriage settlement, authorizing them to take the necessary steps to complete the purchase of the lands. Mr. Grady had, up to this time, a very limited knowledge of The O'Gorman Mahon, hav-

ing met him some years since in France, and knew nothing of his affairs. Mr. Grady did not make any inquiries as to the correctness of the statements made to him by The O'Gorman Mahon, and did not communicate with the trustees as to their intentions or powers over the trust fund. The sale was held on the 3rd of November, 1854. Mr. Grady bid for Knoppogue £10 310, and Masnery Lane £2250, making in all £12560, and signed the Sale Book "Henry Grove Grady, in trust." It appeared there were two other competitors for the lots, one of whom bid within £40 of the price they were knocked down for. The trustees of The O'Gorman Mahon's settlement declined to become the purchaser, they not having at any time given their consent to the proposed application of the fund. Mr. Grady not having paid the purchase money, an application was made to Mr. Commissioner Hargreave, on the 28th of November, that the said lands so purchased should be set up and resold at the risk and expense of Mr. Grady. The commissioners ordered, that a re-sale be made without further order unless the trustees of the settlement, within fourteen days, accept the trust, the re-sale to be made on the terms prescribed by the 22nd section, (12 & 13 Vic. c. 77.) Mr. Grady did not appear from this order. The lands were resold on the 23rd of February, 1855, and produced £2360 less than on the previous sale in November. Upon the application of the owner and petitioner, and also the creditors, Mr. Commissioner Hargreave ruled that Mr. Grady should lodge the said principal sum with interest, or otherwise an attachment would issue.

Rolleston, Q.C., Hayes, Q.C., and F. Walsh, Q.C., for Grady.

Longfield for the inheritor.

Osborne for the creditors, cited Hobhouse v. Hamilton, (1 Hog. 401); Studderts, Minors, (1 Hog. 120); Newman v. Fitzgerald, (6 I. E. R. 258); 1 Sug. Vendors, 11 Ed. 79.

June 13.—The court on this day affirmed the judgment of the Commissioners, without prejudice to Mr. O'Grady's rights against The O'Gorman Mahon.

COURT OF COMMON PLEAS.

TRINITY TERM, 1855.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

COPINGER V. QUIRK AND WIFE.—June 3.

Demurrer—Misjoinder—Coverture—Rent.

The plaintiff sued the defendants jointly for a year's rent accruing out of premises in which the female defendant had, dum sola, become possessed for a term of years by mesne assignment; one half year's gale had accrued due before her marriage, the other gale during the coverture. The defendants demurred to the summons and plaint on the ground of misjoinder of causes, inasmuch as the husband should have been sued alone for the gale which accrued during coverture. Held, overruling the demurrer, that the husband and wife were jointly liable for the rent which accrued during

coverture, and were, therefore, both properly defendants in the action.

DEMURRER. The summons and plaint was brought to recover the sum of £339 19s. 10d. for rent, rent charge and dilapidations due by the defendant as assignee of a lease. The plaint stated the lease to have been made by the Hon. and Rev. John Blackwood, of the lands of Banard, to one Maurice Brown for the term of 31 years, with a covenant on the part of Brown, his executors, administrators and assigns, to keep and deliver up in repair. That Blackwood by his will devised the reversion in said premises to Josiah Dupre Alexander and Thomas Clark, and that Alexander and Clark by deed conveyed the reversion to one Richard Copinger, who afterwards by his will devised the said reversion to the plaintiff. That the estate of the lessee Browne became vested by mesne assignment in the defendant, Honoria Browne, and that said Honoria in the month of November, 1854, intermarried with and then was the wife of the defendant, James Quirk. That after the plaintiff became seised of the reversion, and after the said Honoria became such assignee of the lease, one year's rent, &c., became due to said plaintiff. Demurrer thereto, assigning for causes, "That the summons and plaint does not disclose any causes of action good in substance against the said defendants, because that said summons and plaint contains causes of action which cannot be brought against the defendant Honoria jointly with her husband together with causes of action which, if well founded in fact, can be brought against the defendant Honoria jointly with her said husband; and also because said summons and plaint discloses causes of action which should be brought against the said defendant, James Quirk, alone, together with causes of action which should be brought against said defendant, James Quirk, jointly with the defendant Honoria, and because there appears on the face of the summons and plaint to be a misjoinder of causes of action."

E. Sullivan (with him Exham) in support of the demurrer.—Causes of action, properly brought against the husband alone, joined with causes of action brought against husband and wife, are improperly joined. The plaintiff should have sued husband and wife for the first gale of rent, and the husband alone for the last gale: the plaint is, therefore, bad for misjoinder.—2 Saund. 117, L. & I.; *May v. House and wife*, (2 Chitty R. 697.) The 84th section of the Common Law Procedure Act does not apply, as it is only discretionary, and does not take away the right to demur. Notice of the misjoinder could not be given, as there are several counts. The wife here never entered into any covenant, she is only assignee; and if an assignee assigns over before breach, he is not liable; so marriage is an assignment for the whole term to the husband during the joint lives of the husband and wife, and the legal estate is in the husband, and he has the power to dispose of it, and so her liability is merged in his during the coverture.—Co. Lit. 351, 300, 46, a. If it be a fee simple, the husband takes a freehold interest in right of the wife during their joint lives. *Robertson v. Norris*, (11 Q. B. 916.) The wife

cannot surrender the premises; the husband alone can do that; and if he becomes insolvent, they pass to the assignee. A *feme covert* cannot commit waste; the husband alone is answerable. *Bingham v. Lee*, (13 Sim. 396); *Horsley v. Daniel*, (2 Lev. 145.) The case of *Billingsworth v. Spearman*, (11 Mod. p. 169, case 220,) will be cited on the other side, but it decides nothing.

Chatterton (with *Coppinger, Q.C.*) contra.—The true rule of pleading is that in an action on a contract made by the wife before coverture for a breach during coverture, the plaintiff has an option to sue the husband alone or joined with the wife.—*Chitty on Pleading*, vol. i. p. 66. The rule contended for by the other side would necessitate the bringing of two actions. When a lease is made to the wife, *dum sola* debt lies against both husband and wife for a breach during coverture—*Anon.* (6 Mod. Case, 349, p. 239.) Under the 80th sec. of the Common Law Procedure Act this is not a case for a demurrer, and the demurrer is too large; it ought to have been confined to that portion of the plaint as to which they say the wife ought not to have been joined. The husband and wife might have been sued for the first gale of rent, but the husband ought to have been sued alone for the last gale. [The following authorities were cited—*Walford on Parties*, p. 944; *Viner's Ab. Bacon*, Fem. E. pl. 1; *Johnston and Wife v. Lucan*, (1 Ell. & Bl. 659, s. c. Law Jour. Q. B. 174); *Wildman v. Wildman*, (9 Ves. Jun. 177); *Dunstan and Wife v. Burwell*, (1 Wils. 224); *Middlemore v. Goodall*, (Cro. Car. 505); *Aleberry v. Walhy*, (1 Strange, 229); *Comyns Dig. Bacon and Feme*, pp. 237, 813; *Williams on Executors*, 724; *Wrottesby v. Adams*, (Plowd. 191–2); *Bracebridge v. Cooke*, (Plowd. 418).]

Exham in reply.—No case has been cited on the other side to show the liability of the wife when assignee of the term; the authorities cited only apply to the case of an executing party; and in the case where it has been held that the husband and wife may sue, the wife had invariably been a party executing the instrument, and not a mere assignee. The husband alone is the party to make a tenant to the *præcipe*. During the joint lives the wife may never have any estate, because the husband has the power, up to the last day, to convey away the estate.

Cur. adv. vult.

June 11.—*MONAHAN, C. J.*—We think this demurrer must be overruled. The argument advanced in support of the demurrer was that marriage operates as an assignment of the term to the husband during his life. It is conceded that it is an assignment of a portion of the term, and gives the husband the power of disposing of the whole term. But we are of opinion that marriage is not an assignment of the term to the husband, but that the husband and wife still continue possessed of the term, and are therefore both properly defendants in the action. Several matters prove this to be so; for instance, if the wife survives the husband, the residue of the term is hers, and she would be entitled to the arrears of rent which accrued during the coverture. Another instance is the case in *Plowden's Reports*, which shows that if a woman, *dum sola*, and a third person are joint tenants, and if the wife marries and dies,

it is the co-joint tenant that takes by survivorship. Therefore, without deciding the point whether misjoinder of causes of action is a proper ground of demurrer, we think this demurrer should be overruled.

Rule accordingly.

IN RE MATHEWS AND WIFE.—June 11, 1855.

4 & 5 Wm. 4, cap. 92—*Fines and Recoveries Act.*

The court will permit the Commissioners for taking the acknowledgment of deeds by married women under the 4 & 5 Wm. 4, c. 92, to endorse the memorandum of acknowledgment nunc pro tunc when it appears to have occurred through fatality, and the deed is clearly identified.

R. Longfield, Q.C. (with whom was *H. Smythe, Q.C.*) moved that A. M. Mosse and W. Calbeck, the two commissioners appointed to take the acknowledgment of deeds by married women, might be at liberty to endorse *nunc pro tunc* upon the indenture dated the 8th of March, 1837, the memorandum of the acknowledgment by the said Alicia Mathews of said indenture taken by them as such commissioners on the 18th of March, 1837. It appeared from the affidavit of Messrs. Mosse and Calbeck that on the 18th of March, 1837, Mrs. Mathews had duly acknowledged the deed in question before them, and that they had examined her apart from her husband touching her knowledge of its contents, and that she had freely and voluntarily consented to sign same; that they had, at the time of Mrs. Mathews signing and acknowledging same, perfected the proper form of acknowledgment and signed their names thereto, and had also marked said deed with the letter A, but that they had omitted to endorse on said deed a certificate of said acknowledgment, and that such omission was an oversight, and perfectly unintentional and unpremeditated on their parts, and that they were now ready and willing to endorse such certificate; that they had lately examined the said deed, and that it was the same as described in the original certificate of acknowledgment, and bore the letter A endorsed upon it, which they had endorsed at the time of its acknowledgment. It appeared also that the certificate of acknowledgment had been filed. The affidavit of the attesting witness, Martin Delany, also identified the deed, and his signature thereto as attesting witness, and stated that Mrs. Mathews had, on the 18th of March, 1837, attended before Messrs. Mosse and Calbeck, and acknowledged the deed. [They cited *Jolly v. Handcock*, (7 Ex. Rep. 820); *Watts demandant, Milne, tenant, Richford and wife vouches*, (6 Moore, 69); *Evans v. Davies*, (6 Scott, 372); *Lloyd v. Nicholas*, (Ib. 355).]

Purcell contra, on behalf of parties who would be entitled if the deed were invalid, contended that the court had no power to remedy the omission. The deed itself was nothing without the extrinsic ceremonies, and they being incomplete, rendered it invalid. [He referred to sections 68 and 70 to 75 of the 4 & 5 W. 4, c. 92, (the *Fines and Recoveries Act*.) and cited *Eyre v. Dolphin*, (2 Ball & B. 290.)]

PER CURIAM.—Let the order be made as sought.

Motion granted.

COURT OF QUEEN'S BENCH.

[Reported by FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.]

EASTER TERM, 1855.

REG. v. THE GUARDIANS OF THE POOR OF THE BANBRIDGE UNION.—*May 1.*

Valuation.—Poor rate.—Appeal.—Spinning mill—Machinery, fixed and detached—1 & 2 Vic., c. 56—15 & 16 Vic., c. 63.

Certain premises had been rated to the relief of the poor under the description of a "spinning mill, thread manufactory, stores, and offices," upon the estimated net annual value of £1,600. Upon appeal it was ascertained that upon the premises there were steam-engines and a large water-wheel, which were fixtures; and that, in addition thereto, there were twisting machines, flax cutting and hackling machines, and warping machines, which were not fixed to the building, but were set in motion by means of the steam-engines and water-wheel, when in gear therewith. It was ascertained that the annual value of the premises, independently of the detached machines, was £600 only; Held that, having regard to the provisions of the 15 & 16 Vic., c. 63, the latter class of machinery did not form a basis for an increased valuation, and that the premises ought to be rated at the reduced amount.

Semble, per Lefroy, C. J., that, under the 1 & 2 Vic., c. 56, irrespective of the later statute, the same conclusion would follow.

THE following case was stated for the opinion of the court above by Theophilus Jones, Esq., Assistant Barrister of the County of Down: "This was an appeal from the rate for the relief of the poor in the Banbridge Union, in the County of Down. The rate was confirmed subject to the opinion of the Court of Queen's Bench upon the following case. The rate was made on the 20th day of February, 1854, on a poundage of four pence in the pound. The property rated was described as 'the spinning-mill, thread manufactory, stores, and offices.' These premises are situate at Guilford, in the Townland of Loughans, the Barony of Lower Iveagh, and County of Down. Dunbar and Company are stated to be the occupiers. The appellant, Mr. M'Master, is the acting partner, and he represents the partnership known by the name of Dunbar and Company. The amount of the rate is £26 13s. 4d. upon a net annual value of £1,600. Hitherto the aforesaid premises have been rated at a net annual value of between four and five hundred pounds. The rate of February, 1854, is in the following form:—'Banbridge Union, Tullylish Electoral Division, Loughnan Townland, in the Barony of Lower Iveagh. A rate for the relief of the poor of the Banbridge Union, made the 20th day of February, in the year of our Lord 1854, on a poundage of four pence in the £ for ordinary expenditure of electoral division, deducting poundage of the sum (if any) paid or standing to credit of townland under Commissioners' order in pursuance of section 2 of 12 & 13 Vic., cap. 104; — in the £ for discharge of lia-

bilities under Commissioners' order in pursuance of section 2 of 12 & 13 Vic., c. 104; — in the £ for payment of annuity or annuities in pursuance of sections 4 and 7 of 13 Vic., cap. 14, amounting to a total poundage of four pence in the £." [The property was then described in said rate as 'spinning mill, thread manufactory, stores, and offices,' valued at £1,600, in the occupation of Dunbar & Co., annual poor-rate, £26 13s. 4d.] The net annual value was thus increased because it was contended on the part of the guardians that the proper criterion of the value of the premises was the annual rent which a tenant would give if the land, the buildings upon it, and the fixed machinery, and also the machinery within the buildings hereafter described, were all demised together. According to this mode of estimating the annual value, £1,600 is a just estimate of the rateable annual value, even after all deductions required by the law had been made. But on the part of the appellant it was contended that the annual rent which a tenant (all legal deductions having first been made) would give for the land, the buildings, and the fixed machinery, namely, a sum of £600, or for the lands, the buildings, and the water-power, namely, a sum of £500, one or other of these sums was the proper criterion of the annual value according to which the rate should be made. In the factory of Dunbar and Company, which consists of the premises designated in the rate as 'the spinning-mill, thread manufactory, stores, and offices,' yarn is spun from flax to be used in weaving, and also in making thread by means of machinery. Upon the premises there are five steam engines and one large water-wheel; these set the machinery hereinafter described in motion, and these steam-engines and this water-wheel are fixtures. Within the building there are twisting machines; these are set in metal frames, which rest upon the floor, and they sustain themselves by their own weight, and are not fastened to the floor or the wall. There are flax cutting machines and hackling machines set in metal frames, and sustained in the same manner as the twisting machines. There are also within the buildings some sixty or seventy hackling machines, which are worked by hand, fastened to a bench by bolts—the bench fastened to the walls or floors, and wedged in. There are also warping machines; these move on an axle, one end of which is let into a socket in the floor, and the upper end into a piece of wood fastened in the walls of the buildings. The twisting, flax cutting, hackling, and warping machines, are not fixtures. All these last-mentioned machines are set in motion by means of an iron shaft which passes from wall to wall of the buildings, and are not fixed in the wall; but there are sockets fixed in the walls, and the ends of these shafts are let into these sockets. The iron shaft is connected with the moving power or the steam-engine, or the water-wheel, by means of a crank and a series of wheels. Upon the iron shaft there are drums; over these drums belts pass, and, when the shaft is set in motion by the moving power, the belts communicate the motion to the twisting, the flax cutting, the hackling, and the warping machines. The steam-engines, the water-wheel, and all the other machines, could

be removed without any injury to the buildings in any way. The question for the opinion of the court is, whether, under the circumstances, the buildings consisting of the spinning-mill, thread manufactory, stores, and offices, are liable to be rated as of the nett annual value of £1600. If the opinion of the court be in the affirmative, the rate to be confirmed; but if the opinion of the court be to the contrary, the rateable annual value is to be reduced to £600, and the rate to be fourpence per pound, £10."

Hamill and M'Donough, Q.C., (with whom was *Lynch, Q.C.*) on behalf of the prosecutor.

J. Perrin and Napier, Q.C., on behalf of the guardians.

[They cited *R. v. Birmingham Gas Company*, (6 Ad. & Ell.); *Hellawell v. Eastwood*, (6 Exch.); *R. v. Lumsden*, (10 Ad. & El. 157); *R. v. South Western Railway Co.*, (2 Gale & Dow. 67); *Colebrooke v. Tuhill*, (4 Ad. & El. 929); *R. v. Chelsea Water Works*, (17 Q.B. 358); *R. v. Leith*, (1 El. & Bl. 121.)

Cur. adv. vult.

May 1.—LEFROY, C.J.—This was a special case reserved for our decision upon an appeal against the rating of certain premises by the Poor Law Guardians of Banbridge Union. The question which was mooted before the Court of Quarter Sessions, has been referred to us for our decision. The points have been fully argued, and we have considered them very diligently. The case is one of so much general importance as renders it right for us to give thereto our very best consideration. The question arose upon a rating made by the Guardians of the Banbridge Union, in respect of certain premises called a "spinning-mill, thread manufactory, stores, and offices," which have been rated at a valuation of £1600. Upon that valuation the rate has been imposed. If that valuation be right, no objection has been taken to the amount of the rate. It appears that formerly the same premises were valued at a lower sum, so low indeed as £600; and it is said now, that though the value has increased £500 to £600, the premises ought to be rated at the former value; and the question is narrowed to the point, whether the valuation should stand at £600 or £1600. The premises consist of mills, manufactory, stores, and offices. The case contains a detailed description of the premises, the machinery, and the manner in which it is set in motion. I need not, however, occupy time with entering into the details of this machinery, for with respect to the question before us, these resolve themselves into two classes, namely, the buildings and machinery attached to as contrasted with the machinery detached from the premises, that is to say, that part of the machinery which, though within the four walls of the building, is in no way connected with the building itself and with the water-power of the mill. The valuation of £600 was made with reference to the building themselves and such parts of the machinery as are attached to the buildings and worked by the water-power, and the valuation is further enhanced to the amount of £1600, by including the detached machinery, which is neither in point of law so connected with the building as, in point of law, to be parcel of it, nor is worked by the water-power. The question then arises, whether this detached machinery has

been properly included in the valuation. It was argued on behalf of the Union, that it did not signify whether this machinery was attached to the realty or detached from and only occupied therewith; that the beneficial occupation was the subject of rateability, and by whatsoever the profitable occupation of the premises was increased should properly form an element in the assessment; that, in fact, the assessment should not only regard the value of the building and the attached machinery, but should also embrace the detached machinery which was used in the profitable occupation of the building for the purpose of spinning, &c. Now though we are all of opinion that if this question were to be decided upon the principle which has been adopted in England respecting assessments under the Poor Law Acts there, the proposition put forward on behalf of the respondents might and ought to be maintained; yet on the other hand, we unanimously hold, including my brother Perrin, who is absent on account of illness, that in Ireland that proposition cannot be maintained, and that the assessment cannot be made in respect of the detached machinery, though within the four walls. We have come to this conclusion, perhaps, not precisely upon the same grounds; but there are two grounds, either of which are sufficient to decide the question. One of these grounds is, that the Poor Law system in England is substantially different in this respect from that in Ireland. In England, personal property is subject to assessment to poor rate, but that is not the case in Ireland, and the result of that difference is, that in England, though such machinery be detached from and not parcel of the realty, if the building be worked profitably by means of the machinery, one rating is made on the whole, and the valuation, upon which that is founded, includes not only the value of the buildings themselves but the profit arising from the machinery; and as the profit to be rated is the result of two things, realty and personalty, one rate is made in respect of both, and that includes the profit resulting from the machinery. On the other hand, personal property in Ireland not being rateable, such a mode of rating cannot be maintained here, as would include such a description of profit. But there is, as regards Ireland, another ground quite independent of the former, and sufficient to create the exemption, and which may have more or less weight with the other members of the court, creating, as it does, a marked distinction between the law of England and Ireland. That arises from the 15 & 16 Vic. c. 63, which follows the Act, 9 & 10 Vic. c. 110. By these Acts it would appear that the Legislature expressly provided for the purpose of exempting in this respect mills and such like buildings, for it is enacted by section 13, that "for the purposes of such valuation all mills and buildings erected for manufacturing or other purposes, together with the water-power thereof, shall be included in such valuation; provided, that the water-power of any mill or manufactory be only valued so far as it may be actually used, and that such valuation shall not extend to or include the value of any machinery contained within such mill or manufactory." This would appear to be an express provision for leaving liable the building it-

self, and also for affirming the liability of the water-power belonging to the mill so far as it was used, but exempting, in clear terms, the machinery, though *within* the mill* or manufactory, which, in England, would no doubt have been liable. These are the two grounds, one or other of which, or perhaps both, induces the different members of the court to come to the unanimous opinion that in Ireland the rating of the additional £1,000 for the machinery imposed here cannot be maintained; but the question involved in one of these grounds is one of great moment, and we have taken great pains to examine the reasons which have been urged for the adoption by us of the principle which prevails in England, and the reasons which, on the other hand, exist for holding such a distinction between the respective poor laws of either country, as would prove that the principles applicable to one would fail to apply to the other. Nearly twenty cases have been cited to us, but it is not necessary to go through them, but they appear to me to furnish the very argument in favour of this distinction by the comparison of the provisions of the respective Poor Laws. The poor laws in England are founded on the 43rd Eliz., and the decisions there have gone upon the judicial constructions put on that statute for the purpose of carrying out its provisions. I will read the 1st section; for it appears to me that every part of it is material to refer to. It provides for the appointment of overseers, who, with the concurrence of the Justices of the Peace, should set the indigent to work, &c. [His Lordship read the introductory part of the section.] Then comes a provision for the mode in which that fund was to be raised—namely, “by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriation of tithes, coal mines, or saleable underwoods, within said parish, in such competent sum and sums of money as they shall seem fit,” “to be gathered out of the same parish, *according to the ability of the same parish*,” &c. These words must explain many things which otherwise would be unintelligible in the decisions which have been made in England. Let us consider the class of persons which it renders liable to be rated. First, inhabitants, without reference to lands and houses; secondly, the occupiers of lands and houses; and as to both there appears to be annexed a qualification—“according to the ability of the same parish.” I advert to that more because it appears strange that in many of the cases in England, which were sent from the Sessions to the Queen’s Bench, it was stated as having been the custom of the parish not to rate personal property, and how such a custom could have arisen since 43 Eliz. would be unintelligible except it were alleged as evidence of the inability of that parish to afford the payment of rate in respect of personalty. The construction which has been put by the judges in order to carry out that portion of the statute which makes the inhabitants of the parish rateable *qua* inhabitants was this—that such should be through the medium of a tax on the personal property yielding profit in their possession *qua* inhabitants. It appears that in some cases, and before some judges, a question has

been mooted, whether personal property was rateable even under that Act; but it cannot be denied that, in a long list of decisions, there is abundant authority to show that there was that which amounted to a settled judicial determination that personal property was rateable under the statute of Elizabeth; and, if further authority was required in support of this position, I need only advert to the decision which led to the statute of 3 & 4 Vic. c. 89, and the annual Acts subsequently passed continuing same, for the purpose of exempting from rating a particular species of personal property, namely, stock in trade; for, if personal property, in general, had not been rateable, it would have been nugatory to have exempted a particular class of personal property. In the last decision to which I have referred, the observations of the judges indicated their view that a man became rateable by the possession of the stock in trade in a shop, which could come under no other head than personal property. Those Acts of Parliament are a standing memorial that, by the Act of Elizabeth, personal property is rateable, and continued rateable at the time of the passing of the subsequent Acts; and further, that whatever was not thereby exempted, still continued to be rateable. The way in which machinery came to be rated was, where its employment in a building was made productive of profit. The rate was then made conjointly upon the united valuation, having regard to the profit yielded by both, and hence all the English decisions on this subject are quite compatible, and reconcileable, with the construction of the statute of Elizabeth—namely, that personal property is rateable *per se*; but, when jointly used with the buildings themselves, though not attached, there should be a conjoint rating on a conjoint value, as here, upon the valuation of £1,600, taking into account not only the buildings and the machinery *annexed* thereto, but also taking into account the machinery which form no part of the buildings, not being even momentarily annexed thereto, and are therefore part of the personal estate of the occupier. In England that species of rating would be quite consonant with the Act—giving effect to it, in fact, in the most convenient manner, including all in one rate. This is what has been done in the present case, and it appears to me, therefore, that unless our Act makes personal property rateable, as well as the buildings themselves, that cannot be maintained; and it then only requires that we should refer to the 61st and 62nd sections of our Act, (1 & 2 Vic., c. 56,) to see that the only rateable subject-matter are tangible hereditaments, described as lands, buildings, opened mines, &c., &c. There are no words therein which would even appear to glance at inhabitants made rateable, *save qua* occupiers. We have in the Act lands and houses, and the occupiers of them liable to rate, but the entire omission of “*inhabitants*.” Therefore it appears to me, upon this first ground, that there is such a solemn distinction between the two Acts as to cause me to say that while such a valuation as the present would be valid in England, it would not be valid here. There is another great difference between the Acts which makes it impossible

to apply the same construction to both. In England the occupier is bound to pay all the rate; here the landlord pays his moiety. But on whose premises is the machinery which increases the rate so much? The tenant would take all the profit, while the landlord would pay half the rate. We cannot suppose that the Legislature intended any such thing. The Act must be construed according to its legal intentment. Therefore, on that ground—namely, of the distinction between the two Acts, we are prevented from rendering liable to rating personal property, merely because it is used along with the building. The other ground for distinguishing the cases is to be found in the 15 & 16 Vic. c. 63. That extends the provisions of the former Act, 9 & 10 Vic. c. 110, which were made for rating particular counties, and confirming the valuations made under that Act, extending that, as altered by the subsequent statute, to all counties in Ireland. That former Act, however, so far as it extended, contained in its terms that which is now applied to all counties in Ireland. By this Act a return of the valuation is to be made to the Poor Law Guardians; the duty is imposed on them of giving notice thereof, and the provisions relative to the things rateable, are in the same terms as the Poor Law Act. Therefore it would appear that this Act must, of necessity, in Ireland, exempt machinery, and so, whether upon the variance between the English and Irish Acts, or the express declaration in the latter Act, this rating at £1,600 cannot be maintained, but must be reduced to the lesser amount.

CRAMPTON, J.—I should wish to make a few observations relative to this very important case, for though I have come to the same conclusion as my Lord Chief Justice, I have not arrived thereat by the same road. My opinion is founded expressly on the 15 & 16 Vic. c. 63. That General Valuation Act is applicable to Ireland only, and I do not find my opinion in this case on any difference between the respective English and Irish Poor Law codes, for since the passing of the 3 & 4 Vic. c. 89, in England, the question of the taxation of inhabitants, *qua* inhabitants, has in my opinion altogether ceased. If the case came before us, as it did before Mr. Jones, I should have no difficulty in establishing the rate. Two principles appear to me to have been expressly established with regard to the law of Poor Law rating in England; first, that the rate should be levied on lands, hereditaments, &c., only, and not on personal property; but secondly, that in estimating the annual value of buildings the machinery of a mill, though not directly available, is still to be taken into account in the estimation of the annual profits of the hereditaments which would be of a greater annual value by reason of the machinery in the mill. The last case bearing on this subject is that of *R. v. Leith*, (1 Ellis & Bl. 121.) Were I to act upon the Poor Law Acts, the decision at which I would arrive would be the same as that adopted in England; but my Lord Chief Justice has alluded to a recent statute to which we have been referred since the argument, namely, the 15 & 16 Vic. c. 63, which does not apply to England, and creates a difference on this subject between the law

of England and Ireland. I own that I feel some difficulty upon this subject, more especially at a time when it is supposed that the legislation regarding this country is converging towards that of England, which is indeed “a consummation devoutly to be wished.” But however important it would be to assimilate the laws of both countries, the statute seems strongly to assume that the Legislature intended to validate the present system of rating, which is not to value the machinery *itself* in the estimate of the annual profit. I do not therefore feel justified in differing from my Lord Chief Justice.

MOORE, J.—I concur with the opinions expressed by my Lord Chief Justice and my brother Crampton, that this rate should be reduced from £1600 to £600. When this case was first argued, the 15 & 16 Vic. c. 63, was not referred to. I have looked into the various decisions, amounting to at least twenty, to which the court have been referred for the purpose of ascertaining the principle upon which they proceed, and have analyzed the Acts of Parliament relating to this subject, and my impression was, that no such substantial distinction exists between the laws of both countries as to exclude the guidance of the English authorities; but before I made up my mind upon this subject I was referred to an Act of Parliament which appears conclusive, and I accordingly did not further prosecute my other inquiries, about which I do not express any opinion. The 15 & 16 Vic. c. 63, contains positive legislation upon this subject. It is entitled “An Act to amend the laws relating to the valuation of rateable property in Ireland;” and it recites that “it is expedient to make one uniform valuation of lands and tenements in Ireland, which may be used for all public and local assessments and other rating.” It then recites the 9 & 10 Vic. c. 110, and says, “that under the provisions of the said Act the tenement valuations of certain counties have been made and completed for Poor Law purposes,” thereby showing that the rating for Poor Law purposes was in the contemplation of the Legislature at the time of the passing of the Act. It accordingly provides for the valuation, and says, (sec. 11,) that “in every valuation hereafter to be made, or to be carried on and completed under the provisions of this Act, the Commissioner of Valuation shall cause every tenement or rateable hereditament hereafter specified to be separately valued,” &c. &c.; and it further provides that “such valuation in regard to houses and buildings shall be made upon an estimate of the net annual value thereof; that is to say, the rent for which, one year with another, the same might in its actual state be expected to let from year to year, the probable annual cost of repairs, insurance, and other expenses (if any) necessary to maintain the hereditament in its actual state, and all rates, taxes, and public charges, if any, (except tithe rent charge,) being paid by the tenant.” It thus uses the exact language which is to be found in the Poor Law Act. The 12th section then declares what shall be the rateable hereditaments, and with the exception of one or two matters not to be found in the Poor Law Act, that section transcribes the said corresponding enactment. It is impossible not to see that, at the time, the Legislature had the Poor Law as

well as other ratings in their contemplation. Then comes the 13th section, which says, that "for the purposes of such valuation all mills and buildings erected for manufacturing or other purposes, together with the water-power thereof, shall be included in such valuation, provided that the water-power of any mill or manufactory be only valued so far as it may be actually used, and that such valuation shall not extend to or include the value of any machinery contained within such mill or manufactory." So that it is plain that the valuation of mills under this Act does not include the machinery which is to be found in such mills. The 27th section then enacts, that "every rate for the relief of the destitute poor in every union, &c., shall be made upon the hereditaments and tenements liable thereto, according to the valuation of each hereditament or tenement comprised in such Acts," &c. So that here there is a provision for a uniform valuation of every hereditament in Ireland, including for Poor Law purposes. The enactment that machinery is not to be included in the valuation is followed by another, directing these Acts to be transmitted to Poor Law Guardians, and that the poor rate shall be levied according to the valuation so transmitted. After these sections and others to the same effect, I will not waste the time of the court by going into further detail. It is clear that the Poor Law rating was in the contemplation of the Legislature, and it was not contemplated that they should make any valuation distinct from that transmitted to them, only that they are not prevented from altering the name of the occupier or immediate lessor, &c.; and by sec. 29, the limits for the revision from time to time of the tenement valuation are defined. Thus there can only be an entirely new valuation, distinct from that revision given by this section, in cases where buildings have been thrown down, &c. Therefore this Act of Parliament appears to me to furnish positive legislation upon this question, and so, without expressing any opinion upon the other subject, I shall say that the Guardians had no power to include in the rating that machinery which the Act of Parliament has directed them to exclude.

Judgment for the appellants to reduce the rating from £1600 to £600.

HILARY AND EASTER TERMS, 1855.

ELLIS v. O'NEILL.—January, April 27.

Tithe rent charge—Non render of tithes during continuance of demise—Tithe Acts.

A composition and applotment of certain tithes were made in 1834. It did not appear that any render of said tithes had been made for 60 years prior to said composition, but during all that time the tithes had been demised (originally by a lease of 1776, for lives renewable for ever, and which had been continually renewed,) to a party not the owner or lessee of the land in respect of which they were chargeable, and the reserved rent paid to the tithe owner. Held, (Perrin, J. dissentiente,) that the above case came within the saving of the 20th section of the 1 & 2 Vic. c. 109, and that the 60 years' non render was no bar to

the recovery of the rent charge, for which the said tithes had been commuted by the statute.

THIS was a special case sent to this court by the Lord Chancellor upon the following state of facts: By letters patent of Charles 2nd, dated 1684, the Monastery and lands of Clontuskert in the Diocese of Elphin and County of Roscommon, and the lands of Moherclare, otherwise Ballinclare and Clonadra, and other lands situate in said parish were granted to Henry Lord Kingsland, his heirs and assigns for ever. By indenture of lease and re-lease, dated 18th August, 1766, Lord Kingsland demised and re-leased to Ulick Burke, his heirs and assigns, all Lord Kingsland's impropriate tithes in the Counties of Roscommon and Longford, for three lives, renewable for ever, at the yearly rent of £240. This lease was renewed by the parties respectively representing the original lessor and lessee on the 31st of March, 1813, and the 1st of August, 1832. The above rent appeared to have been paid under the said several successive renewals to Lord Trimleston and his heirs, (the successors of Lord Kingsland,) from 1822 to the 25th March, 1852, inclusive. In 1834 a composition and applotment was made of said tithes. There was no evidence to show that any tithes had been paid during any part of the period of 60 years next preceding the establishment of such composition. The special case further set out a lease by Lord Kingsland, dated 21st of February, 1731, whereby he demised the lands in question along with other lands, "together with as much of the tithes of all or any or either of them as were vested in or belonging to said Lord Kingsland, to Richard Berford, his executors, administrators, and assigns, for 51 years, at a yearly rent." The interest of said Richard Berford under said lease in said lands thereby demised, (but not in the tithes of said lands,) afterwards, by assignment dated 7th June, 1745, executed by said Richard Berford and one Laurence Berford, became vested in one Thomas Shanley, who, by indenture of lease dated 12th of July, 1746, demised the lands of Ballinclare, Moher, and Gurteen, in the parish of Clontuskert aforesaid, to John Farrell for 21 years from 25th March then last. Robert Fetherston, under whom the petitioners in the second matter of *O'Neill v. Ellis** derive title to the said lands of Moher, Ballinclare, and Clonadra, obtained from Lord Kingsland in 1751 a lease for lives renewable for ever of these lands, subject to the outstanding lease to Berford; and by deed poll the said J. Farrell subsequently assigned to Fetherston his interest in the sub-lease. By deed of conveyance dated 7th of Nov., 1768, Lord Kingsland conveyed to Fetherston the fee simple of the lands of Moher, Ballinclare, and Clonadra; and the latter subsequently, by deed of the 29th of August, 1775, conveyed same to Theophilus Johnston, John Daniel Coates, and William Alexander, who, by indenture of same date, demised the said lands to Fetherston for lives renewable for ever. The following question was then submitted on the foregoing

* *Ellis v. O'Neill* was a petition to recover the tithe rent charge. *O'Neill v. Ellis* was a cross petition to establish the claim of exemption under 1 & 2 Vic. c. 109, s. 16.

facts—viz.: whether the lands of Moher, Ballinclare, and Clonadra, respectively situate in the parish of Clontuskert, Diocese of Elphin, and County of Roscommon, or any and which of them would have been rightfully charged with payment of composition in lieu of tithes, if the said Act of the 1 & 2 Vic., chapter 109, had not passed; and whether the right of exemption from the payment of tithes existed, and was acted upon, at the time of or within one year next before the establishment of a composition in lieu of tithes in the said parish of Clontuskert?

Wm. Smith, Fitzgibbon, Q. C., and Napier, Q. C., argued in support of the liability.

Lawson, Berkeley, Q. C., and Deasy, Q. C., for the exceptions.

Cur. adv. vult.

April 27.—*MOORE, J.*—In this case there is a difference of opinion between the various members of this court. It is my duty, in the first place, to express the opinion I have formed. This case originally came before the Court of Chancery, and two eminent judges, the Lord Chancellor and the Master of the Rolls, having differed in their opinions, the former sent the present case to this court for their consideration and opinion. I need scarcely say, when such eminent men as these have differed in opinion, that the case is one of great difficulty. The facts of the case here, so far as they relate to the question to be decided, are shortly these. In 1684 Lord Kingsland became seised in fee, under a patent from the Crown, of the impropriate tithes of the three denominations of lands, namely, Moher, Ballyclare, and Clonedan, with respect to which this question arises. In 1766 Lord Kingsland, being so seised in fee, by indenture under his hand and seal demised the same tithes to one Ulick Burgh for three lives, with a covenant for perpetual renewal, at the rent of £240. This lease has been renewed several times, and the last renewal was in 1832. Two of the lives in that renewal are still living, and that lease consequently still subsists, and was so at the time of the passing of the 1 and 2 Vic. c. 109, in the year 1838. The interest in that lease is now vested in the petitioner, in the first matter, the representatives of Charles Armstrong, to whom the renewal of 1832 was granted. They claim the tithe rent charge of the three denominations which I have already mentioned. The legal estate of the lands comprised in the three denominations is vested in the respondents in the matter under a lease for lives renewable for ever, who dispute their liability to the payment of the tithes out of any of these three denominations. It appears that the rent of £240 has been paid regularly to Lord Kingsland and to those who represent his reversionary interest, and up to a period shortly before the subsisting demise. In 1834 there was a tithe composition of the parish in which the lands are situate, and an applotment was made in respect of these denominations. The case goes on to state that there was no evidence to show that tithes had been paid out of these denominations, or either of them, during the sixty years before the composition of 1834. After stating these facts which I have mentioned, the case goes on to state what was the question between the parties, and what

the petitioners and respondents respectively contended for, namely, whether the lands of Moher, Ballinclare, and Clonadra would have been rightfully charged with the payment of composition in lieu of tithes if the said Act of 1 & 2 Vic. c. 109, had not passed? and secondly, whether the right of exemption from the payment of tithes existed in the said parish of Clontuskert? Neither of these questions appears to me to present very distinctly the real question in the case; but, however, we have most distinctly, in those passages of the case which I have read, that which the parties respectively contend for, and the judgment thereon of the judges of the Court of Chancery, and their opinion has rested on the construction of the Act. We have also, to assist us, the arguments in this court, and counsel therein rested the case exclusively upon the construction which they think ought to be given to the different sections of the Act. I may therefore assume that the point which is to be decided by the court is this, namely, whether the fact of the non-payment of tithes for sixty years before 1834, did, under the facts in this case, create an exemption for the said three denominations, or either of them, from the future payment of tithe rent charge. The respondents rest their claim to exemption from tithes on the 18th section of the Act. By that section, to which I shall hereafter more fully advert, the enjoyment of the land for sixty years before the composition, without payment or render of tithe or matter in lieu thereof, is made a general ground for a claim of exemption. In the present case there is no payment of tithes or other matter in lieu thereof for sixty years before 1834, nor was there any enjoyment of tithes by any deed or writing; and so far it is clear that the case of the respondents falls within the 18th section, and if that stood alone, the respondents would make out their claim for an exemption; but then, the petitioners say, on the other hand, that while such would have been the case under the 18th section, by the 20th section an exception is engrafted upon the 18th section, within which exception they allege that the present case comes. Now, by that 20th section it is enacted, that "the provisions before executed with respect to exemption from tithes shall not extend to any lease, when the tithes shall have been demised by deed for any term of life or years subsisting at the time of the passing of the Act." The petitioners say, that there having been a subsisting demise of the tithes by deed under the lease of 1766 and the renewal of 1832, they come under that exception, and that the case therefore does not come within the operation of the 18th section, but is exempted from it. The respondents contend for a different construction of the 20th section, and say that no case comes within it, unless where there has been a demise of tithes by the tithe owner to the land owner; that such is not the case here, and hence, that the petitioners do not come within that exception, nor have they the benefit of it. Accordingly, the important question for the court to decide is, which of these two constructions is the right one. It is perfectly plain, and indeed has been admitted in the course of the argument, that the words of the 20th section are large enough to embrace within them the

case of the petitioners, for the words are "the provisions of the Act shall not extend to any case where the tithes have been demised by deed then subsisting." Here we have a demise by deed, and that deed subsisting at the time of the passing of the Act. There is nothing to limit the generality of the terms of the exception, or to confine it to the case of a demise of tithes to the land owner, but the words extend to every case of demise by deed, whether to the land owner or to any other person. It is admitted that the construction given by the petitioners to this section is the grammatical construction, but the respondents say that the court is bound to introduce certain words, when the policy of the Act is understood, for the purpose of effectuating that. I shall read the entire clause, which runs thus, "That the provisions hereinbefore contained, with respect to the establishment of claims of and for any modus or exemption from a discharge of tithes, shall not extend to any case where the tithes of any land shall have been demised by deed or for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing by the person or body corporate entitled to such tithes, with the owner or occupier of the land for any such term or number of years, and such demise shall be subsisting at the time of the passing of this Act, nor to any suit for establishing a claim to tithes now pending." It is plain that, grammatically, that part of the clause which relates to demises of tithes is not connected with the words, "owner or occupier of the land;" but the respondents say, that if the words "to or," be inserted before the words, "with the owner or occupier of the land," the construction will be right, and the whole clause will be made grammatical. I admit, that if it were rendered so it would be grammatical, but before I feel warranted in introducing words for the purpose of limiting the sense of the Legislature, and thus excluding cases which else would have been provided for, I must feel satisfied that their introduction is consonant with the intention of the Legislature, required by the policy of the Act, and consistent with justice. With respect to the intention of the Legislature, I see no other intention than that apparent on the face of the 20th section, and as to the policy of the Act I do not know where to find it. There are no recitals in the Act to manifest its policy. We have only the enacting clause in the body of the Act to look at for the purpose of arriving at its policy, and we see that by them no burden whatever is cast on the land owner; on the contrary, a great boon has been conferred on him by simplifying his proof for exemption when he claims it, enabling him to establish that exemption by means which otherwise would have been unavailing. But I do not know why we should construe the words so as to create a greater boon than the Legislature intended. If the respondent's construction were adopted, a gross injustice would, in my opinion, be done to those who represent the lessor's interest in the lease of 1766, for by that the lands would be for ever exempted from tithe compensation. The security of the reserved rent would be gone so far as related to the tithes of the denominations, and though the lease expired or were evicted,

the lessee's property in the tithes would for ever be taken away. The representatives of the lessee in the lease of 1766 could not have been guilty of any negligence in the assertion of his rights, for when that lease was made the lessee parted with his right to the tithes during its subsistence. He then became no longer entitled to the tithes, but to the reserved rent, which has been paid up to the present time. Ought he, therefore, to be deprived of his property in consequence of the negligence of his tenant, and when the words which the Legislature has used are large enough to prevent such an injustice as this? Is the court justified in inserting words which the Legislature has not used, to do a wrong to one man in order to confer a boon on another? There is nothing either in the policy of the Act or in justice to warrant us in so doing. The respondents have urged that if the lease of 1766 had expired but one day before the passing of the Act, the lessee would have been barred. I agree that he would have been so, because the words of the section are, that the lease should be subsisting at the time of the passing of the Act. I think that that was a *casus omisus* in the Act; but I do not not see why the lessor should not be protected when his case comes within the very words of the Act, because there might have been a case in which he might have been exposed to injustice. It has also been said that the lessees of the lease of 1766 will be protected, though they, or those who represent them, may have been guilty of negligence in not enforcing their right to those tithes for 60 years. That may be true; but that affords no reason why, in order to punish them, you should likewise punish those who were guilty of no negligence whatsoever. I therefore think that the words of the 20th section are clear, and that we are not justified in altering its words. There is another reason, which to my mind is strong, if not conclusive—namely, that if the construction to which I have just adverted be the right one, the 20th section would have been superfluous. The respondents say that the 20th section only applies to leases made by the tithe owner to the land-owner, subsisting at the time of the passing of the Act. Now put the case of a subsisting lease to the land-owner, and let us see whether the 20th section would have been necessary to protect it. It must have been made either *before* the tithe composition or *after* it. Take it as having been made before the composition. I think that I can show that the 20th section was utterly useless and nugatory for its protection. It is clear that under the 18th section a lease by tithe owner made before the tithe composition, and subsisting at the time of the passing of the Act, would be a bar to a claim of exemption. The 18th section provided for the two periods of 30 and 60 years, the latter of which I will take as being the one applicable to this case. It was incumbent upon him to prove the enjoyment of the land for 60 years, without payment of tithes, or render of "matter in lieu thereof" during that period. In the case which I have put of a lease to the land-owner before the tithe composition, if that lease reserved rent, and that were paid within the sixty years, it is plain that the land-owner claiming the exemption *could* not make

the necessary proof, for the circumstance of the reservation of that rent upon a lease of the tithes and its payment would have put it out of the power of that person to make the required proof. But it is possible that though such lease might have reserved rent, that rent might not have been paid within 60 years; and so a party claiming exemption might give the proof required by the statute, for it would be then in the power of the owner of the land to show an enjoyment of the land without render of tithes for the term required. But in that case, though he gives such proof, the question would remain, whether his claim to exemption would be conclusive as to the land. I think not; for, by the 18th section, that claim of compensation would be open to a rebutting case. It provides in the case of a 60 years' non render—"Such claim shall be deemed absolute and indefeasible unless it shall be proved that such payment or render of modus was made, or such enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or in writing." Now, if there was a lease by deed made before the composition by the tithe-owner to the landlord, and that lease subsisted until 1838, could it be argued that the land had not been enjoyed by the land-owner tithe free under an agreement made by deed? and so, if the construction contended for by the respondent to be given to the 20th section be the true one, it would be perfectly useless with regard to such leases. The 21st section confirms this view, for that provides that the time during which lands shall be held by the persons entitled to the tithes thereof shall be excluded from the computation; as also the time during which the persons interested in resisting any claim shall be under disability. But if the lease had been made to the land-owner after this composition, then this observation would not apply—because, by the 18th section, the 60 years are to be anterior to the composition, and so it may be argued that section 20 was the proviso for such a lease made after the composition, if subsisting at the time of the passing of the Act. I, however, see nothing in the Act to abrogate leases made between tithe-owners and land-owners, when created by deed or writing. I think that the 20th section could not have been necessary to protect such leases, and that the 20th section would have been useless for the case of leases made either prior or subsequent to the composition. This composition was made in 1834; the Act was passed in 1838. It would be highly improbable that a land-owner, who has not paid tithes for 60 years before the composition, would take out a lease afterwards, and I cannot think that the 20th section was passed to protect such improbable leases, and had such been the object of the framers of the Act, language would have been used of a more specific character, and not words applicable to every lease by deed or writing, no matter to whom made. For these reasons my judgment is in favour of the petitioners in the first matter. I may further add that I have received a letter from my brother Perrin, who is unable to attend from illness, and in which he states it to be his opinion that, in respect of the three denominations in question, the claim of exemption has

been established, and that the case does not come within the 20th section, the demise of the tithes not having been made to the owner of the land, and that no such exception as the present came within the contemplation of the Legislature.

CRAMPTON, J.—Concurring as I do, *in omnibus*, with the opinion expressed by my brother Moore, I might possibly have been excused did I allow the case to rest with his very lucid observations; but this is a case of great importance, now raised for the first time, and very high authorities differ in their opinions respecting the point at issue. The question now before us is one of the construction of an Act of Parliament, not one that is governed by authority, seeing that no authorities are applicable to the present case save the very high authorities on either side of the question of the present Lord Chancellor and the Master of the Rolls. The solution of the question now before us turns upon the construction of the 1 & 2 Vic., c. 109, s. 20, for it is agreed that if the 18th section stood alone in this case, the petitioner in the first matter (*Ellis v. O'Neill*) would not be entitled to the tithes. But the question here is respecting the construction of the 20th section—namely, whether the demise specified in that section is limited to the case of a demise made to the owner of the land; or whether on the other hand, demises to strangers are comprehended therein. The best opinion which I am able to form upon this subject is that *all* demises of the class mentioned in the 20th section, whether to occupiers or to strangers, are included. My reasons for arriving at that conclusion I shall state. In the first place, the grammatical meaning of the words used by the Legislature require this construction. The section contains two members connected by the conjunction "or." The first member, "where the tithes of any land shall have been demised by deed for any term of life or number of years," excludes from the operation of the 18th section the case of demises; and the subsequent member of the sentence applies to the case of composition for tithes, "or where any composition for tithes shall have been made by deed or writing by the person or body corporate entitled to such tithes with the owner or occupier of the land for any such term or number of years." It appears to me that these two members of the sentence are as distinct as the two subject-matters to which they refer, one to demises and the other to compositions. The construction put upon this sentence by the respondent in the first matter, which I may term the narrow construction, does violence to the grammatical construction. The supporters of that construction are obliged to read the section with the interpolation of the words "to or" before the word "with," or else to attribute to the Legislature such a loose mode of framing this Act as to understand the word "with" as signifying "to." One or both of these things, namely, interpolation or change of signification of a word, must be done in order to eke out the limited construction for which they contend. In the cases in which this course was adopted it was found essential to do so. Mr. Napier cited a rule of construction laid down by a venerable judge of this court, who sat for many years in the place

which I have now the honour to occupy—the late Mr. Justice Burton. That rule has been frequently adopted by some of the most eminent judges in England. It was pronounced in the case of *Warburton v. Ivis*, (1 Huds. & Bro. 648.) “It is a rule in the construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to or inconsistent with any expressed intention, or any declared purpose of the statute, or if it would involve any absurdity, repugnance or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience but no farther.” Now the counsel for the petitioner in the second matter admit that the grammatical construction of the sentence is against them. If that would necessarily involve any absurdity, the grammatical construction must be abridged so as to obviate that, but no further. But it has been said that it is necessary to do violence to the form of this Act of Parliament to carry out the policy of the statute. Here we are called on for the purpose of doing a great right to do a little wrong. We are called upon to violate the intention of the Legislature, as evidenced by the language used, in order to carry out a vague supposed policy. No such intent as that which we are called on to infer appears in the Act of Parliament; no such preamble is to be found. The intention of the Act plainly was, to substitute rent charges for tithe compositions. That, at least, is the *declared* intention, and any other we must make out from the context. I cannot find any such intention as is supposed to have been expressed. The 18th and 20th sections are apparently no part of the original framework of the Act, and these provisions appear to have been taken from the English Act, 2 & 3 Wm. 4, c. 100. We might, then, well suppose that the intention and policy of the Legislature in introducing these provisions from the 2 & 3 Wm. 4, c. 100, was the same in one Act as it was in the other. Now, we find that the recital of the English Act does not deal at all with the general subjects of the Irish Act, but has only particular sections common to both; “whereas the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a *modus decimandi*, or exemption from or discharge of tithes.” The object of these sections is likewise merely to shorten the time required for the establishment of claims of *modus* and exemption, and ought therefore to have the same construction as the corresponding part of the statute of Wm. 4. Section 20 of the Irish statute is verbatim with the earlier portion of section 4 of the English Act. It, however, omits unfortunately the last clause, which made part of the condition the institution of the particular suit within three years after the expiration or other determination of the demise or composition. Now, looking at this last clause, and indeed at the whole of the 4th section of the English Act, can we hesitate at coming to the conclusion that the true construction of section 20 is of a *general* character and not *limited*, as has been contended for? No one can deny that the same

construction must be given to these two analogous provisions. We have, to be sure, no decision regarding the construction of the English Act; but the framers of the Irish Act, in their adoption of the words of the English Act, would, in case the latter had contained the verbal blunder complained of, have repeated that blunder. Moreover the 20th section would have been unnecessary, if the construction contended for is to prevail, for in that case there would have been “such a consent or agreement by deed or writing” for suspending the enjoyment of the tithe by the tithe owner as provided for by the 18th section, and so we are called upon to do violence to this Act of Parliament in order to support a construction which would be quite unnecessary for the purposes of the Act. Is it more reasonable that a party without any default of his own, being merely a reversioner receiving rent on an ancient lease, should be barred from all right and claim on foot of his long acknowledged right according to the limited construction contended for in this case? While the rent is regularly paid up, the reversioner has no remedy to compel payment of the tithes. Indeed if the lessee could by laches bar the reversioner, we might justly suppose that some provision in emphatic terms would have been made to provide for it, and yet such is called a *reasonable* construction. It would not be so, unless it had been intended by the Legislature, as soon as possible, to put an end to lay property in tithe, which ought to be protected as much as any other property. I have accordingly arrived at the conclusion that the demises mentioned in the 20th section are not confined to the case of demises of tithe to the owner or occupier of the land, but are generally applicable to those of the character which the terms of the clause appear to denote.

LEFROY, C. J.—This case comes before us under circumstances which demand our most anxious consideration. I do not feel myself at liberty to gratify my own feelings by merely expressing my own concurrence with the views of the able judges who have preceded me, but, concurring with them *in omnibus*, I feel bound to state my reasons for that concurrence. The facts of the case have been so fully and accurately detailed, that it is unnecessary for me to go into them. The question is, whether these three denominations of land have been shown to be exempt from the payment of tithe. I use that latter word, with reference both to composition and rent-charge. A good deal of confusion and some degree of mystification has crept into the argument in this case by confounding that which is the real question with what is not the question. The question is not, whether tithes let on lease are exempt from composition or commutation into rent-charge, but whether the lands, which are bound to pay tithe, are exempt from liability. The reversioner here does not contend that his reversionary interest in tithe was not liable to the process of commutation, but he contends that his right to the tithes so commuted has not been taken away by the operation of this Act, as deciding the question of exemption. Now this question of exemption, which is the question here, has arisen for the first time under the 1 & 2 Vic., c. 109, and so far from that having been

made the subject of agitation under former Acts, it was provided by every one of them that the Commissioners appointed thereunder were to pay no regard to any claim for exemption, but were at once to charge the whole of the lands with the composition, although a claim of exemption might have been made, or even that claim put forward so seriously as to be the subject matter of discussion in a pending suit. For the first time, therefore, the question of exemption has come to be discussed under the 1 & 2 Vic., c. 109, and I shall have hereafter to consider how far the jurisdiction conferred by that Act could have been intended by the Legislature to decide the ultimate right to tithes when on lease. I shall, however, postpone that till I have considered how that stood under former Acts, for these, except so far as they have been expressly repealed, must be read in connection with the 1 & 2 Vic. c. 109. But what do I find in these Acts? The Legislature has not left it mere matter of conjecture whether the reversioner was to be bound by the process of commutation, for by the 31st section of the 4 Geo. 4, c. 99, it is enacted that this process shall be binding on him and all persons whatsoever, whether owners or lessees of such tithes. Now, contrast these careful provisions of the Legislature to bind the reversioner, when they mean him to be bound, with the saving of the reversioner's rights when they did not mean him to be bound. When they did design to bind him, they do so in *express terms*; but where they did not mean him to be bound, they have declared him to be out of the operation of the provisions contained in the antecedent part of the Act, and the nature of that saving is in harmony with all the previous provisions of the Act, and the sense of the Legislature in the clause in question is not to be collected only from the words themselves, but from all the antecedent provisions. It will not be disputed for a moment, that at the common law, antecedent to all these statutes, no such right of exemption in respect of tithes against the owner or reversioner could have been set up, for no such presumption could have been established by any such evidence, as provided by the 18th section of the 1 & 2 Vic. c. 109. At common law that would have been insufficient; and under the statutes antecedent to the 1 & 2 Vic. c. 109, that could not have been made a ground for establishing an exemption. So we have on the part of the reversioner this common law right, and that saved under the former Acts. Next, I inquire what was the object of the Act of 1 & 2 Vic. c. 109? Its title is, "An Act to abolish compositions for tithes in Ireland, and to substitute rent charges in lieu thereof;" and the preamble recites, that it is expedient to abolish compositions for tithes in Ireland, and in lieu thereof to substitute rent charges, payable by persons having a perpetual estate or interest in the lands subject thereto, a reasonable allowance being made for the greater facility and security of collection arising out of such transfer of liability from the occupiers to the owners of land. Is there in what has been termed the policy of this Act one vestige of an intention to change the position of the tithe owner for the worse? All which appears to have been intended was, to subject his reversionary rights to tithe to commutation

into rent charge; but where is there any intention apparent to affect the remaining three-fourths, or that he should be in a worse position as regards that than he stood at common law? Down to the 16th section we find no one word about exemption, then come the important provisions which, for the first time, create this new jurisdiction. [His Lordship read the 16th section.] Now, between whom is that question of exemption to be decided? Is it between the tithe payer, who is the occupier, and the tithe owner, who is not the reversioner but the lessee of the tithes? What has the reversioner to do with that question? He has no right to the tithes, no right to composition or rent-charge; none of these things belonged to him. Why then is the man who has no right to the subject matter of the petition to be bound by the petition? I ask *a priori*, from the nature of this provision, is it to be intended that the Legislature meant to bind the right of a party who was not a necessary party to the proceeding, who in fact had nothing to do with the matter? The Act then proceeds, and, with a view to this jurisdiction, and with reference to the party who is really interested in the litigation in question, it provides what shall be the criterion for establishing the right of exemption; what case it shall behove one party to make in support of his claim, and what shall be the nature of the defence on the other hand. If the occupier could show that he had not for thirty years paid tithes, in the first instance, *prima facie* he would make out a case for exemption, to which, however, the answer would be the payment of the tithes or "other matter in lieu thereof" prior to the commencement of the period of thirty years; but to the occupier or lessee alone could the fact of that non-payment be known, and whether the suspension arose from an agreement or any other ground. Then, if the intermission continued for sixty years, the right of exemption became peremptory, unless a previous agreement by deed or in writing could be shown. How could the reversioner in such a case have been able to raise the question, who had never had recourse to the occupier for the purpose of getting his tithe, and could have had no knowledge of what passed between the tenant of the lands and his lessee, and so might have been ousted of his property by an arrangement made between the lessee of the tithes and the occupier of the lands behind his back, in ignorance of what had taken place between the parties? The matters which ought to confer the right of exemption on the occupier, could therefore never have been within the knowledge and observation of the reversioner. If the latter were the hand to receive the tithes, and not the lessee, then he would be subject to this enactment, for he would be cognizant of the facts, and would have known what agreement had been made to suspend the payment, and would accordingly have been competent to discuss the question of exemption; but how could he do so when the tithes were in lease? What, then, have the Legislature done? They have, by sec. 20, enacted that such an arrangement, to which he need not and ought not to have been a party, should not affect him; that a man who has no right to discuss a certain point, should not be bound by a discussion respecting same behind his back, in which

he could take no part; that any man, whose tithes are let on lease, should not be affected by these provisions. The words here are as plain as words can be, and the reason of the thing is equally so; and then, when we are told that words should be inserted in order to carry out the supposed view of the Legislature, we are asked to do what the Legislature never intended. We are not to presume that the Legislature intended to do an injustice, more especially if the words can be interpreted consistently with justice. When the words of an Act give a plain and clear sense, they are to be construed in that sense. We are bound, at all events, not so to alter them as to make them inconsistent with the provisions of previous Acts. In the former Acts, where the Legislature intended to bind, they used fit words for that purpose; so here, where they have declared an intention to bind in respect of the question of exception, they have nevertheless created an exception. The very argument in favour of the new moulding of this clause makes it altogether unnecessary; for supposing that the Legislature meant leases of tithes, made only to the occupier of the land and not to a third party, what would be the effect of such leases? They would be equivalent to an agreement between the parties, whereby the rent reserved was substituted for tithe during the period. Could the occupier say that the lessor had no right to the tithes when he took out a renewal of the lease from time to time? I need not, however, go more fully into that argument, which has been so ably met. What further do I find in the 4 Geo. 4, c. 99, s. 31? It is provided, with regard to tithe compositions, that "where any owner or occupier of land out of which any such tithes shall have been issuing, shall be liable by or under any covenant to the payment of any sum or sums of money to the party entitled to such tithes, as and for the rent of such tithes, such owner or occupier shall, during the continuance of such covenant, pay such rent or sum to the person or persons entitled to the same, and such rent shall be received by such person or persons in lieu of such portions of such composition as shall be assessed and apportioned upon such occupier in respect of such land." Therefore we have this fact, that if a lease of the tithe had been made to the occupier the payment of the rent would have been equivalent to the payment of the composition, and that goes in support of the argument of my brethren, Moore and Crampton, that the construction sought to be given to the clause would make the saving idle and nugatory. If, then, the law, as it stood before this Act, allowed to tithe impropiators to enjoy their property through the medium of leasing it, and the tithe owner here has availed himself of that legal mode of enjoying his property, can it be imagined that by an *ex post facto* law that very mode of enjoyment should be made the cause of the destruction of the property itself? But for the high authority of my brother Perrin, who has taken a different view of the law, I, for my part, can see no ground whatever for entertaining such a view; but considering that high authority on the other side, all that I will at present say is, that I am happy to be able to concur with my learned brethren, Crampton and Moore, in declaring, that in our opinion the

claim of exemption against the reversioner is not maintainable under this Act, for, though he was liable to be affected by the commutation of the tithe, he was not liable to have his claim thereto barred.

Judgment accordingly.

COURT OF CHANCERY.

[Reported by BECHER L. FLEMING, Esq. Barrister-at-Law.]

RE M'KIBBON, (A BANKRUPT.)—June 2, July 2.

Bankrupt—Mortgagee—Fixtures—Goods and chattels—Steam engine—Reputed ownership
—6 W. 4, c. 14.

A flax-spinner, holding a mill and premises under a lease for lives renewable for ever, had mortgaged the entire mill and machinery to a banking company. Portions of the machinery consisted of boilers embedded in mason-work, and of a steam-engine; the latter was attached to the boilers by pipes, but could be separated from them by loosening screws. It was also attached to a platform of stone-work, (upon which it rested,) by means of bolts passing through apertures in the stone-work, and secured below by pins, and also connected with the engine; but the engine could be detached from the stone-work by removing the pins and withdrawing the bolts, and without disturbing the mason-work. The machinery also included shafting, gearing, water-pipes, (called gas-fittings,) and several other articles. In the year 1850 the above mortgage was effected, but the mortgagor still continued to work the mill and use the machinery, and in 1854 he became a bankrupt. The mortgagees claimed the machinery by virtue of their mortgage, and the bankrupt's assignees also claimed it upon the ground that it passed to them under the "reputed ownership" clause of the Bankrupt Act, 6 W. 4, c. 14, (s. 86). Held, that the boilers, steam-engine, shaftings, gearings, and gas-fittings, passed to the mortgagees, and did not vest in the bankrupt's assignee; but that the remaining moveable machinery of the mill passed to the assignees.*

THIS case came before the court on appeal from the decision of Mr. Commissioner Macan. The bankrupt, who was a flax-spinner, had in the year 1834 obtained a lease for lives renewable for ever of certain lands and premises containing about seven acres from Lord Templemore, upon which

* Section 86 enacts—"That if any trader, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner, the Commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the Commissioners: provided, that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment duly registered according to the provisions of an Act of Parliament made in the fourth year of the reign of King George the Fourth, intituled An Act for the Registering of Vessels."

he had erected a mill, two dwelling-houses, and offices, and he also purchased machinery in England, consisting of a steam-engine, two steam-boilers, a steampipe, shafting and gearing, spinning-frames, spindles, reels, flax hackling-machines, roving-frames, spreading-boards, drawing-frames, carding-frames, presses, lathes, vices, &c. The steam-boilers were built into the walls with brick and mortar, and embedded in the soil, and in connection with them was a steam-pipe, by which they were attached to the steam-engine; and the latter rested upon a platform of stone-work, to which it was connected by bolts and screws—but in such a manner that it could be disconnected without breaking or fracturing the stone-work on which it rested, and the other machinery could also be taken asunder by the loosening of bolts and screws, and removed from the premises, without doing any injury to the walls and buildings, or to the machinery itself. During the progress of the erection of the mill, and the purchase of the machinery, the bankrupt had an account with the Northern Banking Company, and had drawn a large sum of money, which he had expended in the necessary expenditure connected with the mill; and as a security for these advances he had, in the year 1855, lodged with the bank his lease of the premises by way of equitable mortgage. In 1842 he passed them his bond for £10,000, and in 1850 the bank having upon a settlement of accounts abandoned £3,000, portion of their claim against the bankrupt, he granted to them a legal mortgage of the entire mill and machinery, but continued in possession until his bankruptcy, which took place in the year 1854. The bank claimed the mill and machinery by virtue of the mortgage deed, (the effect of which to pass the property would have been indisputable but for the bankruptcy), and the assignees of the bankrupt insisted on their right to the property under the provisions of 6 W. 4, c. 14, s. 86. [The facts of the case will appear more fully in the judgment of Mr. Commissioner Macan.*]

* This case had been argued in the Bankrupt Court by *Creighton, Q. C.*, and *Fitzgibbon, Q. C.*, on the part of the bankrupt's assignees, and by *Deasy, Q. C.*, and *Dobbe*, on behalf of the mortgagees, before Mr. Commissioner Macan, who delivered the following judgment on the 7th of May, 1855:—

"MR. COMMISSIONER MACAN.—I had intended to give my judgment in this case immediately after the argument; and I would have done so, but that I understood there was a similar question to be decided by the Court of Queen's Bench, and the great respect I entertained for that court collectively and individually demanded the delay. The name of that case was *M'Master v. Banbridge Union*. It is, however, unnecessary to inquire how far that case has any bearing upon the present question. As far as I understand, it does not militate against any part of the judgment I am about to pronounce. I will proceed at once to consider the question raised between the assignees of the bankrupt Robert M'Kibbon and the Northern Banking Company as mortgagees of his freehold premises and machinery, where he carried on business as a flax spinner, at Ballymacaire, in the County Down. That question is, whether any, and if any what part of the machinery in his flax mill, was or was not goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, with the consent of the true owners, the mortgagees. It is insisted on the part of the assignees that the whole of this machinery

June 2.—The case was argued by *F. Fitzgerald, Q. C.*, and *Deasy, Q. C.*, for the mortgagees; and by *The Solicitor-General* and *Fitzgibbon, Q. C.*, for the bankrupt's assignees.

retained its character of goods and chattels, and that having been left in the apparent ownership of the bankrupt up to, and at the time of, his bankruptcy, it passed to his assignees. On the other hand, it has been contended on the part of the mortgagees that, the machinery being affixed to the soil and to the buildings, it lost its character of goods and chattels. It did not come within the terms of the 86th section of 6 William 4, cap. 14, (12 & 13 Victoria, cap. 106, s. 123, Eng.) known as the reputed ownership clause. [The learned Commissioner read the section.] The question therefore in this case is, whether any part of the machinery in the bankrupt's mill, according to the true meaning and spirit of this section of the Act, has passed to the assignees. The question in point of law is of great importance to that branch of trade in the north of Ireland, and is also of some importance as to pecuniary amount, as the machinery in question is sworn by the bankrupt to have cost fourteen or fifteen thousand pounds, and is now valued by him, after the wear and tear of many years, as being worth ten thousand pounds; but I gather from affidavits that have been made in support of an alleged custom of trade, that the pecuniary amount sinks into insignificance when compared with the importance of the question at issue, and its consequences to the banking interest of Ulster, and the trade of flax-spinning in that part of the kingdom—indeed, I may say the United Kingdom—nay, even abroad. In deciding the case, it is impossible to be too particular, when we consider the interests that are involved in it; but, after all, the decision must rest more on questions of fact than of law. In the course of the argument the legal questions applicable to the case were scarcely controverted, and it is not my intention to decide a mere abstract case. After the most laborious and anxious consideration, I will decide the case upon the facts which appear in it, and about which there is scarcely any dispute. It has been contended by counsel for the bank that machinery of this kind does not come under the operation of this statute; that, not being stock-in-trade, it was not to be treated as goods and chattels, giving a false credit to the bankrupt. I think, however, that the nature of the property in question is as much, if not more, calculated to give a false credit than stock-in-trade, which is of that mere transient character, that, if the trader have it to-day, it may be sold and totally disappear to-morrow; whereas, every one knows that machinery in these flax mills is of a very expensive character—the cost of its erection in this case being fourteen or fifteen thousand pounds, laid out by the trader as capital permanently invested in his trade. Under these circumstances, it cannot be denied that it is at least as much, if not more, calculated to create a false credit than the goods and chattels which constitute a trader's ordinary stock-in-trade, or than the furniture of his dwelling-house. The remark made by Mr. Fitzgibbon is worthy of observation, that the possession and use of machinery is the actual wearing away and destruction of it. This machinery remains in the possession of the owner; it is wearing and consuming away; and every incident connected with it is calculated to lead to the belief that it belongs to the manufacturer in whose possession it is. All these circumstances, in my opinion, contribute in fixing the title of the assignee. Besides, every particle of this machinery was goods and chattels before it was erected by Dr. M'Kibbon, or delivered at his mill. He was the original owner of it; it was purchased perhaps in Birmingham or Sheffield, sent over in minute parts, and put together on the premises, where it was to remain merely for the purposes of his trade. These parts were often of the most delicate character, and frequently required to be taken asunder and repaired. The bankrupt was thus the original owner, and this original ownership was the foundation of that reputed ownership upon which the assignees insist, particularly where the mortgagees gave no notice to the public of the change. Another prin-

[The following cases were cited and commented upon:—*Horn v. Baker*, (9 East. 215; s.c., 2 Sm. Lead. Cas. 122); *Coombes v. Beaumont*, (2 B. & Ad. 72); *Boydell v. M'Michael*, (1 C. M. & R.

177); *Minshull v. Lloyd*, (2 M. & W. 459); *Helawell v. Eastwood*, (6 Ex. 298); *Fisher v. Dixon*, (12 Cl. & Fin. 312); *Ex parte Heathcote*, (2 Mont. Dea. & De Gex, 711); *Hamilton v. Bell*, (18 Jur.

ciple of great importance in determining cases of this character is the intention with which the trader erects the machinery or fixtures; whether, when erecting them, he intended they should be annexed to the freehold and building, and remain there permanent and irremovable; or whether as machinery for the mere purposes of his trade, they could be displaced at any time, and either removed to some other premises or replaced by new machinery of a similar kind. If erected with this intention, and capable of removal without material injury to the freehold or to themselves, they never lost their character of goods and chattels. The case is widely different when the fixtures or machinery are put up with the intention of affixing them permanently to the freehold without the necessity of removal. The doctrine with regard to what passes to assignees, or ought of right to belong to the mortgagee, as being affixed to the freehold, has been greatly modified within the last few years. The exigencies of trade in a great commercial country like England, and the great improvements in agriculture in the United Kingdom, made a change in that respect necessary, and the leaning of the courts, in considering what was, or was not, affixed to the freehold, was in favour of general creditors in case of bankruptcy. I shall divide the whole of this machinery into three classes: First, such portions, if any, as are affixed to the freehold; I mean permanently affixed; or were built into it by the bankrupt himself. Secondly, such portions as, although not permanently built into the soil or freehold, or affixed to the buildings thereon, yet are firmly attached to the walls of the mill and houses by bolts and screws for the purposes of trade. Thirdly, that class which remains altogether detached and moveable, but which, nevertheless, essentially constitutes the principal part of the machinery of a flax spinning mill. With regard to the first class, viz., that portion which is so attached to the walls or imbedded in the soil that it cannot be removed without doing material injury to itself or the building, and cannot therefore be regarded as goods and chattels within the meaning of the statute, I may as well announce at once that the only portion which appears to me to come under this head are the two steam-boilers which have by the act of the bankrupt himself been so built into and embedded in the soil that their severance could not take place without doing material injury to themselves, and which is more important, to the buildings themselves in which they are placed. I shall add the metal steam-pipe that conveys the steam from the boilers to the cylinder of the steam-engine, and I do so more for caution than certainty. These boilers and this steam-pipe could not be removed without injury to themselves and injury to the buildings. In a pecuniary point of view this metal pipe is not worth the time that has been given to it, but with these two boilers and this steam-pipe in my judgment the rights of the mortgagees end. I state this at once, so that the observations I make upon the other portions of the case may be better understood. As I have already said, the question is one more of fact than of law, and resolves itself into this, are there any other portions of the machinery or fixtures so embedded in the soil, or affixed to the walls and buildings themselves, that the removal of them would cause substantial and material injury to the premises, to the freehold as it is called, or to the machinery itself? And this test applies to the sheeting of boards round the vertical shafts. This is really the question, and I do not think it was sufficiently adverted to by counsel on the part of the mortgagees. It was not shown, either in the evidence or in the argument, that anything like substantial injury would be done either to the buildings or to the machinery itself by the removal of any other portion of it, save what I have above excepted. It is not the displacing of a few bricks or a few stones, that could be replaced or set right by the same bricks or stones and a few trowels of mortar, and done by a common workman, that constitutes

such an injury as will prevent the removal of fixtures or machinery, or change their character of goods and chattels. The injury should be a serious substantial injury to the soil and freehold, or building thereon. In all the reported cases, the question really is, whether the fixtures or machinery could be removed without doing substantial injury to the freehold, or buildings, or to themselves. If they could be removed without doing such injury, they have been always held to be goods and chattels, subject to the operation of the reputed ownership clause. If they could not be removed without doing injury of a serious character (not that species of injury that could be repaired in a few moments, leaving the walls just in as good a condition as they were before,) then they have been always held to go with the freehold, and, consequently, to belong to the mortgagee. Now, let us examine the nature and character of this machinery, and see if it can be removed without doing serious injury to itself or to the freehold. In the first place, the steam-engine can be removed with as much ease as if it were not attached to the freehold at all. It was put up in pieces and attached to a solid stone foundation by bolts and nuts. Eight or ten holes were drilled through the solid stone on which it rested. Corresponding to these holes were others in the flange or rim of the cylinder, through which wrought-iron bolts were passed, fastened below by iron keys, and above by nuts, all of which might be removed by a hammer and a common shifting wrench. The cylinder, the piston, the top or cover, the supporters, were all put up piece by piece, and can be taken down without doing the slightest injury to themselves or any wall or building. The observations that apply to the steam-engine and its parts apply to the large fly-wheel and to all the other portions of the machinery, even of the second class. They are all put together in parts, each part being most accurately fitted, and capable of removal by displacing a nut, a bolt, or a screw. Even the most enormous water-wheels are cast in sections, or segments, and can be put up piece by piece, each most accurately fitted into the other, and afterwards capable of being taken to pieces and then removed with the greatest facility. If they are thus so easily removed, the species of annexation that exists does not alter their character of goods and chattels (a character which they originally bore,) more particularly when they were left in the apparent ownership of the bankrupt at the time of his bankruptcy by the laches of the mortgagees who now claim them. I do not happen to know where this machinery was made, but wherever it was made, it was originally goods and chattels purchased by Dr. M'Kibbon, the owner of the mill, brought over by him in parts erected in his mill, and now removable without doing any injury to itself or to the freehold. How then, I ask, can it be contended that this machinery has lost its character of goods and chattels, and that it should go to the mortgagees, as well as the houses and buildings themselves, as a part of the freehold? The whole of this machinery, many parts of which are of a very delicate and minute character, comprising nearly four thousand spindles, can be taken down without serious injury to the walls, or the slightest injury to the machinery itself. No case of this description can be found in the Irish Reports; the English Reports, through which I have searched, are filled with such cases, *usque ad nauseam*. The true result of all these cases is, that machinery purchased and put up by the owner for the mere purposes of trade, which could afterwards be removed without injury to the buildings or to themselves, do not belong, as a part of the freehold, to the creditor to whom they and the premises were mortgaged, where the mortgagor continued in possession of them up to the time of his bankruptcy, with the consent of that creditor. In this case Dr. M'Kibbon built the mill, was the original owner of it, as well as the original purchaser of the machinery, and his mode of annexing it to the walls does not, in my opinion, take from it its original cha-

1109); *Trappes v. Harper*, (2 Cr. & Mee. 153); *Ex parte King*, (1 Mont. Dea. & De Gex, 119); *Ex parte Humphries*, *In re Gibbs*, (1 Eng. Bank. & Ins. R. 68); *In re Wood*, (Ibid. n.); *Ex parte*

Langton, (Ibid. 241); *Hubbard v. Bagshaw*, (4 Sim. 326); *Ex parte Cotton*, (2 Mont. Dea. & De Gex, 725); *Ex parte Wilson*, (2 Mont. & Ayr. 61); *Ex parte Belcher*, (2 Mont. & Ayr. 165);

racter of goods and chattels, and the mortgagees having permitted all this machinery to remain in the apparent ownership of the bankrupt at the time of his bankruptcy, have forfeited their right to priority, and these chattels must now be thrown into the general assets and divided rateably amongst all the creditors under the commission, the bank inclusive, whilst their mortgage will remain perfectly valid as regards the realty, including the two steam-boilers and steam-pipe. Every observation I have made with regard to the second-class of machinery, namely, that part which is attached to the walls and floors by bolts and screws, applies with much greater force to the third class, which is wholly detached from the walls, including the carding-machine, worth two hundred pounds, and resting on the floor by its own weight. The present is, I believe, the first time an attempt has been made to exempt from the operation of the Act this loose kind of machinery. It was strongly urged, that to take it away would dilapidate the mill, and that it could not be removed without having been taken asunder. This argument, according to my notion, is wholly untenable; for if it were well founded, what would become of the rights of landlords to distrain large four-posted beds, winged wardrobes, large bookcases, and other articles of furniture that cannot be removed without being taken asunder—articles which, if removed in the state in which they are fixed in any of our houses, would not pass through the door or windows of any mansion? And when any of these articles are taken asunder, they do not thereby lose their character of goods and chattels. They represent in their separate parts what they represent in the whole. If I leave my watch for repair, and when I call for it, I see it in separate parts under a glass shade, waiting to be put together, it is not less a watch than it was before; and I think the argument seems untenable, that because the machinery in this case must be taken asunder before its removal, it thereby loses its character of goods and chattels, and is not to come within the operation of the statute. This statute was enacted for the purpose of preventing the mischiefs that would arise to trade and commerce by permitting the trader to continue in the visible ownership of property to which he had no title, and thereby create a fictitious credit which must be injurious to the interests of trade. Where the statute is remedial, the Bankrupt Court, as well as every other court, is bound to construe it so as to advance the remedy and repress the mischief. Besides, the Legislature has thought fit to make a very stringent enactment upon the subject, and it is my duty to administer it. The 86th section declares 'that if any trader, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods and chattels whereof he was reputed owner, or whereof he had taken upon him the sale, order, or disposition as owner, the commissioner shall have power to dispose of the same for the benefit of the creditors under the commission.' Then came the 160th section of the same statute (6 Wm. 4, c. 14,) which declares that the Act shall be construed beneficially for creditors, and which in effect directs me so to construe it. The words of the closing section of the 12 & 13 Vict. c. 107, are still stronger, and all the Acts relating to bankrupts are to be construed together as part of the same code. I am therefore bound, according to the true spirit of these statutes, to advance the remedy by construing them beneficially for creditors. It is somewhat remarkable that of late years the judges of the Bankruptcy Court in England seemed rather disposed to sustain the rights of mortgagees than those of the general creditors as against the principle to which I have been alluding; and this is the more striking, as the judges of the courts of common law at Westminster Hall, in their decisions, have leaned more in favour of the rights of general creditors. The palpable difference of the reported cases in England has been attempted to be

reconciled; and it was urged, on the part of the mortgagees, that the difference between these cases may be explained by considering whether the bankrupt was the owner of the fee or freehold, or merely lessee for a term. But a careful examination of these cases will not justify this argument. Thus, in *Ex parte Lloyd*, (3 D. & C. 755,) decided in 1804, the bankrupt held part of the premises for a mere term, yet the decision was against the assignees. So also, in *Boydell v. M'Michael*, (3 Twyr. 974; s. c., C. M. & R. 177,) decided also in 1834, the bankrupt was a mere termor, as was also the case in *Ex parte Heathcote*, (2 M. D. & D. 711.) On the other hand, in *Trappes v. Harter*, decided in 1833, (3 Twyr. 603; s. c., 2 C. & M. & R. 153,) the bankrupt was the owner in fee, but the decision was in favour of the assignees. So also, in *Ex parte King*, (1 M. D. & D. 119,) decided in 1840, the bankrupt was seized of the freehold of part of the premises; and in these two cases the principles that ought to regulate the questions now at issue are, in my judgment, most correctly laid down and rightly applied. The cases on which I rest my judgment are *Horn v. Baker*, (9 East, 215; s. c., 2 Smith's Leading Cases, 122); *Trappes v. Harter*, (3 Twyr. 605; s. c., 2 C. M. & R. 117); *Ex parte Austin*, (1 Dea & C. 207); *Hellawell v. Eastwood*, (6 Exch. 295); *Ex parte King*, (1 M. D. & D. 119, 125.) This latter case is peculiarly valuable from the able and elaborate decision of Sir George Rose, for whose judgment and opinion I entertain the highest respect, and whom, from his great experience and knowledge of the law and practice in bankruptcy, I would willingly follow as a guide. I rely, too, on *Ex parte Humphries* in *Re Gibbs*, (1 English Bankruptcy and Insolvency Reports, 68); *Ex parte Wood*, (in the note there, 70;) and *Ex parte Langdon*, (241, same vol.) The counsel for the mortgagees, in commenting upon the judgment given by Mr. Commissioner Fane and Mr. Commissioner Fonblanque in these cases, seemed to underrate their value, as these gentlemen are merely commissioners of bankruptcy, and not judges. Now, although their learning, their research, and their acumen are not the less because they are designated commissioners and not judges, possibly to some extent it is a misfortune that they are not called judges; for if they were, more weight would be attached to their judgments and decisions, and the title of judge would be more in accordance with what is due to the great learning, research, and ability of such men. I have read judgments of theirs, and of Mr. Commissioner Holroyd, worthy of the most eminent judges of any of the courts of law or equity. I come now to another part of the case, of which I think the assignees have some right to complain, and with which the court ought not to be well pleased. A suitor is supposed to bring his case into court *simul ac semel*—altogether perfect at the same time, as far as he can make it perfect; but in this case, after the issues were joined, after the charge and discharge were filed, some months at least after the filing of the charge, a new case is sought to be made, and no less than seven affidavits have been filed, and made a part of the proceedings, with a view of establishing a custom of trade which is to exempt the whole of this machinery from the operation of the order and disposition clause of the Bankrupt Act. Neither when these affidavits were read to me in court, nor upon my own examination of them in my chambers, could I understand how the banks of the North of Ireland from the mere practice of lending money upon the mortgage of machinery in mills, could turn this into a custom of trade that is to exempt such machinery from the operation of the order and disposition clause. This practice of getting a mortgage, not only of the mills and buildings, but of the machinery in them, is for their own greater security, and to give them advantages that other creditors do not possess; but I do not know that it can be seriously contended that this practice for their own better security is to be turned into a custom of trade that is to exempt the goods

Lee v. Risdon, (7 Taunt. 188); *Hallen v. Runder*, (1 C. M. & R. 266.)]

Cur. adv. vult.

July 2.—**LORD CHANCELLOR.**—This case was argued before me upon appeal from the decision of

and chattels so mortgaged from the operation of this enactment. The mortgage is no doubt registered, but every one knows the value of such registry—it gives the public no real notice of the mortgages, whilst the millowner still continues in the apparent ownership of every species of property on the premises; acquiring thus in the eye of the world a credit to which he is not entitled, and then when bankruptcy takes place, the banks claim by force of this practice to have the goods and chattels exempt from the operation of this salutary law. I cannot agree in calling this practice a custom of trade, and even counsel for the mortgagees did not attempt to say that this practice of the banks was anything like a general custom of trade—but persons unkindly disposed might be inclined to say that it was more in the nature of a prudent and even an astute precaution on the part of these banks. I can very well comprehend the custom of the trade of Lancashire, known all over the commercial world, namely, the hiring of machinery. It is well known that the cotton-spinners hire the machinery there, and that the letting out of it on hire almost constitutes a trade in itself. This custom is so well known, so notorious, that the possession of the machinery of a cotton-mill in Lancashire, whilst let to him on hire, cannot obtain a false credit by his merely having the use of it; and hence it has been held that such machinery there does not come within the operation of the reputed ownership clause. This custom with regard to the cotton-spinners of Lancashire is just as notorious as the three days of grace given to the acceptor of a bill after it becomes due, before he is called upon to pay it. But who ever heard of the precaution of the northern banks in Ireland to secure their debts having been deemed a custom of trade, that is to exempt the machinery there from the salutary operations of this enactment? I can also understand the custom of trade of the coal merchants on the Thames who hire from the owners the coal-lighters and boats necessary for their trade. This custom is also notorious—it is well known that the coal merchants are hardly ever the owners of the barges or boats in use by them, and therefore no false credit is obtained by the possession of them. What analogy then is there between this custom of trade, well known in the commercial world, and the practice of the northern banks as to the security which they obtain when lending their money to the mill-owners? The banks do not hire out machinery or coal boats that may be got back again—they hire out their money, and get as a security for it a mortgage upon goods and chattels that never were their own. In the case of the cotton-spinners and the coal merchants the things lent out originally belonged to the party claiming them back, whilst the machinery which they now claim they never owned; they owned the money that was lent on it, but that they cannot get back, the borrower having become bankrupt. They, by their laches, permitted the chattels pledged to remain in the apparent ownership of the bankrupt, who was well known to have been the original owner, and they now want to get what they never had in possession. But this decision, even if affirmed on appeal, does not in the slightest degree invalidate their mortgage; but it will, for the future, impose upon them the necessity of going into possession as mortgagees, or otherwise put an end to their consent and permission before the bankruptcy of their debtor. These affidavits intimate to me that the consequence of my deciding against the banks will be most injurious to the trade of flax-spinning in the north of Ireland. I am not at all alarmed by this intimation—even if this were so, I cannot alter the law. I must administer it as I find it. I think I am right in saying that the banks with whom traders are in the habit of dealing are frequently better judges of their solvency than they are themselves; and, when that solvency is in any degree shaken, they can put an end to the

Mr. Commissioner Macan, brought on behalf of the Northern Banking Company in Belfast, who claim to be entitled as mortgagees to those premises and the machinery upon them under the following circumstances. [His Lordship stated the facts connected with the mortgage deed.] The bankrupt had, previous to his bankruptcy, conveyed under this deed of mortgage all the machinery, engines, &c. on or about the premises in question, subject to the proviso for redemption; in other words, a legal mortgage was executed by him to the Banking Company in the most full and complete terms. It appears that, subsequently to the execution of this deed, M'Kibbon continued for a considerable time in possession of the premises and machinery, and ultimately became a bankrupt; whereupon his cre-

order and disposition clause, by the simple precaution of going into possession. There is no difficulty in their doing this. In this very case, the Northern Bank must have known that, long before the bankruptcy of Dr. M'Kibbon, his credit and his circumstances had been failing; for it was upwards of three years before that period they abandoned between three and four thousand pounds of their claim against him, from his inability to pay it. They had ample opportunity during this time to be fully acquainted with his circumstances; they might have gone into possession and effectually put an end to his reputed ownership before his bankruptcy occurred; but instead of doing so they permitted the bankrupt to continue the reputed owner of all these goods and chattels, which they now call on me to declare them entitled to in preference to the general creditors. They must see I cannot do this whilst the law remains as it is; and I can only say, if I have not succeeded in laying down the law right and applying it right, it has not arisen from a want of the most careful and anxious investigation of the whole facts connected with the matter, and of every reported case in any degree applicable to it. I may add this observation, which is applicable to the knowledge, the bank had of the circumstances of Dr. M'Kibbon long before his bankruptcy. I found, on reading over the documents, that so far back as the 11th September, 1842, eight years before the execution of the mortgage, the bank thought it necessary for their own protection to get the bond of Mr. M'Kibbon for no less a sum than £10,000 to hold over him as a security for their advances, and on that bond judgment was entered as of the antecedent term. Now, suppose that at any period during those eight years, the bank had thought proper to issue a *fi. fa.* and seize under it the whole of this machinery, as part of the goods and chattels of Dr. M'Kibbon; suppose that bankruptcy followed, and that we had counsel for the assignees coming in here and disputing the right of the bank to do so, insisting that all this machinery was affixed to the freehold;—in that case the tables would be turned, and we would have counsel for the bank contending, and successfully contending, that they had a right to sell them as mere goods and chattels, not at all affixed to the freehold; and that this court would not be justified, in law or in fact, in declaring that the assignees were entitled to them. On the whole of this case my judgment is, that all the machinery in the mill of the bankrupt, with the exception of the two steam-boilers and the steam-pipe, were goods and chattels in his order and disposition at the time of his bankruptcy, with the consent of the true owners, the mortgagees; and I now order them to be sold for the benefit of the creditors under the commission. The form of the necessary order was settled in *Re Evans*, in the case of the Boyne Aqueduct, and it is to be accompanied by two schedules, specifying in detail every article of the machinery, from the two steam-engines inclusive down to the minutest portions that are loose and detached. As to costs, I will let the mortgagees abide their own costs; the assignees will, of course, have their costs out of the estate."

ditors insisted upon their title to this property for the liquidation of the bankrupt's debts; and their demand was resisted by the mortgagees. As to the machinery and implements which are the subject-matter of the discussion, the Commissioner has enumerated them in separate schedules, and he has ruled that, as to those in the first schedule, the assignee was not entitled to them, but that they were the mortgagees' property: however, this ruling was confined to two articles, the boiler and steam pipe. The second schedule is that which was chiefly the matter of discussion in this court; and it contains the steam engine, shafting and gearing, lathes, vices, gas-fittings, &c., together with an old boiler lying outside the mill, and, as I conclude, useless, and as to which, therefore, no question need arise. The third schedule contains a variety of minor articles, which appear to me to be mere chattels; but the chief question in this case is in reference to the steam engine, and the shafting and the gearing; in other words, it appears that the motive power of this mill, which was set in motion by a steam engine, was applied to the working of looms, &c. and that the latter were connected with the steam engine by wheels and in other ways, and the main question is in reference to these articles, viz. the steam engine, the shafting and gearing, and the gas fittings. Mr. Commissioner Macan has decided that all these things are goods and chattels within the meaning of the 86th section of 6 W. 4, cap. 14, and therefore, they having been in the possession, order, and disposition of the bankrupt with the consent of the true owner, that the Commissioner had the power to sell and dispose of them for the benefit of the creditors under the commission. I have before me a copy of the judgment of the Commissioner, and his opinion appears to me to have been founded upon the supposition that these things were removable by the bankrupt in the same manner that such articles are removable as between landlord and tenant upon the ground of their being trade fixtures, and that they could be removed without doing any substantial injury to the soil and freehold, or without damaging the machinery itself. The words of the Act of Parliament are as follows. [His Lordship read the section.] Now, in the present case, the bankrupt had not, in point of fact, taken upon himself the sale, alteration, or disposition as owner of these things, beyond making use of them for the purpose of carrying on the trade, and I do not think that the latter sort of ownership is what is contemplated by the Act. No other evidence has been adduced to show that he was the reputed owner of this property. That he was, generally speaking, in possession with the consent of the true owner, is not doubted; but the question of reputed ownership depends in all cases of this nature upon the general character of the articles themselves, and the power of the party in possession over them, more than upon the mere direct evidence of the fact of possession. This is, I take it, the correct view of all questions arising under this section, where it is sought to make possession confer reputation of ownership. As regards mere chattels, possession is *per se* a reputation of ownership in them, and, therefore, no question can arise in such cases, but where the pro-

perty is not a mere chattel, it is otherwise. It is to be observed that the words of the Act are not, "if any trader by the consent and permission, &c. have in his possession, order, and disposition 'any property,'" but "any *goods or chattels*;" and, therefore, the articles must be of the latter nature to bring it within the statute. Much confusion has arisen in applying the test of ownership in such cases, and it appears that in some decisions very slight evidence of that fact has been held sufficient; but in the present case the first question to be considered is, whether or not these things as they stand can be called goods and chattels, and if so, then, so far, the Act is satisfied; but, if they were not so at the time of the bankruptcy under the law, as it stands, then the power of the bankrupt to remove them as his own property, whether as trade fixtures or otherwise, will not confer upon them the character of goods and chattels. I think that many of the observations in the books go rather upon the mere question of removability than upon the nature of the things themselves, whether they be chattels or otherwise. It has been argued that all these articles are individually of a chattel nature, but so are bricks lying in a heap, and yet it will not be contended that the latter do not cease to be chattels when built up in a wall. If such were the case, then everything belonging to the owner in fee could be nothing more than a chattel, and therefore it is that I think the question is to be considered not so much in reference to the power of severance from the freehold, as whether these things as they stand are what the law declares to be chattels. This question has been decided in an early case, and the matter is there clearly stated; but before we go into the consideration of this question, let us see what was the nature of the possession of M'Kibbon. It appears that he had mortgaged these things to the Northern Banking Company in Belfast, and therefore he was merely tenant at will, they being the owners—he tenant at will to a landlord whose property was the mill and steam engine; therefore, so far it appears to me that he could not have removed a particle of them, and this proposition is laid down in very early cases. But it is plain that it is not the mere power of removal that will decide this question, although as tenant I do not think he would have had power to remove the steam engine. One of the early cases upon this subject is *Ryall v. Rowles*, (1 Atk. 169; s. c. 1 Vez. 348,) and in that case a clear distinction was taken between what were fixtures and what were goods and chattels, and that, independently of the power of removal by *any one*, but solely resting on the nature of the thing itself. This appears from the judgment of Lord Hardwicke. In that case some of the things were embedded in the soil, and others of them were vats resting upon it. That case was followed by *Horn v. Baker*, (9 E. 215.) [His Lordship stated the facts of the case.] In that case Lord Eldon asked the Attorney General whether he intended to insist upon the right of the bankrupt's assignees to such things as were affixed to the freehold, (referring to *Ryall v. Rowles*), and being answered in the negative, he said that if the rest of the court agreed with him as to the right of the assignees to such things

as property falling under the denomination of goods and chattels, it would be better to refer the matter. He says subsequently in his judgment, "The stills, it appears, were fixed to the freehold, and, as such, we think, could not pass to the bankrupt's assignees under the description of goods and chattels in the statute." Reference was made in the argument in that case to an usage for distillers to rent or hire vats and articles of that nature for the purposes of their trade; but the decision of the court was plainly without any reference to the power of the party to remove such things. The next case is *Clark v. Crownshaw*, (3 B. & Ad. 805.) In that case a person took a lease of a forge, and purchased the fixed and movable implements it contained; but it was agreed that they should be given up at the end of the term if the lessor should give fifteen months' notice of his intention to take them. The lessee conveyed the premises to a trustee in favour of a creditor, upon trust to enter and sell, and satisfy the debt, and to reassign the residue. The lessee became a bankrupt, and the assignee having brought trover, it was held that the lessee had a reputed ownership in the moveable goods, but not in the fixtures. Parke, J. during the argument says, "How is this case distinguishable as to the fixtures from *Horn v. Baker*?" The ground of decision there was, that the stills were affixed to the freehold, and would not pass to the assignees as goods and chattels under the statute 21 Jac. I, c. 19, s. 11, by reason of reputed ownership in the bankrupt. That case must govern the present as to fixtures;" and the other judges concurred. *Coombes v. Beaumont*, (5 B. & Ad. 72,) was to the same effect. That case decided that a steam-engine, erected for the working of a colliery, to be used by the lessee of the colliery during his term, but to be held to be the property of the landlord subject to such use, will not pass to the assignees of the bankrupt in the event of the tenant's bankruptcy, not coming within the description of "goods and chattels" under 6 Geo. 4, cap. 16, s. 72. It was contended in that case that it was a fixture for trading purposes, but Lord Denman says: "As to the steam engine, I think this case must be governed by *Horn v. Baker*, and that the engine does not pass to the assignees." One of the most important decisions on this subject is *Hubbard v. Bagshaw*, (4 Sim. 326,) as it closely resembles the present case. In that case a tenant in fee of a cotton mill, in which was a steam-engine, boilers, &c., mortgaged the mill, engine, &c., to another party, but remained in possession until his bankruptcy. The entablature plate of the engine in that case was fixed to the freehold, but all the rest of it was attached by screws and bolts, and could be removed without injury to the freehold; but it was held, that the steam-engine was not in the order and disposition of the bankrupt at the time of his bankruptcy. It is impossible to distinguish that case from the present as regards the steam-engine; no question there arose as to the gearing and shafting, and therefore so far the case is not an authority; but as to the steam-engine, it is precisely this case, for the boilers were in separate houses, and the case did not turn upon the connection between the steam-engine and them,

but upon its connection with the soil and freehold. The Lord Chancellor in his judgment says: "The mortgagors were, in point of law, merely tenants at will to the plaintiffs, the mortgagees, part of whose fee-simple estate was the steam-engine;" citing *Horn v. Baker*. Another case of the same nature was *Boydell v. M'Michael*, (1 C. M. & R. 177,) where a tenant had taken a lease of a house and premises for a term of years, and certain fixtures at a valuation, and after having assigned the entire by mortgage to a third person, he became bankrupt; and it was held in that case also, that the fixtures were not goods and chattels within the disposition of the bankrupt. Baron Parke says in that case: "I have always considered that *Horn v. Baker* had determined that fixtures affixed to the freehold were not goods and chattels within the order and disposition of the bankrupt;" and Alderson, B.: "This question turns entirely on the nature of the property. It is clear that nothing of a freehold nature is within the meaning of the clauses of the Bankruptcy Act as to order and disposition. It is settled by the case of *Horn v. Baker* that fixtures were not within the meaning of the statute of James." In *Trappes v. Harter*, (2 C. & M. 153,) the case was of this peculiar nature that the mortgage did not include the articles in question, and also in this, that the mortgagee, who claimed against the creditors, had represented to them after the mortgage, but before the bankruptcy, that this property was part of the assets of the bankrupt. The last case I shall cite on this subject is *Fletcher v. Mannings*, (1 Car. & K. 350,) where a mill and the machinery had been mortgaged, and the mortgagee continued in possession until the time of his bankruptcy; and it was held, that the property was not in the order and disposition of the bankrupt. I may also allude to *Rufford v. Bishop*, (5 Rus. 350,) which is to the same effect. These are the chief decisions upon this subject in the Superior Courts. There are also several decisions in the Bankruptcy Courts; but the preponderance of opinion is in favour of the principle laid down in *Horn v. Baker*. In *Ex parte Lloyd*, (1 Mont. & Ayr. 495,) there had been a mortgage of premises and machinery, including a steam-engine, which had been erected for trading purposes. The mortgagor had continued in possession until his bankruptcy; and it was held, that the steam-engine did not pass to his assignees. The chief judge refers to *Trappes v. Harter*—he says: "The question then before the court is reduced to this, are the fixtures 'goods and chattels' within the meaning of the Bankruptcy Act. This question the decision of *Trappes v. Harter* leaves wholly untouched;" and he states the reason to be, that the machinery was not in that case included in the mortgage. As regards the steam-engine, I cannot find any case in which it has been decided that it can be removed under such circumstances as the present, and, indeed, it is very difficult to conceive how it could be removed without an injury to the freehold. This may not be the case if the meaning of these words be, that some of the freehold must actually be removed; but taking a larger view of the meaning of the expression, a great deal that will be of no use in the pre-

sent case will be left behind if the steam-engine is removed, namely, the house and the other premises in connection with it; and it is hard to suppose that there can be no injury done to the freehold except by an actual displacement of clay. It is impossible to say that no injury has been done to the freehold premises if they are rendered worth nothing by the removal of the mill from them; and in the case I have last alluded to, Sir J. Cross, after referring to *Horn v. Baker*, says: "A person who erects a machine, and then mortgages it, and continues in possession, is a tenant." In *Ex parte Belcher*, (2 Mont. & Ayr. 165,) the Chief Judge says: "In this case the assignees claim upon two grounds—1st, that the bankrupt was the true owner, as the fixtures in question were not included in the mortgage; if so, there would be an end of the question, as the bankrupt would be the true owner. It is also said that some portions of the property are not fixtures strictly speaking, but furniture. If that were so, the assignees would be clearly entitled thereto; but the affidavits show that they are fixtures, not only modelled and fitted into recesses, but also fixed by nails and plugs, which makes them fixtures." Now, comparing that case with the present, I cannot see how this steam-engine can be put in a lower position than these things; they were fitted into recesses, and fixed by nails, but it would have been just as easy to remove them as to remove this steam-engine. In *Ex parte King*, (1 Mont. D. & De Gex, 119,) the question was as to fixtures in a dwelling-house, and the court was divided in opinion in that case. In *Ex parte Heathcote*, (2 Mont. D. & De Gex, 711,) Sir J. Cross says: "Fixtures have been repeatedly determined by the court not to be within the meaning of the 72nd section." *Ex parte Cotton*, in page 725 of the same volume, and *Ex parte Bently*, in page 591, are to the same effect. In *Ex parte Reynal*, page 442 of the same book, a similar opinion is expressed by Mr. Commissioner Holroyd, referring to Mr. Cullen's book. In *Ex parte Wilson*, (2 Mont. & Ayr. 61,) the controversy was not as to steam-engines and boilers; but the Chief Judge there says: "If the bankrupt had been a tenant, and had fixed the property in question for trade purposes, I should even then have thought it not within section 72 of 6 Geo. 4, c. 16, though these might be fixtures that would be within that section." *Ex parte Humphries*, (1 Bank. & Insolv. Cas. 69,) decides that the assignee of a bankrupt is entitled to all such fixtures, set up for purposes of trade, as come within the principle of *Hellawell v. Eastwood*, (6 Exch. 295); we must therefore look to see what that case decides, and it appears that the spinning machines in that case had been some of them fixed by screws to the wooden floor, some by screws that had been sunk into holes in the stone flooring, and secured by molten lead. Baron Parke in his judgment says: "The only question, therefore, is, whether the machines, when fixed, were parcel of the freehold, and this is a question of fact depending on the circumstances of each case, and principally on two considerations—first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united

thereto, whether it can easily be removed *salvo, integre, and commodo*, or not without injury to itself or the fabric of the building; secondly, in the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling in the language of the civil law, *perpetui usus causa*, or in that of the year book, *pour un profit del inheritance*, or merely for a temporary purpose or more complete enjoyment and use of it *as a chattel*. Now in considering this case we cannot doubt that these machines have never been a part of the freehold; they were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier, and more capable of convenient use as chattels." The things which were under the consideration of the court in that case were mere chattels; they were merely attached to the ground for the purpose of making them steadier, and could be no more considered a portion of the freehold than a carpet. I cannot distinguish the case in 4 Simons from the present case, and I do not not think the decision of *Hellawell v. Eastwood* goes beyond that case. *Ex parte Wood*, (1 Bank. & Ins. Cas. 70,) is another similar case, reported in the note; but the soundness of that decision has been questioned. I need not go into the particulars of *Ex parte Langton*, (1 Bank. & Insolv. Cas. 241,) as all the articles it treats of are beyond all question mere chattels; the only thing in which it might refer to the present case would be as to the gas-fittings. [His Lordship also referred to *Davis v. Jones*, (1 B. & Ald. 115,) and *Ex parte Heathcote*, (1 Fontbl. B. C. 45,) upon the subject of fixtures.] In *Fisher v. Dixon*, (12 Cl. & Fin. 312,) it is laid down that if the *corpus* of the machinery belong to the heir, all that belongs to that machinery, though more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. *Stewart v. Lambe*, (1 Bro. & Bing. 506,) was the case of a mortgage of land upon which a windmill had been erected, and it was held, that the windmill could not be taken in execution by the creditors of the mortgagor, although he continued in possession. What will pass under a mortgage of a mill—viz., the stones, tackles, and implements necessary for the working of it, has been laid down in the case of *Place v. Fagg*, (4 M. & Ry. 277,) and *McCluney v. Larnon*, (Hayes, 154,) in this country. I have gone through all these cases in order to see what the principle is upon which this matter is to be decided, and the question in them all comes to this—what are fixtures? a question not depending upon the removability of the particular thing; for the owner in fee can remove everything; and again, a tenant may remove certain things during his term; but if he does not do so within that time, his right to remove ceases, and the articles which he might have removed become fixtures; then another right of removal exists as between the mortgagor and mortgagee, and therefore the power of removing is not so much the test of what is to

be called a fixture, as the nature of the thing itself. Here the article is a steam-engine attached to the soil of a freehold in two ways—to the building, and also to a mass of stone-work imbedded in the soil. This stone-work would be of no use but for the engine; take away the engine, and these stones will be useless. In the same way the building to which it is attached will be useless if the engine be removed. I cannot see the use of the steam-engine without the boilers, or of the boilers without the steam-engine. I think they are all one. We are told that the removal of this steam engine can be effected without cutting through anything attaching it to the stone platform or to the boilers—viz., by opening certain screws, and withdrawing certain pins; but I cannot appreciate this distinction, when I find that the portion left behind, however detached, is thereby rendered useless. Then we also must consider how the steam-engine is attached to the walls of the building; and therefore I cannot conceive that the steam-engine can be predicated of as a chattel—the mill itself being of a freehold nature; the working power must go with it. As to the shafting and gearing, that I consider to be portion of the steam-engine, which without it could be of no use. This gearing is fixed to some extent, and although movable, yet its removal would be an injury to the engine, and it therefore appears to me to be a portion of the engine as much as the wheel of a water mill; and therefore I cannot distinguish it from the mill itself. No one could imagine that the bankrupt had a different property in this portion of the machinery from what he had in the engine. The question is, are these things—the mill, steam-engine, and gearing—goods and chattels? They certainly would be goods and chattels if removed; but while upon the premises, they must be considered as fixtures. As to the gas-fittings, they would probably be worth nothing removed from the mill; but, if necessary to discuss this portion of the matter, the court would probably allow further directions as to these. [Counsel stated that the gas-fittings were nothing more than hot water-pipes connected with the steam-engine.] If they be only hot water-pipes attached to the engine, they are not distinguishable from the gearing. As to the things comprised in the third schedule, these must go to the bankrupt's assignee, the rest to the mortgagees—that is to say, the steam-engine, shafting, gearing, and gas-pipes, as I do not consider that the bankrupt was entitled to them.

Decree accordingly.

DEMPSEY v. VINCENT.—May 4.

Specific performance—Renewal—Construction—"Habendum"—Lease for lives renewable for ever.

By indenture of lease made in the year 1799 between F. and D., after reciting that F had, by a renewal of a former lease for lives renewable for ever, made under a covenant for perpetual renewal, become entitled to the premises in question; it was witnessed that F. demised to D. the said premises, to

have and to hold the same to him, his executors, administrators and assigns, from, &c., for the lives therein named, "and for and during such other life or lives as shall hereafter be added to the original lease," reserving a certain yearly rent; containing covenants for quiet enjoyment and further assurance but not for perpetual renewal, nor reserving a renewal fine. In May 1852 V., on whom the interest of F. had devolved, served notice upon D. to renew his lease, informing him that two of the lives named in the lease of 1799 were dead, (not naming them,) and calling upon him to nominate two other lives in their place, and informing him that in case he neglected to do so V. would decline to renew the lease; and in July 1853 D. furnished to V. a draft fee farm grant of the premises for his approval, which the latter refused, alleging that D.'s right to renewal had been lost through laches. The original lease had been renewed in 1828. A petition having been filed by D. for a declaration of his right to a renewal of the lease of 1799 for the lives to be named in each renewal of the original lease, Held, that, independently of the question of laches, he was not entitled to a perpetual renewal of the lease of 1799. Held also, that he was entitled to have the lives named in the renewal of the original lease granted in the year 1828, inserted in the lease of 1799.

THIS was a cause petition to obtain the renewal of a lease. By indenture bearing date the 19th August, 1799, and made between William Fry, Thomas Fry, and Patrick Dempsey, after reciting that the said William Fry, Joseph Fry, and John Fitzgerald had by a renewal of the original lease from Ephraim Dawson to Daniel Kennedy, obtained from Lord Carlow for the lives therein named by virtue of a covenant for renewal therein contained, become jointly entitled to an equal share of the premises demised, and now in the possession of Patrick Dempsey, it was witnessed that William Fry and Thomas Fry, (his heir-at-law,) for the considerations therein mentioned, demised to Patrick Dempsey an undivided third part of the premises in question, to have and to hold the said premises to him, his heirs, executors, administrators and assigns, from the first of May, 1799, for the lives named therein "and for and during such other life or lives as shall hereafter be added to the original lease, from Ephraim Dawson to Daniel Kennedy, and renewed by the said Lord Carlow, late Earl of Portarlington, to Joseph Fry, William Fry, and John Fitzgerald," at the yearly rent therein reserved, with a covenant by William and Thomas Fry for quiet enjoyment, &c., that they, their heirs, executors, administrators and assigns, would make and execute any further acts or deeds to Patrick Dempsey, his heirs, executors, administrators and assigns for the better and more perfectly securing the present demise. This deed was subsequently ratified by Joseph Fry, by an indorsement to the same effect. Patrick Dempsey died intestate leaving William and James Dempsey his sons surviving, the latter being his heir-at-law, who, by deed bearing date the 7th September, 1846, conveyed a portion of the demised premises to William Dempsey,

one of the petitioners, to hold for the lives named in the lease of 1799, and all other lives to be added thereto. James Deimpsey died in 1848, having devised his interest in the premises to his sons Patrick and James, (the other two petitioners.) The lessor's interest in the lease of 1799 had vested in the respondents. Upon the 8th of August, 1852, the respondents served notice upon the petitioners informing them that two of the *cestui que vies* in the lease of 1799, (not naming them,) were dead, calling upon them to nominate two lives in their place, or to take out a renewal of the lease within the time limited, and informing them that in case of their neglecting to do so they (the respondents) would decline to renew the lease. There was no period limited for renewal in the lease of 1799. Upon the 30th July, 1853, a draft of a fee farm grant was furnished by the petitioners to the respondents for their approval, which the latter refused to accept, alleging that the petitioners were not entitled to a grant of that nature, and that their rights, if any, to a renewal, had been lost through their own laches; and that the lease of 1799 contained, at all events, no express covenant for renewal. A renewal of the original lease had been granted by the then Earl of Portarlington, (in whom the interest of Ephraim Dawson had vested,) upon the 17th Oct., 1828. The petition, alleging that the respondents were about to obtain from the present Earl of Portarlington another renewal of the original lease, or a fee farm grant, and submitting that the petitioners were entitled to a renewal of such interest in their lease as the respondents should acquire, prayed for a declaration of the petitioners' right to a renewal of the lease of 1799, for the lives named in the renewal of the original lease.

Ball, Q.C., in support of the petition.—There are two questions in this case; 1st, whether this be a lease for lives renewable for ever; and 2nd, whether the petitioners have done any act disentitling themselves to a renewal. It is alleged by the respondents that the notice served by them upon the petitioners, calling upon the latter to renew their lease, had this effect, not having been complied with, but this notice was defective in not specifying the lives that had dropped; besides, the doctrine of forfeiture is only applicable where renewal fines are payable. There can be no question but that the original lease granted to the respondents is for lives renewable for ever, and if so, the lease granted by them must be of the same nature, by force of the *habendum*. The decision in *Shepherd v. Doolan*, (4 Ir. Eq. Rep. 654,) may appear to support the respondents' case, but that case has been overruled. In the original lease in that case there was no covenant for perpetual renewal, but the *habendum* was to the lessee, his heirs and assigns, "for the natural lives of A, B, &c., or the longest lives of them, or whatever life or lives should for ever hereafter be nominated or appointed, added or inserted, on the back of said indenture." A subsequent lease was made, reciting the original lease as containing a covenant for perpetual renewal, and stating that it was made "in pursuance and performance of that covenant," but it did not contain any covenant for perpetual renewal either, but only a *habendum* simi-

lar to that in the former lease, except that the word "and" was put for "or;" and the Master's report that the original lease did not contain a covenant for perpetual renewal was upheld by Sir M. O'Loughlin, Master of the Rolls. But that case must be regarded as overruled by *Chambers v. Gausson*, (7 Ir. Eq. Rep. 575; s. c. Jon. & Lat. 99.) In the latter case the *habendum* was "for and during the life or lives of such other person or persons as shall be nominated by (the lessee), his heirs and assigns, upon the death of any of the persons for whose lives the premises are hereby granted, and upon the death of such person or persons as shall hereafter at any time be appointed and nominated for ever, according to the covenant and agreement for that purpose hereinafter expressed;" and this was held to be a lease for lives renewable for ever, although it contained no covenant for renewal. No doubt, the words "for ever" were used in that case, and they do not appear in the present lease; but there are other words sufficient, viz., "as shall *hereafter* be added to the original lease;" and it is to be observed that the lessor was not to be compelled to renew, but that if he obtained a renewal of the original lease that he should grant a similar time to his lessee; and the head landlord is now about to make a fee-farm grant. The notice to renew, served by the respondents, shows that they conceived themselves bound to grant a renewal. In the case last cited the Lord Chancellor, (Sir E. Sugden,) says, referring to *Taylor v. Pollard*, (Lyne on Leases, App. c. 16, p. 72,) "The court must have considered that there was a clear intention that the lease should endure for ever, and therefore made the covenant give way to the *habendum*. In *Shepherd v. Doolan*, in which the construction arose on such a lease as this, the Master of the Rolls thought that it would not amount to a lease for ever. But with every respect for the authority of that learned judge, I cannot follow that decision. The parties, if they choose, may take the case to a court of law, but if not, let there be a decree for specific performance." It was the duty of the lessors to specify the lives in their notice. This appears from the judgment in *McDonnell v. Barnett*, (4 Ir. Eq. 229,) in which the rule is stated thus: "In ordinary cases it is the duty of the tenant to ascertain when the lives drop, and to look after the renewal; but in such a case as the present the rule is reversed, and the duty is cast upon the landlord," viz., when there is a provision that in the lease to be renewed to the tenant the lives are to be the same as those in the renewal made to the landlord by the original lessor. No fine is reserved, and therefore the *habendum* amounting to an actual grant, no laches can be objected; besides, there is no allegation that the landlord has suffered a loss by the tenants failing to renew. The Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.) was passed for the relief of tenants who had neglected to renew their leases, and protects them from the effect of lapse of time in case no circumstances of fraud can be proved against them, unless it could be established that they had neglected within a reasonable time after demand to pay the renewal fines. The essential matter entitling the tenant to a renewal under this Act is the re-

newal fine. It has been held that the payment of the fine without taking out a renewal preserves the right of renewal under this Act, and that this statute was merely declaratory of the old equity that existed in Ireland before it was passed—*Magrath v. Lord Muskerry*, cited in 1 Furl. Landlord and Tenant, 261. The petitioner is at all events entitled to the present renewal, this being the first renewal sought by him since the date of the lease of 1799.

F. Fitzgerald, Q.C., (with him *Hemphill*), contra.—There may be an intention apparent on the face of the lease to grant one renewal, but there is no intention to grant a perpetual renewal. The case of *Chambers v. Gausson* is clearly distinguishable from the present by the words “for ever;” and words to that effect do not appear in the lease of 1799; on the contrary, the expression is “for and during such other life or lives as shall hereafter be added to the original lease;” the words “for ever,” or “from time to time,” or any expression to that effect, being purposely omitted. The covenant for further assurance is for such further acts and deeds as may be necessary to support the *present demise*. This covenant can only be interpreted by reference to the *habendum*, and the words “this demise” further show the intention of the parties. Previously to the filing of this petition, the petitioner made no application for a renewal, but claimed a fee-farm grant. This application should have been at any rate made in 1828, when the original lease was renewed. Such laches as the petitioners have been guilty of have been held in this court to be sufficient to work a forfeiture of the right of renewal—*Morgan v. Gurley*, (1 Ir. Ch. Rep. 492.) *Chestermann v. Mann*, (9 Hare, 206,) is an English decision of about the same date, and it was held in that case that equity will not decree specific performance of a covenant for perpetual renewal by the mesne landlord to his tenant, after wilful refusal or neglect to renew, and that nonpayment of the fine which the mesne landlord has paid to his head landlord amounts to such neglect, citing *Lennon v. Napper*, (2 Scho. & Lef. 682,) per Lord Redesdale. There must have been wilful neglect in the present case. The equitable jurisdiction of the court is discretionary as to compelling specific performance in such cases, and when it is sought there must be mutuality between the parties, which does not exist in this case, as the respondents could never compel the petitioners to renew. It must be admitted that the Tenantry Act does not apply where only a peppercorn fine is reserved, and therefore we must consider the state of the law before that Act passed, and it will be found that pecuniary fines and peppercorn fines were put on the same footing, and that a forfeiture is worked if there be laches, the best evidence of which is the demand made by the landlord—per Pennefather, B., in *Sheehy v. Maunsel*, (MS. Exch., May 23, 1837, cited in 1 Furl. Land. and Ten. 274); *Jack v. Reilly*, (2 Hud. & Bro. 301.) Neglect to renew is of itself equivalent to laches, but more especially when the tenant has been called on to renew—*Lyne on Leases*, 161. The fact that no fine, even nominal, has been reserved, is some evidence that there was no intention of

granting a renewal—*Brown v. Tighe*, (Hayes, 158.)

Gernon, in reply.—That this was a lease for lives renewable for ever plainly appears by reference to the original lease, and the nature of that lease will explain the intention of the parties as to the other. If the words “for ever” were necessary in all cases, the court could never have a discretionary power in directing specific performance in such cases. No case can be found precisely like the present, and therefore the court must be guided by the intention of the parties; and there can be no doubt but that one renewal, at all events, was contemplated. The petitioner's application for a fee-farm grant must be regarded as the same thing as if he had applied for a common renewal, and it is to be further remarked that no rent was due at the time. The question of laches depends altogether upon the particular facts of each case, there being no decision limiting any particular time in such cases; and under the circumstances of the present case fourteen months is not more than a reasonable time.

LORD CHANCELLOR.—I do not consider that the petitioner in this case is entitled to a perpetual renewal of his lease, and therefore he cannot be entitled to a fee-farm grant. The safest way is to follow the intention of the parties if there be words sufficient to carry out that intention; but without deciding what words would be necessary in the present case, my difficulty is to find any words in this lease to warrant my saying that the parties intended that it should be a lease for lives renewable for ever. This lease does not contain any one of those expressions considered as importing so much. It contains a very short statement on the subject, and has no covenant for perpetual renewal. The latter, however, may not be necessary; and then the question arises as to the fair construction of this *habendum*. The words are, “for and during such other life or lives as shall hereafter be added to the original lease.” Now the parties had before them the lease referred to, and they must have known the terms of it, which are full and clear, going into all the necessary provisions, and concluding with a covenant for perpetual renewal in the clearest terms; and it is strange that if they intended that the derivative lease should also have contained a covenant for perpetual renewal, they should have altogether omitted every thing about it. The only expression at all raising such a presumption is the word “hereafter;” but we must consider what was the position of the parties. The original lease was made by Dawson to Kennedy, and it appears to have been already twice renewed, once before and once since the making of the lease of 1799. The Frys became his assignees, and therefore the renewal is described as the lease to them from Lord Carlw. It is remarkable that the parties do not, in the recitals in the lease of 1799, take up the latter lease to the Frys, and describe it. Perhaps the only life then *in esse* was that of Thomas Fry; and probably the lessees were contracting for a lease for the lives of the Frys and of Dempsey, and that upon the next renewal, so as to complete the three lives. If that were their intention, which I consider it was, it may be carried out, and the *habendum* will be satisfied

by carrying out that intention, for I see nothing in the *habendum* showing an intention to create a larger interest. I do not think that I could make a decree for perpetual renewal; such a contract is not to be presumed, at least in this country, and the court will require strong language to warrant such a construction. It is not to be found in the language of the instrument, and the words used may be satisfied in another way. Under these circumstances, although the case may not be altogether free from doubt, I cannot grant the prayer of this petition to its full extent, not having sufficient material for that purpose. Still it is clear that these parties have entered into a contract of this nature, that at all events they should obtain the advantage of the first renewal of the original lease that should be made after the execution of the lease in question. That renewal was obtained in 1828. Besides, it is plain that in 1852 the respondents, by the notice which they served, conceived that the petitioners were entitled to some such privilege, and led them to suppose that they were at all events entitled to that renewal; but of course, the subsequent acts of either of the parties cannot control the language of the instrument. This notice has been relied upon, and it is argued that noncompliance with it amounted to laches. But we must consider the nature of the notice, and it appears that it called upon the respondents to do what they were not entitled to do, namely, to *nominate* two parties *cestui que vies*, whereas they were only entitled to the lives named in the original lease. Besides, it does not appear that there was any intention of fraud, as there was in the case of *M'Donnell v. Burnett*. I shall therefore decree that the petitioners are entitled to have inserted in their lease the lives named in the renewal of 1828.

Decree accordingly.

ROLLS COURT.

[Reported by R. W. GAMBLE, Esq. Barrister-at Law.]

WHITE v. M'CARTHY.—Jan. 24, 1855.

Injunction—Action at law—Cause petition—Amendment.

A cause petition had been filed by A., the owner of certain lands, against B., his agent, praying an account of the monies received by him. B then brought an action at law against A. for bills and monies handed to him, and for salary and receiver's fees; but it appearing that these matters were all a part of the same transaction, the petitioner was allowed to amend his petition, setting out these facts and praying an injunction to stay the proceedings at law, and the petitioner giving a consent for judgment in the action, an injunction was granted to stay the proceedings in this action till the hearing of the cause petition.

THE petitioner, Robert H. E. White, had filed his cause petition in this matter against the respondent, Florence M'Carthy, who had acted as his agent in the collection of his rents and the management of his property, praying for an account of said rents,

and for an order on the respondent for payment of same. The respondent thereupon, in December, 1854, commenced an action at law against the petitioner for the sum of £1600 for an amount claimed to be due to him on foot of certain bills of exchange, and interest thereon, and also for cash advances and receiver's fees. The petitioner's affidavit stated, that the items sued for in this action at law were bills and monies passed and paid, with respect to the collection of said rents, and salary and fees for such collection; in fact, that they were part of the same transactions.

C. Chatterton for the petitioner, moved for an injunction to restrain the respondent from prosecuting his action at law against the petitioner, which action was now pending in the Court of Common Pleas, for the recovery of the sum of £1600, and from otherwise proceeding at law against the petitioner for his demand in said action, pending the proceedings in this cause, the petitioner undertaking to give a consent for judgment in the action at law, if the court should consider him bound so to do, and if necessary that he might be at liberty to file a supplemental petition for the purpose, and that the respondent might be restrained by injunction in the meantime.

O'Riordan contra.

The following order was made:—

"Let the petitioner be at liberty to amend the petition in this matter, without in any manner altering, erasing, or interlining the said petition as now verified, by annexing thereto the amendment as endorsed by the registrar of the court, the petitioner undertaking to abide any order which may be made at the hearing of this cause for the appointment of a receiver, if the Lord Chancellor should think it proper to do so, having regard to the fact that the petitioner is only tenant for life, and the petitioner undertaking to give a consent for judgment at law within two days from the date of this order. Be it so for an injunction until the hearing of this cause, and let the costs of this motion be costs in the cause."

[The following is the amendment directed to be made:—

"That after the filing of the cause petition in this matter the said respondent issued a writ of summons and plaint forth of the Common Pleas in Ireland, bearing date the 21st December, 1854, for the sum of £1600, and that a bill of particulars is annexed to said writ of summons and plaint, claiming a sum of £526 8s. 1d., as a balance due to him on foot of certain bills of exchange therein mentioned, and the sum of £188 for interest thereon, and also claiming a further sum of £554 6s. 4d. for alleged cash advances for petitioner on foot of his agency of said Dorman estate, and also a sum of £200 for wages and salary for collecting the rents of said Bantry and Cumner and Cumbola estates, and £123 1s. for receiver's fees, claimed by him for collection of the rents of the lands of Lisgallah, portion of said Dorman estates; that said demands of the said respondent in said action are on foot of the very same transactions as those hereinbefore mentioned, and that said respondent received more than sufficient

money out of respondent's said estates for liquidating the entire amount of said bills of exchange and other just demands, and petitioner believes and charges the fact to be that respondent discharged said bills with the monies of petitioner so received by him, and that upon the taking of the accounts hereinbefore prayed, the said respondent will be found to have been fully paid all his said demands, and to be indebted to the petitioner; that petitioner in order to prevent judgment being entered against him in said action, filed a defence thereto on the 19th January instant, but that it will be impossible in said action to have the accounts taken which are proper and necessary for ascertaining the true state of the dealings between petitioner and said respondent.

"Prayer—In addition to the relief above prayed, that the said F. M'Carthy may be restrained by the order and injunction of this honourable court from further prosecuting at law said action pending the taking of said accounts, for recovery of the said alleged demands, petitioner being willing to give a consent for judgment in said action if the court shall think him bound to do so, and that a writ of injunction for such purpose may issue according to the course and practice of the court."]

COURT OF DELEGATES (ADMIRALTY.)—1854.

[Reported by W. G. CHAMNEY, Esq., Barrister-at-Law.]

[BEFORE JUDGES CRAMPTON, JACKSON, AND PERLIN; AND DOCTORS ANDREWS, Q.C., AND BALL, Q.C.]

"THE WILLIAM."—June 7.

Appeal—Collision—Additional evidence admitted upon appeal—Mutual default—Costs.

In a suit for collision, where the promovent vessel was anchored in harbour, and in an improper position, according to the harbour regulations, and did not exhibit a light, which was also in opposition to the harbour regulations, and the impugnant vessel was under weigh, this Court held, that each party should bear the loss sustained moietywise, and pay their own costs, reversing the decree of the Court of Admiralty, which held, that the impugnant ship, which was unskilfully manœuvred, should pay for all the damages, and costs. (See 7 Ir. Jur., 229.)

It is the duty of a vessel which is even properly placed in harbour, and which complies with the harbour regulations, to do all in its power to prevent a collision, or if a collision unfortunately takes place, to prevent further damage, if possible.

This court will admit additional evidence upon an appeal, if it appear by affidavit that it was impossible for the party or parties in the court below to tender it at the original hearing, the witnesses examined being nautical men, whose attendance is not always available.

THIS case, the facts of which are fully stated in the report of the original hearing above referred to, was heard upon appeal by their lordships, who admitted additional evidence to be adduced before them to show that the respondent vessel was in default after the collision of "The William" with "The Sally."

Doctors *Radcliffe, Q.C., Hayes, Q.C., and Gibbon*, for the appellants, cited, "*The Victoria*," (3 W. Rob. 49); "*The Gazelle*," (1 W. Rob. 474); "*The Speed*," (2 W. Rob. 230); "*The Favourite*," (5 Ir. Jur. 118); *Steward v. Tremain*, (4 M. P. Cases); *Pollock v. M'Alpine*, (7 M. P. Cases, 778); "*The Ebenezer*," (7 Jur. 1117); "*The Shannon*," (1 W. Rob. 462.)

Doctors *Townsend and Chatterton*, for the respondents, cited the several cases referred to by them on the original hearing, and also referred to some of the foregoing cases, (7 Ir. Jur. 231.)

CRAMPTON, J., (the senior delegate) pronounced the unanimous judgment of the court. He said: In this case, which was heard before Doctor Stock, assisted by a gentleman of considerable ability as a nautical man, to whom two questions were put, and which are incorporated in the case which has been laid before us, together with his answers to those questions, upon which the learned judge founded his decision, the facts are very simple, and there is little difficulty, upon the evidence, in stating what they are. We all know the nature of this harbour, with its eastern and western piers; and it is in evidence, that according to the harbour regulations there is a triangle formed at the entrance of the harbour, within which no vessel should anchor except in cases of necessity. It appears that on the 18th of December last "The William," a coal brig, came into Kingstown harbour, about six o'clock in the evening, laden with her usual cargo, bound for Dublin; and it appears that within the prohibited ground—within the triangle formed by a particular buoy and the two piers, and directly in the way of vessels entering the harbour—there were a number of vessels at anchor. Now, it is proved that the night was a dark one, although there is some difference between the witnesses as to how far a person could see; however, it was undoubtedly dark and stormy, and the wind was blowing from the "SSE" across the eastern pier; and it appears that many vessels, in consequence of the boisterous character of the night, were obliged to take refuge in this harbour, and I believe that both the vessels at issue had taken refuge in it for the purpose of avoiding danger outside. That was their object in coming in, and it appears that there were four other vessels very much in the mouth of the harbour, in the way of vessels coming in, about six o'clock that evening, at the time Captain Richardson of "The William" arrived. "The Commerce" was the first and outside vessel, and she was directly in the centre of the prohibited ground, in the way of vessels coming in. "The Sally" was further in, but within the prohibited ground; and "The Victoria," the promovent below and the respondent here, was near her, and also within the

prohibited ground. There was likewise a vessel called "The Robert and Henry" there; in fact, they were all in a cluster within the prohibited ground, and occupying the centre passage of the harbour. "The Commerce" was well lighted, and although in a position she ought not to have been in, yet she had good lights exhibited, by which vessels coming in were able to see her, and to steer so as to avoid a collision with her; but "The Victoria" had no lights. That is confessed; and as to "The Robert and Henry," I am not sure if she had or had not a light, as the evidence is not very clear on the subject. Part of the evidence of Captain Hutchinson, the harbour-master, was, that he understood that there was but one light up, the light on board "The Commerce;" and with respect to "The Sally," there is conflicting testimony, but my impression and that of my learned brethren is, that "The Sally" had no light up at the time "The William" was rounding the pier of the harbour. That a light was put up subsequently, there is evidence, but it does not appear to us that there was any light exhibited by her at the important moment. As to the harbour regulations, they are important matters to be considered; and every vessel coming into anchor, that has knowledge of them, ought to observe these regulations; and some of them, indeed, are such, that if there were no regulations at all, they ought to be adhered to under such circumstances. Here was a cluster of vessels without any light, except the light of "The Commerce" far in advance of them, and not calculated to show that there were any vessels behind her. There was a strong light from the lighthouse on the east pier, and this leads me to speak of the course pursued by "The William." She was a vessel in the habit of frequenting the Bay of Dublin and Kingstown harbour, and her captain knew quite well her capabilities, and the harbour and its regulations; and if he is to be bound by the harbour regulations, it perhaps would not be unnatural for him to suppose that the other vessels in the harbour before him were to be bound by and attend to the same regulations. "The Victoria" had come in about one o'clock on the day of the 18th of December, the same afternoon, and at six o'clock P.M. "The William" came in, and at this time all the vessels I have named were lying at anchor, with their heads to wind, in the position I have described, and they were not illuminated, but all in total darkness, with the exception of "The Commerce." "The William" came into harbour under the command of an experienced mariner by the east pier; and according to the evidence of Captain Richardson and the other evidence in the case, which is not contradicted, he rounded the pier as near to the windward as he could do it. Now, part of the charge against the captain of "The William" is, that he did not come in by the west pier, that he did not take a course to the leeward instead of the windward passage. That is a matter of nautical skill, and if the assessor pronounced as a matter of nautical skill that under the circumstances of the case "The William" ought to have come in by the west pier, I don't think we should feel ourselves strong enough

to compete in judgment with a gentleman of such experience as Captain Daniel; but he has given no opinion on that subject. If we look at what has been stated by him in the respective cases, we find that he says, "It was possible for 'The William' to have gone to leeward, and have gone down to the west pier, which she does not appear to have thought of." Now, this mariner coming in and knowing the harbour must have thought on the subject whether he should take the east or west course, and he decided on the former, and very probably it was a sound decision. It was open to him to choose whether he would go one way or the other, and I don't think it is attributing too much to his skill, knowing as he did the harbour and the regulations of the harbour, and not expecting to find that his course would be impeded by vessels near the east pier, to select it; it is not attributing too much skill to him to say that he made not an imprudent choice in fixing on the east course, and avoiding the west course, when there was a violent wind blowing. I don't think that part of the case which imputes blame to the captain of "The William" for not going to leeward is sustained, and we are all of that opinion. The other blame imputed to him is this, that as he chose to go to windward, he ought to have kept up his try sail, or have had it in readiness the moment he turned the pier, to give him power over his ship. It appears on the evidence, and on the captain's own evidence, that he took down and furled the try sail before he came to the mouth of the harbour, and he said that he did this in consequence of the gale of wind which was blowing; in fact, that he thought it right and prudent to take it down, and that he accordingly did so. The moment he rounded the pier, the statement is, that he came as near the east pier as she could with safety, and that the moment he turned round there was a change of wind, and he lost his power over the ship, and the consequence was that he fell foul of "The Sally." Now, I can't help thinking—it may be extra-articulate—that "The Sally" was the principal delinquent in the case. Every one of the harbour regulations were infringed by "The Sally." We do not know if she knew them, but she was of all the vessels the nearest to the east pier, and her head was to the wind, and she had her jib-boom out, and it stood out from the vessel nine or ten feet, I presume, at all events. That was her position. She had no light, and the night was dark, and Captain Richardson's course was not sufficiently to the windward to enable him to keep clear of her; at all events she had no light, and he did not do so, and did not see her until he was directly over her bows; and the consequence was, that one of the ropes of his vessel caught hold of the rigging of "The Sally." "The William" not having way at this time, her head was turned, and she appears to have dropped in round "The Sally," and to have drifted in between that vessel and "The Victoria," and got into the position here represented. Under these circumstances, the first question to be considered is, whether Captain Richardson was to blame in the navigation of his vessel? and with respect to that we have the posi-

tive opinion of Captain Daniel, that he was to blame, and we cannot go behind that opinion. Whenever an assessor is called in to assist the Judge of the Admiralty, the greatest respect is due to his judgment on all questions of nautical skill, but more emphatically so when the assessor is the mutual choice of the parties, and they are bound to pay more than ordinary attention to an arbiter of their own selection. In England the course pursued in such cases is to call in two of the masters of the Trinity House. The judge calls them in, and he is guided by their opinion on all questions of mere nautical skill. The judge then states the facts to his assessor, and puts the questions on which he requires nautical information, and having got the replies, founds his judgment on them accordingly. Now, I own that I have been embarrassed by a part of the arguments, to which I have not paid sufficient attention, perhaps, during the earlier part of the case, namely, that some of the matters relied on by the promovent below were *extra-articulate*, but whether they are sufficiently articulate in the manner the question has been argued is perhaps a matter of doubt. However, this was a subject for examination in the court below, and we cannot well go into it. It appears on the pleadings here that the captain of "The William" came in after having furled his mainsail, and that he lost all power over his vessel the moment he got inside the east pier. There is nothing said about the try-sail in the libel of the promovent, and the impugnant's matter, contrary and defensive, states the sails that were up when "The William" came into the harbour, and amongst the sails mentioned as set, it does not mention the try-sail. It is manifest that neither party at that period relied in point of charge or defence on this matter. However, it became important, and it appears that there was no try-sail when she came into the harbour, and that being the case, although not strictly articulate, yet the judge of the Admiralty has considered it to be one of the facts on which his opinion or the opinion of his assessor should be rested. Now, we did not think it convenient that we should take the short and rigid course of putting parties out of court, merely because a matter of importance has not been strictly set out in one of the articles of the libel or defence, and the judge below having admitted it as a fact, and the assessor having pronounced his opinion on it as the fact on which his judgment was founded, upon the ground I have stated we are not at liberty, I think, if competent, to enter into this question; and for one of the court I may say that I feel incompetent to criticise the soundness of Captain Daniel's judgment as to whether it was an error on the part of Captain Richardson not to have had his try-sail up, and in readiness, to enable him to handle his ship when turning the point of the pier. Captain Daniel thought that this experienced mariner must have known, when he turned the pier, that there would be a lull, if no change of wind, which would deprive his ship of a part of her way. We have here, then, the express opinion of Captain Daniel, and that opinion flattered by the learned judge below, to this effect: He says—"I think there was not

proper skill used on board 'The William.' I think she should have been under sail, so as to give her captain full command over his ship, and he had no after-sail." Here we must take our stand; we can't criticise, overturn, or neglect that solemn opinion so given—the result of nautical skill and experience—and we must take for granted that there was a fault on the part of the captain of "The William," and for that fault he must be answerable in such a suit as this. It was contended for the appellants that there was no fault on the part of "The William" in coming in, and that all the rest of the transaction—the collision with "The Sally," and the subsequent collision which grew out of it—was what has been called *inevitable accident*. If it were so, of course the promovent below could take nothing by his suit, and however lamentable the consequences might be, we could not help it; but we have come to the conclusion that "The William" was wrong in coming into the harbour without a try-sail, the result of which was that her captain lost the command over his vessel. "The Commerce" had a light up, and therefore that vessel was passed in safety; but "The Sally" had not, and "The William" became entangled in her. Now, if the captain of "The William" went more to windward, he would have avoided "The Sally," and I think he might have gone a little closer to the wind even with the sail he had up, and then no mischief would have been done; but unfortunately, as I said, the head of "The William" was turned off by the collision; her stern became the moving part of the vessel, and worked its way in between "The Sally" and "The Victoria." Was there any fault after this on the part of "The Victoria?" "The William" seems to have done what was quite right under the circumstances in which she was placed. When she found herself entangled with "The Sally," and getting into the cluster of vessels which she had not seen until the collision took place, she did what was, perhaps, the most prudent thing. She threw out her anchors for the purpose of avoiding the vessels by which she was surrounded. And what did "The Victoria" do? "The Victoria" had her head to wind; she was ahead of "The Robert and Henry," and "The Sally" was in front of her; and then by the stern of "The William" coming on, these two vessels came to be within six or seven feet of each other, and that is just the period, or a little after, at which the anchors were let go. I don't see on the evidence or arguments that there was anything "The William" could have done after that to prevent the collision with "The Victoria;" and if that be so, and it appears there was a vessel at the stern of "The William," the second question for consideration is, Has "The Victoria" done her duty under all the circumstances? for it certainly is the duty of a vessel which is even properly placed, and which complies with all the harbour regulations, to do all in her power to prevent a collision; or, if a collision takes place, to prevent further damage, if possible; and we are therefore led into the inquiry, whether "The Victoria" did all in her power, ordinarily speaking, to prevent or to mitigate the effects of the collision which occurred in this case?

Now, in making this inquiry, we are to recollect that she came into harbour at one o'clock in the day, and that it was the first time she had ever been in the harbour, and we have no evidence that the harbour regulations were ever communicated to her. Captain Hutchinson said that he would have communicated the regulations to her if he had had an opportunity; but that the weather was so rough, that he could not send a boat to her. There was, it appears, a flag flying at the harbour station, and in view, directing vessels to moor with two anchors, but the same reason that made "The Victoria" unacquainted with the other regulations, might of course make her unacquainted with this one. Now, first of all, was "The Victoria" within the prohibited ground, and if so, was it a matter of necessity? All that Captain Hutchinson said as to that was, that it was a natural place for her to anchor in, as there were other vessels there before her; at all events she was there, and was riding by a single anchor, the effect of which was to make her swing about with the other ships. Undoubtedly she had no light. Now, these are the circumstances under which the harbour regulations were not complied with, and I don't say that she is to be answerable for not complying with regulations she did not know, but I think it not unreasonable to say, that when there were a cluster of vessels in the front of the entrance of the harbour, forming an obstruction to vessels coming in, and she must have known, and everybody have known, that many a vessel would be obliged to take refuge on that windy day, it is a circumstance which goes to her damage that she had not a light. If she had a light, although "The Sally" had no light, that very light might have enabled "The William" to have gone a little to windward, and have avoided the bowsprit of "The Sally," and prevented the collision with her which led to the subsequent collision. Again, she had but one anchor out. Why was that? The harbour regulations required two, but I don't find fault with her on that account merely, for the reasons I have before stated; but considering the weather, it is a matter to be considered as one of the circumstances which seems to have led to a good deal of the mischief that resulted from the original collision. Supposing she had been moored with two anchors, she was still in an improper place, and had no light. If she had two anchors out, she could not have swung as it appears she did, and the collision with her might have been avoided, or at least not have been as bad as it turned out to be. In all these respects she seems to have been deficient, and her not knowing the harbour regulations would not, in my opinion, benefit her on this latter point; but it further appears that she did not do what the parties required her to do, and that she did not use the proper remedies, such as were in her power, to extricate herself and the vessel she was in collision with from the unfortunate position in which they were. The evidence of Captain Lewis of "The Robert and Henry" is very strong on the subject, if he be not a partizan, and it appears very strong against "The Victoria." He swears positively, that if he had been master of that ship, he could have saved

her from the consequences that ensued, and suggests certain modes by which this might have been done. He states that there might be a sail put up, and that a second anchor might have been put out, and he also suggests that the cable which was out might have been let go. It appears on the evidence that the cable was thirty-five feet out, and was only let out fourteen more. Why not let it go further? If Doctor Hayes's criticism be correct, there is an inconsistency in her account of this transaction, and first, that she had not cable enough to let out. Part of the evidence is, that she let out all her cable, and then in the next place it is relied on that she could not back astern because that directly astern of her was the ship of Captain Lewis, but Captain Lewis contradicted that. Upon this subject we are not met by any positive evidence or nautical opinion given, as on the other part of the case by Captain Daniel. He only alludes to her not having given cable, and he defends her on the ground that she could not have given cable in consequence of the "Robert and Henry" being astern of her; but the evidence before us would not warrant that opinion exactly. We don't dispute in the minutest degree the nautical skill or opinion given by Captain Daniel on this occasion. When he speaks of "The Victoria" not being in fault here, he grounds that opinion on the alleged fact of "The Robert and Henry" being astern, but by the testimony of Captain Lewis, which was not before the court below, nothing can be more clear, than that "The Robert and Henry" was astern, not of "The Victoria," but of another vessel. The other evidence and the nature of the thing shews—and common sense shows—that "The Robert and Henry" must have been at one time astern of one vessel, and at another time astern of the other, as the vessels were swinging about; and under these circumstances one witness might say that at one time "The Victoria" was ahead of the one, and at another time ahead of the other. The evidence of Captain Lewis, as I said, was not before the court below, and Captain Daniel founded his opinion as to "The Victoria" on the assumption that the position of the "Robert and Henry" was such as to make it impossible for the "The Victoria" to have backed out. She was riding by a single anchor, and she threw out a second anchor after the collision, and it appears that it was thrown out in an unskilful manner, and thrown out after the two anchors were thrown out by "The William" and thrown across one of the chains of "The William," at the side next herself; the result of which was that there was an unusual amount of chafing between them, so that one of the chains of "The William" went. I don't say that this occurred in consequence of this chafing, for "The Robert and Henry" lost a chain that night also; but the effect of all this was, that those two vessels, so far from being allowed to separate and escape further collision, after coming into contact, were bound together, and were kept together; and the great mischief which ensued, ensued subsequent to the throwing out of the second anchor, which was the act of "The Victoria." Under all these circumstances, without in the least treaching on the sound

nautical opinion of Captain Daniel, which we would not for a moment controvert, we feel bound to say that "The William" was not alone to blame, and that in some degree "The Victoria" is in fault. Every allowance must be made for the perturbation and want of presence of mind of persons so placed on a dark night under such circumstances, but we think "The Victoria" took measures which contributed materially to the injury which she sustained, and cannot, therefore, be held blameless. The injury to "The Sally" was, I believe, little or nothing, and the injury to "The William" was little or nothing, but "The Victoria" was considerably injured, only lasted throughout the night, and was submerged in the morning about eight o'clock. Under all the circumstances, the court is of opinion that it must sustain the sentence of the court below, as far as it imputes fault to "The William," but we are not of opinion that the sentence is sustainable as far as it acquits "The Victoria" of all blame; and our judgment therefore is, adopting the recent authorities on this subject in England, that the sum which has been awarded as damage to be paid by the appellant should be divided; that the appellant should pay but one half of the amount of damage proved to be sustained; and, of course, that each party should bear their own costs.

COURT OF EXCHEQUER.

EASTER TERM, 1855.

[*Coram* RICHARDS AND GREENE, B.B.]

GILMORE v. FARRELL.—April 21.

[Reported by JOHN NORWOOD, Esq. Barrister-at-Law.]

Law of shipping—General average—Pleading.

The owner of a ship interested in the freight is liable to contribute to the loss and damage sustained by the shipper of goods on board in a general average.

Semble—It is not a good defence against an action for the recovery of money payable for general average to allege that the defendant—the owner of the ship—had, previous to the commencement of the voyage, let and hired the use of the ship to S. B., a third party, for the conveyance of a certain cargo from port to port, of which hiring the plaintiff—the shipper of other goods—had notice, and that the plaintiff had put his goods on board the ship by permission of the said S. B., but without the knowledge or consent of the defendant; because the defence admits the defendant to be owner and proprietor of the ship at the time of the jettison of the plaintiff's goods, and also that he was interested in the freight of plaintiff's cargo.

THE summons and plaint stated that the defendant was the owner of a certain ship "The John Clifton," bound from Liverpool to Dundalk, whereof one G. C. was captain; and that the plaintiff shipped on board of it divers logs, to wit twenty-three, of mahogany and cedar wood, to the value

of £58 5s. 8d., to be conveyed safely to Dundalk for a certain freight; and that by the carelessness and negligence of the said captain, the said goods were lost, &c. The second count averred the conversion by the defendant of the logs to his own use. The third count was to the effect that the defendant, at the time of the damage and losses herein-after mentioned, was the owner of a ship which was proceeding on a voyage from Liverpool to Dundalk, with twenty-three pieces of timber of the plaintiff's and with divers other goods belonging to divers persons, to be carried for freight payable to the defendant, on the said voyage, and that during the said voyage on the high seas, the said ship, with the timber, goods, and merchandise on board thereof, was by storms, and tempests, and the dangers and perils of the sea, brought into great distress, and was in danger of being utterly lost and destroyed in the sea, and thereupon the master and mariners of the said ship, for the safety and preservation of the same, and of the goods and merchandise, &c., were necessarily obliged to, and did, throw overboard the said logs of timber, being the property of the plaintiff, and cast and leave them in the sea, whereby the same were utterly lost and destroyed, by which means the ship and other cargo were preserved, and arrived safely at Dundalk; whereby the defendant, as the owner and proprietor of the ship, and interested in the freight payable to him for the carriage of the said other merchandise, was liable to contribute to the losses and damages of the plaintiff in a general average on request. And the plaintiff in fact saith that the defendant, as such owner of the said last-mentioned ship or vessel, and interested in the last mentioned freight, became, and was, and still is, liable to pay and contribute to the said losses and damages of the plaintiff in a general average, a large sum of money, to wit, the sum of £50, whereof the defendant had due notice, and although the defendant afterwards, and before the commencement of this suit, was requested to pay to the plaintiff the said last-mentioned sum of money, yet he hath not paid the same, nor any part thereof. The fourth count stated that defendant was indebted to the plaintiff in £50 for money payable for general average in respect of a ship of defendant's, and freight payable for carriage of goods on board thereof, the said ship having been preserved from destruction by the "jettison" of plaintiff's goods, which were then being carried on board thereof for the freight for defendant, and were thereby wholly lost to the plaintiff, &c., &c. The defence to first paragraph of summons and plaint averred, "that the said goods, logs of mahogany and cedar wood, were not shipped and loaded on board the ship to be carried, and conveyed, and safely and securely delivered, as therein mentioned, for any freight or reward to the defendant, as in said first cause alleged, and that the said master did not carelessly and negligently conduct himself with respect to the said goods, as that by and through the carelessness, negligence, or improper conduct of the said master or captain, in that behalf the said goods became and were wholly lost to the plaintiff, as in said first," &c., &c. And to the se-

cond cause of action, &c., the defendant says that he did not convert to his own use the said goods, logs, &c., &c. The defence to the third and fourth counts averred that the defendant was not liable to pay the plaintiff or indebted to the plaintiff, because the defendant, before the commencement of the voyage, had let and hired the use of the ship to one S. B., to convey certain cargoes from Liverpool to Dundalk, of which the plaintiff had notice, and plaintiff applied to S. B. for leave to ship his goods without defendant's knowledge or consent, and that S. B. consented to take plaintiff's goods without defendant's knowledge or consent, and they were accordingly shipped without his knowledge or consent. To this defence to the third and fourth counts, the plaintiff filed a demurrer, inasmuch as it did not set forth any ground of defence good in substance, because it was not framed in accordance with the provisions of the Common Law Procedure Amendment Act (Ireland), 1853, inasmuch as it does not traverse or take issue on one or more than one material matter of fact alleged in the said third and fourth causes of action in the said summons and plaint mentioned, nor is it expressly pleaded as a matter of avoidance, or discharge, or illegality, or by way of avoidance, excuse, or justification; and also because the said defence does not deny that the defendant was the owner of the ships in the third and fourth causes of action mentioned at the time when the plaintiff's goods were thrown overboard, as in the summons and plaint stated, nor that the defendant was interested in the freight payable for the carriage of the plaintiff's goods and the other cargo on board, but the defendant by his said defence, &c., seeks to excuse himself from the payment of the general average or contribution, claimed on the grounds that he had let and hired the use of the said ship to S. B., of which letting and hiring the plaintiff had notice, and that the plaintiff had put his goods on board said ships by permission of said S. B., but without the knowledge or consent of the said defendant, whereas the said grounds are not sufficient in law to exempt the defendant from the payment of the general average or contribution claimed by the plaintiff from the defendant, as the owner of the said ships, and interested in the freight thereof, inasmuch as the said ships' having been preserved from destruction, and the said freight secured to the defendant by the jettison of the plaintiff's goods, the defendant was thereby so far benefitted, and thus became liable in law to contribute to the plaintiff's losses in a general average, as in the summons and plaint mentioned.

F. W. M'Blain (with whom was *H. Joy, Q.C.*) opened the demurrer. Counsel in course of argument stated that "general average" was a general contribution to be made by all parties in interest towards a loss or expense which is voluntarily sustained or incurred for the benefit of all. *Abbott on Shipping*, 7th ed. 473; 1st *Storey. Eq. Juris.* 4th ed. 541-2. The principle of general contribution is derived from the ancient law of Rhodes, and was adopted into the Justinian code with an express recognition of its true origin. The rule of the Rhodian law is this: "If goods are

thrown overboard to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all." "*Lege Rhodia cavetur, ut, si levandæ navis gratia jactus mercium factus sit, omnium contributione sarciantur, quod pro omnibus datum est.*" (*Dig. lib. 14, tit. 1, 2.*) The principle upon which the contribution is founded is not the result of contract, but has its origin in the plain dictates of natural law. It has been more immediately derived to us from the positive declaration of the Roman law which borrowed it, as mentioned, from the more ancient text of the Rhodian jurisprudence, (*Storey. Eq. Juris., ib.*) In estimating a general average, the three contributing interests are the ship, the freight gained in the voyage, and the goods or merchandise, all which may belong, of course, to three different parties, (*Abbott on Ship.* 7th ed. 502-3; 1 *Stor. Eq. Juris.* 4th ed. 543.) General average is not a question of contract, but one of legal liability, (1 *Stor. Eq. Juris.* 4th ed. 541): "The bottom of contribution is a fixed principle of justice." The case of average is somewhat analogous to that of suretyship, as was thus instanced by *Eyre, C.B.*, in *Deering v. the Earl of Winchelsea*, (2 *Bos. & Pul.* 3rd ed. 270): "There is an instance in the civil law of average where part of a cargo is thrown overboard to save the vessel, (*Show Parl. Cas.* 19, *Moor.* 297.) The maxim applied is, '*Qui sentit commodum sentire debet et onus.*' In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shows that contribution is founded on equality, and established by the law of all nations." The great point on the other side is that these goods were shipped on board without the defendant's consent. [*Richards B.*—That consideration would only be important in the case of the shipping of dangerous commodities, and those which, from their nature, led to the catastrophe.] His knowledge or consent to the shipment is immaterial. He has no right to interfere with the charterer in the loading of the ship. "The merchant who has hired a ship may lade it either with his own goods, or, if he has not sufficient, may take in goods of other persons, or he may wholly underlet the ship to another." (*Abbott Shipp.* 7th ed. 246; *Atkinson on Shipp. Laws*, 167.) Consider what a charter-party is, (*Abbott Shipp.* 245.) The courts are unwilling to construe it as amounting to an absolute demise, (*ib.* 240), and the owner of a chartered ship is liable to general average, (*ib.* 449); *Plummer v. Wildman*, (3 *M. & S.* 482); *Cox and others v. May and others*, (4 *M. & S.* 152.) With respect to the question raised by the other side as to this not being a charter, but amounting to a demise, the mere use of words of demise, though often material, does not necessarily show that the intention of the owner is to transfer the actual possession of the ship, where a sum, regulated by the tonnage of a ship, was payable by the charterer for her use, the lien of the owner was considered not to be confined to the charterer's goods, but to extend also over goods consigned to others, *Campion v. Colvin*, (3 *B. N. C.* 17.) The shipowner's lien exists as against sub-freighters to the extent of the freight they have contracted to

pay, although the ship be employed by the freighter as a general ship. *Maude v. Pollock*, (ib. 175.)

John E. Walsh, with *T. O'Hagan, Q.C.*, for defendant, in support of the plea. The plea, on analogy, is good. It avers the letting or hiring the use of the vessel to a third party, and that the plaintiff had notice of this, and that the cargo was put on board without defendant's knowledge. He incurred no liability to general average. The distinction is where there is an ordinary charter-party, and where, as here, the use of the ship is demised and hired. 2ndly, the plea in substance, if not in terms, averred that the vessel was let to S. B. for a particular cargo, and that plaintiff, knowing this, put on board, without defendant's privity, a different cargo. It might have been an illegal cargo, or wrongly stowed, or one to which more than ordinary risk was incident, and the loss, under such circumstances, should not be visited upon the owner. This is not a "charter," but a demise, and the difference between chartering, and letting, and hiring, causes a different obligation to arise between the parties. The ship was let for a particular purpose, and the "certain goods" to be put on board were a specific cargo of corn. [*Greene B.*—That does not exclude other goods; there can be no more "uncertain" word than "certain," under the circumstances.] Our first position, that this was a "letting and hiring," and not a "chartering," constitutes the hirer as the owner *pro hac vice*, and, as such, liable to contribute to the general average, (Abb. Shipp. last ed. 33 to the end.) The case of *Parish v. Crawford*, therein noticed, has been since overruled, (*vide* Abb. Shipp. and observations therein on case of *James v. Jones*, 3 Esp. 27.) [*Greene B.*—It will be necessary, I should think, for you to show that you have no interest in the preservation of the ship.] The true rule of liability is that the person to pay is the person on whom the general liability of preserving the ship is for the moment cast, who is owner *pro hac vice*. This is plain from the cases collected in Abb. Shipp. 35, 38, 41, that for the purpose of liability for accidents, the hirer would be temporary owner. In case of *Trinity House v. Clarke*, (4 M. & S. 288), where a vessel being chartered by defendant to the Crown for transport-service, it was held that, by the terms of the charter-party, the ownership passed to the Crown, and the defendant was not liable for light-house duties. The payment of these dues is somewhat analogous to the case of average, and the illustration drawn from the hiring of a waggon by *Ellenborough, C.J.*, in 298-300, is useful in the consideration of the question. The question is always whether the words are words of "demise or letting," or of mere "chartering"—*Colvin v. Newberry*, (8 B. & C. 166; s. c. 1 Cl. & Fin. 283; s. c. 7 Bingh. 190.) But the construction of the charter-party is out of the case here, for the plea pleads an hiring and letting, which is the thing to be made out in the case in which the construction was doubtful. It is not possible to distinguish this from any other liability of an owner arising during the period of hiring. Cases of collision are, though least like, somewhat analogous—Abb. Shipp. (*vide* close of cap. 1), but the case of the payment for

goods furnished to the ship—"materials, men"—is not unlike. The case of the apportionment of salvage is somewhat analogous. There the owner *pro hac vice* would not be liable to contribute, but we have no express authority on the subject. It is shown in the case of the *Trinity House v. Clarke*, (4 M. & S. 288), that the policy of the Act is to make the person benefitted—i. e., the owner *pro hac vice*—liable for the light-house dues. This is an analogous case to that in the law of real property, where a house is let without the covenant to repair. [*Greene B.*—If you have any case to show that the hirer or owner *pro hac vice* takes the ship at all risks, then you might bring the case within the analogy of the owner of a house in the circumstances you suggest.] It is laid down in *Abbott* that there is no tangible difference between throwing a cargo overboard in a storm to preserve it, and any other expense incurred in the bringing of the ship home safely, as for instance the employment of additional sailors. [*Richards B.*—The fact of his leaving port without a sufficient crew to work the ship would make the temporary owner liable in such a case. The hirer for the voyage is certainly benefitted, but others—the owner included—are also too.] The owners have no lien for freight. The case of *Hutton v. Bragg*, (7 Taunton, 14 & 26.) That expressly overrules that of *Parish v. Crawford*, and defines hire as different from freight. The hirer *pro hac vice* is liable to barratry; the opposite rule would be unanswerable. The question against whom barratry may be committed is discussed in *Velligo v. Wheeler*, (Cowp. 143); *Soarer v. Thornton*, (7 Taunt. 672); and the same point is ruled in barratry cases against insurers. It would clearly be unreasonable to make a man responsible for consequences he could not prevent, which the owners could not do, not having possession. The control of a ship by the hiring excludes the captain, and the nature of the cargo to be put on board is withdrawn from the general owners, and yet they are to be held liable for the consequence of a dangerous cargo? [*Richards B.*—Have you any case going to that?] Prohibited articles are specially excluded by *Abbott*. It would be absurd to say that all the additional advantage gained by subletting for higher freights, and taking more valuable goods than would be carried at the low freight, goes to the hirer, while the risk remains the same to the general owner. This would form a direct motive to throw the goods overboard, for, if washed overboard, &c., nought would be recoverable. The question is not, who was benefitted by saving the ship, but on whom the duty of preserving her was cast, and who is to pay for that? The person to pay the average is the person on whom the duty of preserving the ship is cast. The second point is as to the hiring for a particular cargo. These goods are not goods liable to general average—*Trinity House v. Clarke* (4 M. & S. 288.) It is somewhat like the case of a house let with a covenant not to exercise prohibited trades. The question is whether the owners, having undertaken a certain duty, are to have others thrust on them against their will. Let us put the case of

inflammable or unwholesome goods put on board a ship hired for the provision trade. These goods were, in point of fact, overloading, as the result shows, for the ship would have been safe without any sacrifice but that these goods were placed on board; they were overloading, at least, to this extent, that if they had not been there they would not have been thrown over. [*Greene B.*—I don't see how that argument is open to you.] Would it not be unreasonable to make a man responsible for the consequences of what was a trespass against him? The case is stronger than in a mere case of a general hiring for a general voyage; goods then wrongfully on board are not entitled to general average. This is settled, that there may be goods on board for which average is not recoverable, as, for example, where goods have been stowed on deck; on the principle that equal risk is required, and that as deck cargoes impede the sailing—they are not in the same condition—*Milward v. Hibbert*, (3 Q. B. 158.) The case in this court of *Hurley v. Milward*, (Jones & Carey, 224), decided that this rule applies not to the cargo stowed on the deck of steamers, where there is no working of the sails, &c. Here there are some classes of goods for the loss of which the general owners cannot be recompensed. General average is payable for the part of the cargo thrown overboard, cargo derived from the French *chargé*—i. e., goods committed to the care of the master; but goods wrongfully put on board can never be construed to be part of the cargo, if this definition be correct. Average is given in substitution for the right which, if the goods were lost by default of any person, would exist against that person; it is therefore recoverable only for such goods as damages would be recovered for if there was default, and therefore not in this case.

O'Hagan, Q.C., same side, cited as to the letting and hiring, *Abbott, Ship. 33*, and *Addison on Contracts, 471*, as to the question of letting a vessel to convey a particular cargo. [*Greene B.* You did not put forward the case here made on an argument of the demurrer that it was a letting and hiring, but it must be taken as admitted that you were interested in the cargo and ship. The defence is imperfectly pleaded as not averring facts and circumstances sufficient to ground the defence. How, in the face of the pleading, can you possibly say that you are not interested in the freight? You are in this dilemma: you have not put forward one ground of your argument in your plea at all, and for the other portion, you have not alleged facts sufficient to sustain it.]

Joy, Q.C., was not called on to reply.

RICHARDS, B.—All law is deduced from equitable principles. The law of average is so derived, and should not be cut down from what it has been from time immemorial. We should be very slow indeed to hold that the owner of a vessel is not liable to contribute to the general average in consequence of having temporarily let the vessel for hire. That question, however, does not appear to arise on the pleadings in the present case, which state that he was a party interested in the freight, and owner and proprietor of the vessel. This disposes

of the first point raised in support of the plea. With respect to the second ground, we do not think there appears a necessity to have argued it, and consequently we give no opinion thereupon. We must not be taken as giving any opinion on the first branch of the argument which does not appear to have arisen on the pleadings. No facts are stated, nor such circumstances averred as suffice to support the plea. We do not decide the general principles on either of the points which have arisen. I think that the demurrer should be allowed with costs.

GREENE, B.—The averment in the plea that the defendant was interested in the freight of the plaintiff's cargo was not denied. It is quite consistent that the owner of the ship should have let or hired the vessel for the particular voyage. If, then, he had any interest, he was liable to general average. We decline to give any opinion as to his liability if he were wholly uninterested in the freight, but this was not denied by the plea, except by saying that the use of the vessel had been let and hired for the voyage to a third party. As to the second defence, it cannot be sustained on the plea as it has been drawn. It does not allege that there was anything in the nature or in the stowage of the plaintiff's cargo that distinguished it from the cargo to carry which the vessel had been let to S. B. It merely says, the cargo was put on board without the defendant's knowledge, and that the plaintiff knew that the use of the vessel had been let to S. B. Let the demurrer to the defence be allowed with costs.

Demurrer allowed.

HILARY TERM, 1855.

Coram PENNEFATHER, RICHARDS, AND GREENE, B.B.

REGINA v. KELLY.

Practice—Right of Crown to change the venue.

The Crown has a right, in the exercise of its discretion, to change the venue it may have selected without any affidavit.

Michael Morris, on the part of the Attorney General, moved in this case, which stood over from the preceding day, at the suggestion of *Greene, B.*, who thought it better that notice of the application should be served on the respondent, to change the venue from the County of Mayo to the county of Dublin. A *scire facias* was issued on a recognizance to the Crown conditioned for the due performance of certain road-contracts, and was directed to the sheriff of the county of Mayo, in which county the venue was laid. The defendant had filed his plea, to which the Attorney General had replied, and the defendant had filed a rejoinder, the case was now at issue, and ripe for trial. Counsel submitted that the Crown had, of its prerogative, the right to lay the venue in any county and to waive that which may have been previously selected, and cited *Reg. v. Webb*, (*Ventris, 17*);

Attorney General v. Parsons, (2 M. & W. 23);
Attorney General v. Churchill, (8 M. & W. 171).

Jordan contra.—The Crown might of right lay the original venue in any county, but it has not the right, having once laid the venue, to change. This application being made after rejoinder, should be grounded on an affidavit. In the case cited on the other side from 2 M. & W., the application was supported on an affidavit. Besides, the defendant here will not be entitled to costs against the Crown, and should not be put to the expense and inconvenience of bringing witnesses from so great a distance.

PER CURIAM.—The case cited from 8 M. & W. not only recognizes the authority of the Crown to fix the venue in any county, but also the authority to change it. There need not be any affidavit. It is done as of right.

Rule accordingly.

Coram GREENE, B.

PATON v. CARPENDALE, CLERK—Jan. 22.

Practice—Common Law Procedure Act, sec. 136—Sequestration.

A sequestration having been issued in 1846 against a beneficed clerk on a judgment, (recovered in 1840), and marked for the principal sum and interest then due, and interest having since accrued due, and a sequestration having been subsequently issued at the suit of another creditor, the court declined to extend the sequestration pending to the matter of the sum due on foot of the plaintiff's judgment, but held that the judgment should be revived, previous to the extension, it being more than ten years old.

Arthur Jackson moved that an order might issue extending a sequestration pending against the benefice of the defendant to the matter of the sum due on foot of the plaintiff's judgment. It appeared that judgment had been recovered by the plaintiff in the year 1840, on which a sequestration had—in 1846—been issued marked for the amount then due for principal and interest. Interest having since accrued due, and a sequestration having been issued at the suit of another creditor, it was now sought, under the provisions of the 136th section of the Common Law Procedure Act, to extend the latter sequestration to the former amount. Counsel cited *Wynne v. Stirling*, (1 Jones, 51, and 6 Ir. L. Rep. 98); *Thacker v. Williams*, (ib. 97); *Smith v. Armstrong*, (10 Ir. L. Rep. 447).

GREENE, B.—I have some doubts whether the 136th section extends to the case now presented to the court. The section says merely that the same form must not, in all cases, be gone through. You must revive the judgment, as it is more than ten years old, before you apply for the extension. Take a writ of revivor.

CURRIN v. CURRIN.

Pleading—Common Law Procedure Amendment Act, sections 20 and 58—Slander.

In an action for defamation the court granted liberty for defendant—who applied without affidavit—to plead the Statute of Limitations, to traverse the words alleged to have been spoken, and also a denial of the defamatory sense imputed, by plaintiff, to the words.

Barry, for defendant applied for leave to plead three pleas to the summons and plaint. The action sought to recover damages for defamation, and counsel required liberty to plead the Statute of Limitations, to traverse the words alleged to have been uttered, and also a denial of the defamatory sense imputed by the plaintiff to the expressions used. Counsel moved, without affidavit; the 58th section of the Common Law Procedure Act permitted the defence of the Statute of Limitations to be pleaded together with certain other defences, e.g., a denial of the contract or debt alleged, set off, bankruptcy of the defendant, &c. &c., but did not appear to have reference to actions for libel or defamation. The 20th section of the same Act provided that the Statute of Limitations should apply to words spoken where an interval of two years intervened before action brought—"All actions for words, &c., &c., shall be commenced and sued within two years after the words spoken or the cause of such action or suit, but not after;" and one of the defences relied upon came within the operation of that section.

PER CURIAM.—This seems to be a case not provided for by the 58th section. Let the defendant have liberty to plead as required.

EASTER TERM, 1855.

Coram GREENE, B.

EDGAR v. HOUSTON.

Practice—Common Law Procedure Amendment Act, section 64—Furnishing copies of documents—General Orders (11th Jan., 1854), 57, 179—Application to set aside an execution for irregularity.

Every notice of motion to set aside proceedings for irregularity must—in conformity with the 179th of the General Orders, 11th January, 1854—point out specifically the irregularity complained of.

The court will order copies of a bond and warrant of attorney for confessing judgment thereon, to be furnished although it appear, from applicant's affidavit, that execution has been had thereon, and that there is no longer a cause in court. It is no ground for refusing such an application that the party applying does not clearly show the previous written notice of demand for the copy sought to have come from himself.

Fitzgibbon, Q.C., with whom was *Carr*, on behalf of the defendant, moved for an order to compel the plaintiff to furnish copies of a certain bond, with warrant of attorney for confessing judgment thereon, dated in May, 1854, on which judgment was entered up by plaintiff on or about the 22nd day of May, 1854, and that the execution issued thereon at the suit of the plaintiff be set aside, or for such other order, &c., and was proceeding to detail certain facts deposed to by the defendant in relation to the bond, warrant, and execution thereon against the defendant, under which his goods had been seized and sold, and in relation to a letter of agreement previously made between the parties, whereby the defendant admitted certain liabilities, which were to be paid by instalments, and to secure which the bond had been given, when

Hamill, for the plaintiff, stated he had a preliminary objection to make to the notice of motion—that it sought to set aside an execution duly obtained and founded on a judgment of the court, and that it did not, as it should have done, in conformity with 179th of the General Orders, state the grounds of irregularity on which it was sought to set aside such execution. [The court said that part of the defendant's motion must be refused with costs, but defendant might proceed with the first portion of the notice as to furnishing the copy of the bond.] Counsel objected that it appeared from the defendant's affidavit that execution had been executed, and that there was therefore no longer a cause in court, and that the jurisdiction of the court was limited in cases of discovery, inspection and furnishing of copies of documents in the hands of an adverse party, to cases where there was a cause in court, and where such inspection and copy became necessary for the purpose of pleading, and referred to section 64 of the Common Law Procedure Act. [*Richards, B.*—It is sworn there is a bond and judgment recorded in this court. Surely this court has a common law jurisdiction over its own records.] That may be true of the warrant of attorney, on which this execution was obtained, and which, when filed, becomes a record of the court, and remains there, and which the defendant can have access to, but not so of the bond, which, being in the owner's possession, cannot be considered a record of the court. But whether that be so or not, the motion here was premature; nothing was better determined, or more consonant with law and common sense than this, that previous to a party being brought before the court by motion, and made liable to the risk of costs, it should be, affirmatively, shown that the party so moving had first exhausted all proper and necessary means out of court, and that the defendant here should have been prepared to show he had himself made a proper written demand for the copy of the document he now seeks for; the language of the 64th section of the Common Law Procedure Act, and the 57th of the General Rules clearly and distinctly prove that a previous written notice of demand should always be first made out of court by the party who must have or claim a direct and positive interest in the document, a copy of which he seeks. In the

present instance the notice or letter of demand came not from the defendant, but from a person who styled himself his attorney, but of whom the plaintiff had never before heard, and who did not show that he was, in any way, authorised by the defendant to make such demand.

PER CURIAM.—Let a copy of the bond be furnished as required. The rest of the motion to be refused with costs.

Rule accordingly.

CIRCUIT CASES.

WEXFORD SUMMER ASSIZES—1855.

[*Coram CRAMPTON J.*]

CARR, APPELLANT—TOTTENHAM, RESPONDENT.—
July 16.

Poor-law Acts—Landlord's proportion of poor-rate
—1 & 2 Vic. c. 56, ss. 74–75; 12 & 13 Vic. c. 104, s. 11.

A was the immediate lessor of premises set at an annual rent of £82, and rated at a valuation of £62. A held under a lease from B, at a rent of £27 10s., A having, pursuant to the 12 & 13 Vic. c. 104, s. 11, allowed the occupying tenant a proportion of poor-rate, amounting to one-half the amount of the current rate, claimed, in the settlement of his own rent with B, credit for half the poundage of the rate upon the entire of the head-rent. Held, that since the alteration of the law, by the 12 and 13 Vic. c. 104, s. 11, he was not entitled to deduct so much, and that the amount of the deduction to which he was entitled should be strictly regulated by the rule of proportion contained in the 75th section of the 1 & 2 Vic. c. 56—namely, as the rent which he received was to the rent which he paid, so should the amount of the deduction allowed by him to the occupying tenant be to the deduction to be allowed him by the head landlord.

THIS was an appeal from the decree pronounced in favour of the respondent (plaintiff below) by Mr. Sausse, Assistant Barrister for Co. Wexford. The facts were briefly as follows. The appellant, Mr. Carr, holds certain premises under the respondent, Mr. Tottenham, at a ground rent of £27 12s. per annum. Mr. Carr sublet to another person at a rent of £80. The premises are valued at £62, and a rate was struck accordingly. The occupying tenant, in paying his rent to Carr, deducted one half of the current rate, pursuant to 12 & 13 Vic. c. 104, s. 11, in lieu of half the poundage upon the rent, as provided by the repealed section 74 of the 1 & 2 Vic. c. 56. When Mr. Carr came to settle with his head landlord, Mr. Tottenham, he proposed to deduct half the rate in respect of every pound of the head-rent, upon the plea that the subsequent act had no relation to the deductions of poor-rate which middlemen were entitled to make,

these having been regulated by section 75 of the 1 & 2 Vic. c. 56, which was not repealed. Mr. Tottenham refused to allow so large a deduction, it being out of proportion to that allowed by Mr. Carr to his immediate tenants. In order to obtain a legal decision upon this question, it was agreed that Mr. Tottenham should sue Mr. Carr by civil bill for the gale of rent, and that the latter should admit that the rent was due, leaving the court to say what deduction should be allowed. The court below made a decree for the plaintiff, holding that his rule of deduction was the correct one.

Lynch, Q.C., and *J. E. Walsh*, for the appellant.

Lawson, contra, for the respondent.

The court considering the question at issue to be one of much importance, allowed the case to stand for judgment, which was afterwards, on Monday the 16th July, delivered soon after the opening of the Commission at Waterford, by

CRAMPTON, J.—The question involved in the present case is, as to the principle which should regulate the amount of poor-rate which a middleman is entitled to deduct from his landlord. The Assistant-Barrister has decided in favour of the view suggested on the part of Mr. Tottenham. It is true that a mistake has been made in the calculation of the exact sum to be deducted, but my opinion goes along with the Assistant Barrister with regard to the principle upon which that decision was founded. I should mention, first, that there are two classes of cases in which deductions in respect of poor-rate are to be allowed to tenants paying rent to landlords. One of these classes is where the occupying tenant makes the deduction from the middle landlord; the other, with respect to which I am now called on to decide, is where that same middleman deducts from his immediate landlord. Now, the case before me is one in which there is a head landlord, Mr. Tottenham; a *mesne* landlord, Mr. Carr; and occupying tenants. Mr. Carr received from the tenants a rent of £80, and he is bound to pay his head landlord a rent of £27 10s. Counsel on behalf of Mr. Carr contends that it is the rule of the deduction, as given by the 74th section of the 1 & 2 Vic. c. 56, which alone is amended by the 12 and 13 Vic. c. 104. On the other hand, Mr. Tottenham's counsel assert that the principle to be deducted from the 75th section of the former Act of Parliament is in accordance with their view of the case. I hear that a particular practice has prevailed with regard to this subject inconsistent with the view adopted by the Assistant Barrister. The question, however, now before me is solely with regard to the construction of the Act of Parliament itself. Mr. Carr, who is the *mesne* landlord, properly dealt with his undertenants in conformity

with the principle stated in section 74 of the original Poor Law Act, as amended by the 11th section of the subsequent Act; and then his counsel contended that the former principle should be applied to his dealings with his landlord. I have merely to observe that originally, by the 74th section, which has been amended by the 11th section of the subsequent Act, every person occupying premises, and liable to pay rent, was entitled to a deduction of one half the sum which he has paid as poor rate in respect of each pound of the yearly rent. Then the 11th section amended this by making the moiety of the rate the maximum amount which can be deducted by the occupying tenant from the landlord. That is a very simple rule, and I have no doubt that the deduction from it was properly applied between the landlord and tenants. The 75th section is the one which is applicable to the case now before the court. It was argued that the 11th section of the late Act did not apply, and that the 75th section stood unchanged in relation to that class of cases, including the present, to which it referred, and that the principle of deduction deductible therefrom is just as it was prior to the passing of the 12 and 13 Vic. c. 104. When we look at the 11th section of that Act, it is evident that it cannot apply, for it purports only to amend the provisions of the 74th section, without touching section 75. But then assuming that to be so, the 75th section gives an arithmetical rule, applicable to such cases as the present, for ascertaining the sum to be deducted. According to this the sum which the *mesne* landlord is entitled to deduct from the head landlord is to bear the same proportion to the sum which has been deducted from the rent payable to the *mesne* landlord by the occupying tenant, as the rent which the *mesne* landlord pays bears to the rent which he receives. It is a sum in the rule of three; and in order to ascertain the sum in question, all that is needed is to multiply the two intermediate quantities, and divide their product by the last. I am, however, only called upon to decide the principle upon which this deduction is to be made, and I am satisfied that there is only one way in which the 75th section can be understood, and that the Assistant Barrister has properly applied its principle to this case. There was an error in the amount decreed by the Assistant Barrister in consequence of the non-production of the poor-rate receipt. That will be rectified by making the sum decreed, the amount of the rent less a deduction of poor-rate, on the principle which I have specified, and as this was a question of considerable importance, and proper to be thus brought forward, let there be no costs of the affirmation of the decree.

Decree affirmed accordingly.

COURT OF QUEEN'S BENCH.

[Reported by SAMUEL V. PEET, Esq., Barrister-at-Law.]

EASTER AND TRINITY TERM, 1855.

SHAW v. WOODS—May—June 5.

Ecclesiastical Law—Plurality—Benefice with cure of souls—Vicars choral—13 & 14 Vic. c. 98.

The vicars choral of the cathedral church of L. are a spiritual corporation consisting of five members, who have been from time immemorial, with one single exception, clerks in holy orders. The corporation provides for the reading of prayers in the cathedral, which is also the parish church of L., and are also charged with the performance of parochial duties in said parish. They have been accustomed, for this purpose, to employ as stipendiary curate, either a stranger or a member of their own body, whose stipend as curate is in addition to his share of the revenues which the body receive, they being seised of the vicarial tithes of the parish of L. and also burial fees. A., one of the said vicars choral having accepted a benefice with cure of souls, a successor was appointed to him upon the ground that under the Pluralities Act, (13 & 14 Vic. c. 98), he had vacated the vicar choralship. Held, that although the vicars choral as a body corporate are charged with the cure of souls, the individual members were not the holders of benefices with cure of souls within the meaning of the Act, and that A. was accordingly entitled to retain his post of vicar choral.

THIS was an action tried before Lefroy C. J., at the sittings after Hilary Term last. It was an action brought by the plaintiff, the Rev. W. E. Shaw of Dungarvan, in the County of Waterford, against the defendant, the Rev. Richard Woods, of Youghal, to recover the sum of £34 12s. 10d., tithe-rent charge received by the defendant as one of the vicars-choral of the Cathedral Church of Lismore, in the united Diocese of Waterford and Lismore, after the acceptance by defendant of the benefice of Lisnegane, being a benefice with cure of souls, and after his institution and induction thereunto, and after the plaintiff had been duly appointed, and installed, and admitted into the possession of the said vicar-choralship in the place and stead of the defendant. The action was brought under the direction of the Lord Chancellor, who by an order dated 15th April, 1854, in the matter of *Shaw v. Power and others*, directed that the petition in the same matter should be retained for twelve months, with liberty for the petitioner in the meantime to bring such action at law, as he might be advised, and matters of form to be waived, and the sole question to be tried to be whether the acceptance of the living of Lisgenane by the Rev. Mr. Woods, under the provision of the 13 & 14 Vic. c. 98, made void his office of vicar-choral in the Cathedral of Lismore. The summons and plaint alleged that the vicars-choral of the Cathedral Church of St. Carthage, otherwise Macodi, in the United Diocese of Waterford and Lismore,

being five in number, had been from time immemorial seised of the vicarial tithes of the parish of Lismore, and that the cure of souls of the said parish is vested in the said five vicars-choral, and in each and every of them; and that each of the said vicar-choralships is a benefice with cure of souls within the meaning of an Act passed in the 14th of the Queen, entitled—"An Act to amend the Laws relating to the holding of Benefices in Plurality;" that defendant was, on the 6th March, 1851, duly instituted and inducted into the said benefice of Lisgenane, being a benefice with cure of souls, and that in consequence thereof the said vicar-choralship held by the defendant became void; and that thereupon, on the 23rd day of August, 1852, the plaintiff was duly appointed, and duly and regularly installed and admitted into the real, actual, and corporeal possession of the said vicar-choralship, in the place and stead of the said defendant; and so became, &c., one of the vicars-choral of the said Cathedral Church, and is entitled to receive and take to his own use one-fifth part of the said vicarial tithes of the said parish of Lismore. The summons and plaint then charged the defendant with having received £34 12s. 10d., being the one-fifth part of the vicarial tithes, to which the plaintiff was entitled. The defendant, by his defence, alleged that the plaintiff's appointment to the vicar-choralship was a mere nullity, said office being, at the time in question, full of the defendant; that the vicars-choral were seised of only a portion of the vicarial tithes, and that in their corporate capacity, the same being annexed to the body as the property of the body, and for their maintenance; that the cure of souls of the said parish was not vested in the said five vicars-choral, nor in each and every or in any one of them, and that each of the said five vicar-choralships was not, nor was any of them, a benefice with cure of souls, within the meaning of the said Act, and that the said vicar-choralship did not become void by the acceptance, &c., of the defendant into the benefice of Lisgenane, and that the plaintiff was not duly appointed to the said vicar-choralship, or duly and regularly installed and admitted into the same, but that the defendant still continued to hold the same, &c. The issue joined between the parties was, whether the acceptance of the living of Lisgenane by the defendant made void the vicar-choralship of Lismore, held by him. At the trial the Rev. Saml. Meyrick, one of the five vicars-choral, was examined on behalf of the plaintiff, and proved that the Cathedral Church of Lismore was also the parish church; that there were two other churches in the parish—Mocollop and Cappoquin—served by curates; that the vicars-choral presented to Cappoquin, and the dean and chapter to Mocollop. The vicars-choral read prayers in the Cathedral, but the dean and chapter provide for preaching. The witness is the curate appointed by the vicars-choral, and is also the preacher, at £80 per annum. The other vicars-choral also occasionally officiate. Witness, as a curate of the vicars-choral, buries the dead and visits the sick. Witness was first nominated to the office of curate before he became a vicar-choral in June, 1847. His license was to do

the duty of absent vicars. Witness received no burial fees until he had become a vicar-choral. The dean and chapter receive a portion of the tithes, and the vicars-choral the other; the relative proportions payable to each vary in different parts of the parish. The witness on his examination stated that he was appointed by the dean; the vicars-choral have a corporate seal, and bring actions as a corporation, the dean alone filling up any vacancy. The vicar-choral on his appointment goes to the surrogate, or to the dean or his commissary, and takes the oaths of abjuration, against transubstantiation, to obey the Liturgy, and of canonical obedience to the dean. One of the existing vicars-choral installs him in the presence of two witnesses. There is no form of institution or induction. The vicars-choral take no oath of residence, and do not read their assent and consent, nor do they pay visitation fees, nor have they ever, in the recollection of witness, applied for license of non-residence. It appears from the registry-books that a curate to the vicars-choral was always appointed. In two cases the curate was himself a vicar-choral. The portion of tithes belonging to the vicars-choral are paid into a common fund. No trace could be discovered as to the mode in which the vicars-choral had become seised of the tithes. The Archdeacon of Lismore was also examined on behalf of the plaintiff, and stated that he had been for thirty years a vicar-choral, and had done duty, but he could not say that he had done so as a vicar-choral. He also stated, on cross-examination, that he held, in addition to the vicar-choralship, a living, with cure of souls, for which no faculty had been taken out. There even was a period during which there was no curate. On behalf of the plaintiff, the following documentary evidence was then given:—1st. The Regal Visitation Books, A.D. 1615 and 1638, brought from the Prerogative Court, from which several entries were read, and counsel relied upon the following, as showing that the vicars-choral had the cure of souls: "*Vicarii singulos per annos alternis vicibus inserviunt curæ ecclesiæ Lismoriensis. Ibi vicarii chorales habent curam animarum.*" 2. The nomination of the Rev. Samuel Meyrick to curacy dated 21st June, 1848, by the vicars-choral to Bishop of Waterford and Lismore. 3. License of said bishop to him as curate, dated 21st June, 1847. 4. Application to bishop (February, 1848) for license for curate to Cappoquin. 5. Licence of H. B. Poer as curate to Macollop. 6. Ditto to John Jackson, 11th May, 1820. 7. Ditto for Lismore to Rev. J. Parks, 10th September, 1818. 8. Ditto to Rev. Mr. Mockler, as curate assistant, August, 1822. And the plaintiff also gave in evidence proceedings taken before the Privy Council under the Church Temporalities Act, to have the vicars-choralship suppressed as sinecures, and the fact of the failure of such proceedings. Counsel on behalf of defendant submitted that though the vicars-choral might be bound to provide for the cure of souls, yet they had not the cure in themselves, or at most had the cure in a corporate and not in an individual capacity, or so as to come within the provision of the late Act against pluralities. They

gave in evidence the following documents, namely: The form of appointment of vicars-choral; the roll of oaths taken by vicars-choral, in order to show that no oath of residence was taken by them; extracts from books of faculties and visitation-books of diocese and other books, in which there appeared an entry of a vicar-choral, viz., "Thomas Barton," described as "Musicus Professor," A.D. 1729 and 1738, and from which it also appeared that there were twenty-five instances of vicars-choral who had benefices with cure of souls, and who did not take out a faculty; and six of them who, besides the vicar-choralship, had more than one other benefice with cure of souls, and took out a faculty to hold the other benefice in plurality, but none in respect of the vicar-choralship. Vestry-books of the parish were also given in evidence, containing one hundred and sixteen cases in which the curate presided, and twenty-two where the vicars-choral, three of whom signed for the curate. The dean and chapter books were also given in evidence. An entry was read therefrom of a direction for the payment of £60 per annum to their curate, and the residue to themselves; also of the endowment of a chapel of ease. They also read a notice from the vicars-choral signed by them, and sealed with their corporate seal, announcing to the Rev. S. Meyrick that after six months they should not require his services as their curate in the parish of Lismore, they intending from that period to discharge the duties by their own body. The evidence on both sides having closed, it was agreed to discharge the jury from finding any verdict upon the issue joined, but that the whole case and evidence should be referred to the Court of Queen's Bench, who were to enter a verdict for the party who appeared to them entitled, and for that purpose they were to be at liberty to draw all proper inferences, not only of law, but also of fact, from the evidence, as a jury might have done.

Dr. Gayer, Q.C., and Lawson, argued on behalf of the plaintiff.

Napier, Q.C., Butt, Q.C., and Elrington, for the defendant.

Cur. adv. vult.

June 5—LEFROY, C.J.—This case was discussed last Term before my brethren, Crampton and Moore, and myself, and we are now of opinion that judgment ought to be given in favour of the defendant. The case involves a vast amount of ecclesiastical law; and though I shall have the advantage of the learning of my brother Crampton on this subject, who will follow me in giving judgment, I think that I shall better discharge my duty by stating the grounds of the judgment, in which we all concur. The question before us arises, in point of form, in an action brought for money had and received, with a view to try the title of the plaintiff to a vicar-choralship of the Cathedral Church of Lismore. The grounds of impeaching that title are these: The former vicar having accepted a benefice with cure of souls, is alleged to have vacated his vicar-choralship under the recent statute against pluralities, because the vicar-choralship was, as they say, a benefice with cure of

souls, and the second benefice with cure of souls was such a one as was contemplated by the late Act. The question, therefore, for our consideration comes to this, whether a vicar-choralship in that Cathedral is a benefice with cure of souls? If it be so, the plaintiff has a right to recover. Unquestionably this is a new law. It makes now a positive ground of avoidance what formerly might have been done by faculty. It therefore becomes the duty of the court to be well assured that the case to which we are called upon to apply that strict rule does come within the true intent and meaning of the Act. Reverting to the question before us, in order to ascertain the important fact, whether the vicar-choralship was a benefice with cure of souls, I find, according to the definition of the term "benefice," laid down by Burn in his Treatise on Ecclesiastical Law, that it implies actual cure of souls, and has several incidents, the absence of which in the present case, adverting to what we find upon the face of the special case, furnish, to my mind, a perfect negative to the position that this office can be regarded in that light. I find it stated in that work that in order to be legally instituted to a benefice, there are several particulars to be taken into account—presentation, examination, admission, institution, induction.—1 Burn Eccl. Law, 136. None of these things would appear to apply to a vicar-choralship. Nobody has a right to examine. There is no institution or induction; nor is there that which is imposed upon any other beneficiary, namely, the reading of his assent and consent. I might stop there, but I will further ask, is there any evidence of the cure of souls being attached to this office? I admit that in the old records of this Cathedral there is an entry, in which the passage occurs—"Ibi vicarii chorales habent curam animarum," and that they do discharge that duty by a curate. It appears undisputably in evidence that they provide stipendiary curates for this service, who are paid by the body corporate. They are charged with the duty of providing for the cure of souls, but they are not charged with the performance of that duty by means of the body corporate; for a body corporate, though a spiritual body, cannot have the cure of souls as a corporation, but can only do so either through the medium of a stipendiary curate, or of the individual members of the body. With regard to the nature of that provision for the body corporate, the receipt of which is, as we may say, the consideration for the cure of souls, no member can receive individually one fraction. The tithes, which have been allocated to the body corporate, are brought into one common fund, and out of that a certain sum is paid in the shape of a money payment to each individual vicar-choral. The ecclesiastical law recognizes the having cure of cure, as distinguished from the actual cure of souls; *habitualliter* as distinguished from *actualiter*. The fact that the individual members of this body are in receipt of a portion of what is paid for the cure of souls, while it obliges the body to provide for the cure of souls, does not put any one of these individuals in the position of having *actual* cure of souls. That being the law, it

cannot be established that these vicars-choral are persons having benefices. We know that in former times it was by no means an uncommon appropriation to allow the dean and chapter to receive the fruits of livings for the purpose of providing for the service of the Cathedral Church, at the same time not neglecting to provide for the cure of souls. The dean and chapter thereby became those who "*habent curam animarum*," being bound to provide therefor. One of the objects for which the appropriation was made was to provide for the service of the church, and so we find the dean and chapter obliged to provide in part for these services. And similar was the origin and nature of the vicars-choral. We find by the evidence that they had certain cathedral duties to discharge—namely, to read prayers, singing in the choir, &c. They were, in fact, to perform certain of the cathedral duties, and the dean and chapter the rest. They should necessarily appropriate to the due performance of those duties a portion of those funds which had been appropriated to the body corporate. This would seem to give a reasonable solution to the inquiry, as to what was the nature of the office of these vicars-choral. Their office was to discharge certain cathedral duties, for which they received a certain portion of the tithes of the parish, and to that intent they were bound, as a corporate body, to see after the cure of souls. I may add that, notwithstanding the amplest search that could be made, no instance has transpired in which the vicar-choralship has been treated as a benefice requiring actual cure of souls. Twenty-six cases have been discovered in which vicars-choral have held second benefices, but no case in which they appear to have taken out a faculty for holding a single additional benefice. Therefore, my opinion is that judgment should be given in favour of the defendant.

CRAMPTON J.—I concur with my Lord Chief Justice in thinking that the defendant here is entitled to judgment. But there is one matter which he has stated in which I cannot concur—namely, in that relating to my superior knowledge of this branch of the law, but this knowledge, on the contrary, is equally distributed among the members of the court. The question which has arisen here is one of very great importance, and I may further premise that it is a novel one. It is an action in the form of one for money had and received, and, as already stated by my Lord Chief Justice, has been brought for the purpose of trying the validity of a claim on the part of the plaintiff to the office of vicar-choral of the Cathedral Church of Lismore. The defendant, the Rev. Mr. Woods, was, and claims still to be, a vicar-choral of that cathedral, notwithstanding that he had accepted the living of Lisnegane, and was instituted and inducted therein in regular course, that being a living with cure of souls. The plaintiff, the Rev. Mr. Shaw, upon the supposition that the defendant, by accepting the benefice of Lisnegane, vacated his office of vicar-choral, was appointed in the place of the defendant. I need not consider the circumstances under which the present action has been brought, for the case comes to the court out of Chancery for the determination of an important legal question.

All mere matters of form are out of the case, the single question being whether the defendant, by accepting a benefice with cure of souls, vacated his former place, and that question resolves itself into this, whether a vicar-choralship is a benefice with cure of souls. If so, the plaintiff is entitled to succeed; if not, the defendant. By the agreement of the parties at the time, the court has been placed in a novel position, inasmuch as the jury was discharged from giving a verdict, and the questions both of law and of fact have been left to this court, who are to act both as judge and jury in the case. The material facts are these. Lismore is a bishopric annexed from ancient times to the see of Waterford. It has a cathedral and a dean and chapter. The cathedral church is also the parish church of Lismore, within which it is situate. It appears that there are five vicars-choral belonging to this cathedral. They are a corporation, having a common seal, and are possessed of considerable property in tithes, as a corporation. These are generally all clergymen, and discharge all the parochial duties, either by one of themselves, or by a curate appointed and paid by themselves. One such, either vicar or curate, always performs divine service in the cathedral, but the dean and chapter provide a preacher. The churchyard and burial fees belong to the vicars-choral, except for burials within the cathedral, which belong to the dean and chapter. The tithes of the parish of Lismore and of Mocollop, which is joined therewith, are divided between the dean and chapter and vicars-choral, not in equal or certain proportions. In a popular, though not strictly legal sense, we may say that the rectorial tithes belong to the dean and chapter, and the vicarial tithes belong to the vicars-choral. We must not be misled by the name *vicars*, given to these vicars-choral, so as to lead us to suppose that by their constitution they are vicars of the parish of Lismore. They are merely officers of the cathedral, and singing vicars of the cathedral, and not of the parish. They have always employed a curate to do parochial duties, who is a stipendiary curate, licensed by the bishop, and to whom the marriage licenses are addressed. The vicars choral are appointed by the dean; they are neither instituted nor inducted, but installed into their office. They pay no initiation fees; they don't read their assent and consent, as parsons are required to do. They only take the oath of canonical obedience to the dean, who is a *quasi* bishop. It appears that there are two auxiliary parish churches in the parish of Lismore, Mocollop, and Cappoquin; that the dean and chapter appoint to the curacy of Mocollop, and the vicars-choral to that of Cappoquin. It likewise appears that the vicars-choral have the cure of souls within the parish of Lismore; and that in 1726 one of them, Dr. Barton, was a layman, but this is the only instance of the appointment of a lay vicar-choral. They are subject to the ordinary visitation of the dean; and by order of the dean and chapter they are compelled to pay a certain salary to their stipendiary curate at Lismore. So much for the rights, duties, and constitution of vicars-choral. There is no instance of any of them having required a faculty before the

late Act, for holding together a vicar-choralship and a benefice with cure of souls, but there are several instances of faculties for the holding of two benefices. By the 13 & 14 Vic. c. 98, s. 7, it is now enacted—"If any spiritual person, holding any benefice or benefices, shall accept any other benefice, and shall be admitted, instituted, or licensed thereto, contrary to the provisions of this Act, every such benefice or benefices which he had previously held shall become *ipso facto* void, as if he had died or resigned the same." Previous to the passing of that statute, the ecclesiastical law of Ireland stood thus: The acceptance of a second benefice with cure of souls, unless the holder of the living had a faculty from the Primate, vacated the former benefice. In England, by the Statute of Pluralities, which did not extend to Ireland, the law was somewhat different—Browne's Ecclesiastical Law, 120. It is plain that if the office of vicar-choral at Lismore were a benefice, a faculty would formerly have been necessary, and the acceptance of the living of Lisnagane without a faculty would have vacated it *ipso facto*. In 1851 the Rev. Mr. Woods was instituted and inducted into the parish of Lisnagane, which is a benefice with cure of souls, and Mr. Shaw was installed into the office of vicar-choral. The question for us is, whether the place or office of vicar-choral of the Cathedral of Lismore is a benefice with cure of souls or not. We have no evidence of the original constitution of the vicars-choral of Lismore—no charter, endowment, nor act of appropriation has been shown to us, and we can only arrive at a conclusion on the subject by looking at the acts, privileges, and duties of the body, so far as they have been brought before us in evidence. I may here refer to the description of the body as given by Dr. Cotton in his *Fasti Ecclesiæ Hibernicæ*, p. 206, where he says—"Lismore Vicars-Choral—There are four vicars-choral belonging to this cathedral. It is believed that they were instituted by Bishop Griffin Christopher, who filled the see from the year 1223 to 1246. Like those of Cashel and other cathedrals, they possess a common seal. In their corporate capacity they have cure of souls in the parishes of Lismore and Mocollop, which contains two other churches besides the cathedral. The archbishop's triennial visitation-book of 1730 has this note: 'Constitution to read prayers week about in the cathedral. The dean appoints the five.' I have not been able to discover the names of any very early deans." Now, the first important fact in evidence is that the vicars-choral of Lismore are an ancient corporation, and that they have a considerable property in tithes. The thought suggests itself to the mind, that if this property be vested in them as a corporation, the duties cast upon them by the ecclesiastical law are cast upon them as a corporation. They have the vicarial tithes of Lismore, and it is plain that these are vested in them as a corporation only. The next important fact is that upon them devolves the cure of souls within the whole parish of Lismore. From that and the rest of the evidence we may infer, that they are not a lay body corporate, but a spiritual corporation. If they were a lay corporation, the cure of souls

would not be in them, which confessedly it is. I hold them to be a spiritual corporation; and although the alleged existence of a lay vicar at one period might raise a contrary impression, yet there having been but one instance of that anomaly, we may conclude either that that fact is erroneous, or that the irregularity was removed by the ordination of Dr. Barton, or by the substitution of some other person in his stead. The only satisfactory solution appears to me to be that the rectory and rectorial tithes of Lismore became vested in the dean and chapter, and the vicarage of Lismore, with the vicarial tithes, became vested in the vicar-choral; that the patronage of Mocollop is thus vested in the dean and chapter, and that the *vicarage* of Lismore, with the vicarial tithes and patronage of Cappoquin, are vested in the vicars-choral, but not in individual vicars of Lismore; and that such an annexation might have been made in ancient times with the consent of the Crown, the patron, and the bishop, or even without the consent of the latter, if ratified by the Pope. But it is plain that the existing tithes and vicarage could only have been made over to this body in their corporate capacity. —4 Burn's Eccl. Law, (Vicars), p. 12. They thereby have the cure of souls, and the tithe of the parish in perpetuity to themselves and their successors, and discharge their ministerial duties either by the members of the body or their curate. I may here also refer to the case of *Grendon v. The Bishop of Lincoln*, (Plowden, 497 g, 500 a), where it is said, "for he to whom the appropriation is made is incumbent, and as complete a one as any other should be, who came in by presentation, institution, and induction." Now, when appropriation has been made to a body corporate, presentation, &c., are unnecessary as regards the new members, for after the preferment is once vested in that body, they hold it in perpetuity, and the change of its members does not make it necessary that there should be any new investiture. Plowden goes on to say, "there cannot be two incumbents at one and the same time." Therefore, assuming that the vicarage of Lismore, with the tithes, became at one time appropriated to the vicars-choral, as we must assume from the circumstances of the case, it follows that the vicars-choral became possessed of that vicarage, as well as the tithes in their corporate capacity. That is strictly in accordance with Cotton's statement in his *Fasti*, p. 206. Counsel for the plaintiff has suggested that vicars-choral for the time being, being spiritual persons, a grant might be presumed to have been made to them of the vicarial tithes in consideration of their taking on themselves the duties of the parish. That is a legal impossibility, for such an endowment, according to the course of the canon law, could not be maintained. Mr. Napier referred to the work of an old canonist named Barbosa (2 part, 8), in which occurs the following passage: "*Et quando aliqui canonici hebdomadam habent curam animarum talis cura non remanet penes ipsos vel singulos canonicos sed penes collegium.*" With this agrees our own ecclesiastical law.—*Grendon v. The Bishop of Lincoln*, (Plow. 501.) According to these authorities, the cure of souls, belonging to the incumbent, may not vest in the individual

members of the college or corporation, but in the college collectively, and it shall form but one incumbent; whereas the argument of counsel for the plaintiff is that there should be five incumbents. The ecclesiastical law agrees with this proposition of the canon law. But I should say, besides, that the term "endowment" is quite inapplicable to such a state of things—Gibson's Codex, 719. An "endowment" properly means a grant of lands, &c., to spiritual persons to enable them to discharge their functions; appropriation, on the other hand, is the term which denotes the annexation of the parsonage to a spiritual person. But in either case these should be made to a corporation either sole or aggregate, and not to individuals not themselves a corporation. A distinction has been attempted to be taken between the different kinds of appropriation—one kind in temporals only, which is to a corporate body, not spiritual, and that in *utroque jure* both in temporals and spirituals. Now, we must presume an appropriation in the case, not merely an endowment, and as that includes an actual cure of souls, we may take it to have been "*ad mensam in utroque jure*." That would account for all the circumstances we find here. Thus the vicars-choral were bound to discharge the parochial duties either in rotation themselves, or, as they have done here, by a stipendiary curate, who would not be a perpetual curate; and so here they might have done duty either by themselves as hebdomedals or by a stipendiary curate. Therefore it follows that the corporation of vicars choral is a corporation with cure of souls, and that each vicar is entitled to a share of the produce, not to the tithes themselves, but to an individual portion thereof. His office is not, therefore a benefice with cure of souls. The corporation is the only incumbent. This case has been compared to that of the rectory of St. Giles's, where there are two rectors of the one parish. All that I shall say with respect to that is, that it appears to be contrary to the general rule, which is that there is but one parson to each church; but between such exceptional cases and the present there is this material difference, that each of these rectors of St. Giles's is a corporation in himself. Here the vicars are in themselves only natural persons. The law requires the incumbency to be vested in a person or body, which shall have perpetual succession. The vicars-choral do not pay visitation fees; they are not subject to institution, &c.; they do not read their assent and consent; and they do not take the usual oaths. But I may also observe that counsel for the plaintiff also attempted to make out their case upon the ground that the vicarage was donative. There is no evidence of that, but if there was it would not help them; for in that case the donees should read their assent and consent, and go through all other formalities except presentation, institution, and induction. In fact all the ceremonies, except those which other parsons must go through, the donees must go through. For these reasons, I am clearly of opinion that the defendant's post of vicar-choral was not avoided, and that judgment should be given in his favour.

PERRIN and MOORE, J. J., concurred.

Judgment for defendant.

COURT OF EXCHEQUER.

[Reported by JOHN NORWOOD, Esq., Barrister-at-Law.]

EASTER TERM, 1855.

Coram RICHARDS AND GREENE, B.B.

MURPHY v. AGAR.—May 1.

Misdescription in insolvent's schedule—Discharge—Insolvent debtors—3 & 4 Vic. c. 107, ss. 57, 61, 82, 84, [Ireland.]

The defendant to an action, by writ of revivor, to revive a judgment obtained by plaintiff against the defendant in the penal sum of £182, and upon which the sum of £61 was claimed to be due, pleaded a discharge pursuant to the Insolvent Act; and in his schedule were set down the following items: "No. 4, L. M., [plaintiff] Kilcarrig, Borris, Gore's-bridge, £13, admitted, 1840; balance of my bond for £90 paid by me to said M. in 1840. No. 20, L. M., [plaintiff] Bagnalstown, £1, admitted, 1840, due for an horse." It was proved that Kilcarrig—where plaintiff resided many years previous to 1840—forms a suburb of, and is close to, Bagnalstown, which is the plaintiff's post-town, (in Co. Carlow,) Borris and Gore's-bridge being also post-towns in the same county, and, by some miles, distant from Kilcarrig. The plaintiff stated that he never received any notice, nor even heard, of the filing of the defendant's petition or of his discharge until two years after it had occurred, and produced in evidence an attested copy of the judgment, in which he is described as of Bagnalstown. It did not appear that plaintiff had instituted any proceedings from 1847 down to 1855, to recover the balance due of the judgment debt. The judge left it to the jury to say, "whether, according to the circumstances, a sufficiently true and full description of the debt, and of the creditor and of his residence, had been given in the schedule." A new trial was now granted by the court; Richards, B., although he was of opinion that the case had been properly left to the jury, and that there had been no misdirection, holding that the trial had was unsatisfactory, and that the case, under the circumstances, required re-investigation. Greene, B., concurred in the reasons which influenced Richards, B., to grant a new trial, but held that the question had not been properly submitted to the jury, and that the description in the schedule was insufficient.

O'Hagan, Q.C., of counsel for plaintiff, had obtained a conditional order that the verdict had for the defendant at the last assizes of the county of the town of Drogheda, be set aside, and a verdict entered for the plaintiff, pursuant to the leave reserved at the trial, or that a new trial be had on the grounds of the misdirection of the learned judge, and that the verdict was against evidence and the weight of evidence.

Samuel Ferguson and John A. Byrne, for defendant, now showed cause against the conditional order.—From the judge's report and the certificate of counsel it appeared that the action was brought

*by writ of revivor issued the 12th of January, 1855, to revive a judgment obtained by the plaintiff in the Court of Exchequer, on the 19th Nov., 1840, against the defendant, in the penal sum of £182, and upon which the sum of £61 was, by the writ of revivor, claimed to be due. The defendant pleaded that he was, after the obtaining of the judgment, by an order of the Insolvent Court, dated 3rd April, 1847, pursuant to the Insolvent Act, discharged of and from the said judgment-debt and cause of action in the writ of revivor mentioned. The issues for the jury were, 1st, whether the defendant was duly discharged according to the Act of Parliament, from the said judgment-debt; and, 2nd, whether the said order and discharge remained in full force? The learned judge (Moore, J.) who tried the case, considered that the affirmative of the issue lay with the defendant, and counsel, on his behalf, handed in the petition to the Insolvent Court, dated March 6th, 1847, with the schedule thereto; the vesting order, dated 8th March, 1847; the order for the defendant's discharge and adjudication order, dated 3rd April, 1847. In the schedule were set down the following creditors, thus described: "No. 4. Luke Murphy, Kilcarrig, Borris, Gore's-bridge, £13—admitted—1840; balance of my bond for £90 paid by me to said Murphy in 1840. No. 20. Luke Murphy, Bagnalstown, £1—admitted—1840; due for a horse." The defendant was examined in person, and admitted the giving of the bond for £90, and the execution of the warrant to confess judgment thereon to the plaintiff, who had, *proprio manu*, filled up the bond. He further stated that he never owed the plaintiff any debt save that in the bond, and £1 for a horse, for which latter sum he had been processed; that he considered, in March, 1847, there was only due on foot of the bond a sum of £13, and that he thought and believed that he had fully and truly described in the schedule the plaintiff both by name and residence, and that the sum of £13 was, to the best of his belief, also a *bona fide* statement of the amount then due, and that the description of the plaintiff's residence as of "Kilcarrig, Borris, Gore's-bridge," was a true description. He stated that a few days after his discharge he had met the plaintiff, who said, "Well, you have got your discharge;" and also "that he was a judgment creditor, and that the discharge did not affect him; that he would not have opposed him, as he knew that the defendant was a perfect insolvent, nor would he (plaintiff) resort to the farm then held by defendant." The process for the £1 occurred two or three years afterwards. He also deposed that the residence, "Kilcarrig, Borris, Gore's-bridge," was inserted by the professional man he employed; that "Kilcarrig" forms a part of and is close to Bagnalstown, which is a post-town; that "Borris" and "Gore's-bridge" are both post-towns in County Carlow, and are distant from Kilcarrig about three or four miles, Gore's-bridge being the head post-town; that plaintiff was, and is, perfectly well known at Gore's-bridge, but he (defendant) could not tell why the plaintiff was differently described in the two different parts of the schedule. The plaintiff being examined, deposed that he had never received any*

notice, by letter or otherwise, of the defendant's application to be discharged, or ever even heard of the filing of his petition, or of his discharge, until about two years subsequent to that event, when he processed the defendant for £1 before the Assistant Barrister in Bagnalstown, upon which occasion the schedule was, for the first time to him, produced; that he (plaintiff) lived in Kilcarrig, and had resided there for many years previous to 1840; Bagnalstown, near Kilcarrig, is his post-town; that he never received a letter directed to him at Gore's-bridge; that Borris and Gore's-bridge are both five miles from Bagnalstown. Witness also denied the conversation alleged by defendant to have taken place; the plaintiff also gave in evidence an attested copy of the judgment, in which he was described as of Bagnalstown. It being admitted that Bagnalstown was the post-town of the plaintiff, the learned judge asked the jury "whether in their opinion, according to the circumstances in evidence, a sufficiently true and full description of the debt, and of the creditor and of his residence, had been given in the schedule annexed to the petition?" To this the jury, after consideration, returned an answer in the affirmative, and the judge thereupon directed a verdict for the defendant. Counsel for the plaintiff at the trial submitted that the learned judge should tell the jury, 1st, that defendant was not discharged by the order of the Insolvent Court from the judgment-debt and cause of action; 2nd, that the said order did not prevent the said judgment from affecting the property of the defendant, the plaintiff never having elected to take under such order in respect of the debt secured by the said judgment; 3rd, that the description in No. 4 of schedule was not a full description of the plaintiff; and, 4th, that the said description was not such as it ought to have been under the provisions of 3 & 4 Vic. c. 107, s. 57,* and that defendant was not discharged from the judgment-debt.

The conditional order in this case has been obtained upon two grounds—1st, the misdirection of the learned judge; 2nd, that the verdict was had against the weight of evidence. As to the first ground, assuming the insolvent's schedule to have contained a sufficient description of the plaintiff, his debt and residence, the direction of the learned judge was strictly right. It was said, at the trial, that the plaintiff's object was to establish his right to issue execution against the land of the defendant, but if so, there was a course open to him which he forbore to pursue—*Rawson and another v. Hinds*, (Hud. & Br. 599.) The pleadings, however, disclose that the question in the suit was not as to the

plaintiff's right to issue execution of any particular species, but his right to execution generally, and, if the defendant has shown that he was disentitled to some species of execution, the verdict was right. No question arises as to the evidence of service of notice upon the defendant. To effect such service was the duty of the Insolvent Court, and this court will presume that all things were there rightly done. The question of sufficiency of description of the plaintiff's residence in the schedule was for the jury. "What is in writing," Mr. Baron Parke has said, "is for the judge," but where a matter is to be ascertained not merely from writing, but also from extrinsic circumstances, provable by oral testimony, the whole is for the jury. The Insolvent Act requires a full and fair description, and nothing is better settled than that all questions of fairness and unfairness are for the jury. *Frampton v. Champneys*, (2 E. Jur. 699) is expressly in point; and, though a *Nisi Prius* decision, has frequently been recognized, and is now unquestioned. And in the cases which may be cited at the other side, as conflicting with it, it will be found that the courts held, not that the effect of the evidence as to this point was for them, but that in those cases there was no evidence to go to the jury; for instance, *Symons v. May*, (6 Ex. 707).^{*} The direction of the learned judge, therefore, was right. As to the second ground, the description of the residence of the plaintiff was full and true—"Kilcarrig, Borris, Gore's-bridge." Kilcarrig is near Bagnalstown, and was his residence. It is distant from Borris and Gore's-bridge not more than three miles. The plaintiff was the only man of the name resident at Kilcarrig; he was well known at Gore's Bridge and Borris; and the inference which was for the jury is strong, that the postmaster of Gore's-bridge, the head post-town, would cause a letter with a direction following the description in the schedule to reach the plaintiff. Further, there was evidence warranting the inference, that in fact the notice was served upon the plaintiff, from the conversation between the parties in the street of Bagnalstown. If the notice were actually served, was not that a circumstance fairly calculated to influence the verdict? With that verdict the learned judge has expressed no dissatisfaction, and it is unnecessary to cite cases to show how slow the courts are to exercise this jurisdiction. For these reasons, the cause shown should be allowed.

Thomas O'Hagan, Q.C., with him *J. Kernan*, contra.—The case turns on the construction of the 3 & 4 Vic. c. 107, s. 57, the last Insolvent Act. There ought to be a full and true description given in the schedule, inasmuch as the due service depends upon the accuracy of the description. Although the 84th† section does not apply to mis-

* The 3 & 4 Vic. c. 107, "An Act to continue and amend the laws for the relief of insolvent debtors in Ireland." Sec. 57 enacts, that after order the prisoner shall deliver in a schedule, containing *inter alia*, "a full and true description of all debts due or growing due from such prisoner, and of all and every person to whom such prisoner shall be indebted, or who, to his knowledge or belief, shall claim to be his creditors, together with the nature and amount of such debts and claims respectively," distinguishing such debts, &c., as are disputed, and also those which are not disputed, and the names and places of abode of the several persons, &c. &c.

* This case arose on the construction of 11 & 12 Vic. c. 21, ss. 5, 6, ("Insolvent Debtors Act for India,") wherein sec. 6 corresponds with sec. 57 of 3 & 4 Vic. c. 107.

† Sec. 84 enacts, that where there is an error in the amount of a debt or claim due from such prisoner, and specified in the schedule without any culpable negligence or fraud or evil intention on the part of such prisoner, the prisoner is to be entitled to the benefit and protection of

description of residence or name, yet it explains the section under consideration. [*Richards, B.*—The 57th section of the Irish Act agrees, I think, with the 69th of the corresponding English Act.]* There was a mistake in the present case both as to the amount of the debt and the residence. The service by the Insolvent Court does not, substantially, matter, if the court be, as here, misled by the misdescription. The 8th rule or order of the Insolvent Court shows that the court does not, by its officers, transmit the notices. [*Richards, B.*—How does the Act direct the service to be made? *J. Byrne.*—The 61st† section provides for that. *Richards, B.*—Was there proof of notice or of posting, through the post-office, of any notice or letter? Was there any evidence of an affidavit of service being filed?] No, my lord. [The issue directly throws the onus on the defendant to show that all requisites prescribed by the Act were complied with, for it opens up the question whether he was rightly discharged or not. If there were evidence to show that the notice was posted or served, I would be indisposed to grant a new trial.] There is no controversy or conflict here on the evidence. We actually put in evidence the judgment wherein “Bagnalstown” was given as the residence. [*Richards, B.*—What do you say as to this being a jury question? There is a recent case—*Dinnen v. James*, (7 Ir. Jur. 28)—tried, I believe, by Ball, J., which came before this court on a bill of exceptions, wherein it was determined that such a case was a jury question. The case you have just cited—*Hoyle v. Blore*, (14 M. & W. 387), does not appear to me to conflict with the case cited from 2 E. Jur.]

The following cases were also cited: *Forman and another v. Drew*, (4 B. & C. 15); *Reeves v. Lambert*, (4 B. & C. 214); *Wood v. Jowett and others*, (referred to in 7 Ir. Jur. 28, in *Forman v. Drew*); *Symons v. May*, (6 Ex. 707); *Mails v. Bays*, (2 Dow. & L. 964). [*Greene, B.*—In 6 Ex. Rep. the question of *Symons*' residence seems to have been argued, and decided as a matter of law, and not merely as a jury question.] On principle it is the duty of the judge to direct the jury as to what, under the statute, is a “full and true description,” and this is a matter of law. In this case the jury appear to have taken a popular view of the question submitted to them. [*Greene, B.*—If the proper name and residence be given, the party has an opportunity of correcting the amount

of the debt.]—*Lambert and others v. Smith*, (11 Com. B. 358); *Leonard v. Baker*, (15 M. & W. 202); *Baker v. Sides*, (7 Taunt. 179); *Nias v. Nicholson*, (2 C. & P. 120).

S. Ferguson, in reply.—It is to be observed that the plaintiff never applied for the amount of the debt from 1847 down to 1855. The defendant has pleaded a statutable defence under the Act. [Reads ss. 82* & 61.] If we had pleaded specially under the Act, we should also have alleged the giving of notice and proved it, and the other side might then have taken issue on the fact. By his issue he has traversed our discharge under the Act generally, for an issue now takes the place of a replication, and we, having to prove the affirmative of the issue, were not to be compelled to give evidence of notice, not having pleaded specially. The Insolvent Court would not have given relief unless it was satisfied that the requirements of the Act were fully complied with. [*Greene, B.*—That is to say, that a notice was transmitted to the address furnished in the schedule. We have no difficulty in going that length with your argument. If the description were accurate, you cannot be prejudiced by any miscarriage.] [*O'Hagan, Q.C.*—It is of the fraud we complain.] The question, then, is narrowed to one of misdescription. If the debt were not in the schedule, then it would be for the court to say “that debt is not here.” If it be in the schedule, then the court would say to the jury, “It is for you to determine whether it be a full and true description.” The question was narrowed to this point, was that a full and true description of Luke Murphy? The jury have found in the affirmative, and it was in their province to decide that query, and it was not competent for the learned judge to withdraw that from their consideration. In *Dinnen and another v. James*, (7 Ir. Jur. 28,) there was no description of a person, but of an office. [*Richards, B.*—In that case a wrong person was given.] In the present case the plaintiff and defendant were neighbours, and the jury were fully satisfied that due notice was received. [*Richards, B.*—It seems that Bagnalstown is the head post-office, and that the two other places are tributary offices thereto.]

RICHARDS, B.—There are some misdescriptions in insolvent schedules disentitling a defendant to his discharge under that Act; as, for example, where, in one case, an insolvent reduced the debt below the sum of £5, and the court held that a sufficient misdescription, because he reduced the debt so as to bring it within a class of debts to be dealt with after a peculiar manner, and where it was unnecessary to give any notice. In *Symons v. May*, (6 Ex. R. 707,) the court deemed it to be a disentitling misdescription where an insolvent actually invented a name. The same thing happened in *Dinnen v. James*, where there was a misrepresentation of the creditor; and one of the judges remarked in that case that “it would have been better, perhaps, if he had not been named at all.” The case of *Frampton v. Champneys*, (2 E. Jur. 699,) which has not, I believe, been over-

such Act, notwithstanding such mistake, and the creditor, &c., to be entitled to the benefit of all provisions of the Act in respect of the amount of such debt.

* 1 & 2 Vic. c. 110, (“Act for abolishing arrest on mesne process in civil actions, for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England.”) The sections 69, 71, and 93 of this Act correspond with sections 57, 61, and 84 of the 3 & 4 Vic. c. 107.

† Sec. 61 enacts, that the Court for the relief of Insolvent Debtors shall cause notice of the making of such vesting order, and the filing of every such schedule, to be given by such means as the court shall direct to the detaining creditor or creditors, and to the other creditors named in such schedule, and resident within the United Kingdom, and whose debt shall amount to the sum of £5.

* Sec. 82 enacts, that on discharge no execution is to issue against insolvents for debts, &c., to which adjudication extends, and discharge under this Act may be pleaded generally.

ruled, although reference is thereunto made in *Symons v. May*, seems to include a class of cases referable to the consideration of a jury, and [reads the case] my Lord Denman, C.J., seems to have rightly left the question to the jury. Where the misdescription arises as a matter of evidence, I do not see how it can with propriety be withdrawn from the jury. Here the question is whether a gentleman's post-town is properly given—that is a question for the jury to say whether the description is correct or the reverse. Here a gentleman resides nigh to three post-towns. It strikes me that it is not a question for the judge to decide, which was his post-town, and that in this case the point is fairly enough raised, as to which is the proper post-town, and, I think, that it has been properly left to the jury, and that there has been no misdirection. It is not right, in most cases, to interfere with the functions of a jury, and we are slow to interfere, save in certain exceptional cases. We are of opinion, however, that this is a fair case for reconsideration. We are strengthened in this opinion because of the length of time which elapsed between the periods of execution of the bond in 1841, of the insolvency in 1847, and of the proceedings in 1855; and also in consequence of the venue having been laid in Drogheda. Hence we think that the plaintiff, having selected that town for his venue in place of laying it in Carlow, must pay the costs of the former trial. In a case which recently came before the Court, the learned judge said he was not satisfied with the verdict, and I must say, in this case, that I am not perfectly satisfied with the verdict had, and I think there ought to be a new trial. It certainly does seem strange that the defendant here should be under a mistake as to Gore's-bridge being the head post-town, and that, having described the residence in the judgment as of Bagnalstown, he in the schedule designates it as of Gore's-bridge. Let a new trial be had, and let the venue be changed from the county of the town of Drogheda to the city of Dublin.

GREENE, B.—The question submitted to the jury seems not to have been—in the words of the statute—whether it was “a full and true description,” but whether it was a “sufficiently fair description,” and that does not appear to me to be a proper and adequate way of putting it. The question ought not thus to have been left to the jury, who were not competent judges of the objects of the Legislature, and were ignorant of the results likely to flow from the fact of there being a “full and true description.”

Venire de novo.

ROLLS COURT.

[Reported by R. W. Gamble, Esq., Barrister-at-Law.]

ABBOTT v. GERAGHTY.—November, 1854, and April 26, 1855.

Cause petition—Costs—Case for opinion of counsel.

A general cause petition was filed against several respondents. The chief respondent, when about to file his affidavit, laid the draft affidavit before

counsel, and with it a case for his opinion to advise proofs. Several other affidavits were subsequently filed, and the petition was afterwards heard, and dismissed, as against this respondent, with costs. The costs of this case and opinion not having been allowed by the Taxing Master on taxation between party and party, Held, in accordance with the opinion of the other two Taxing Masters, but without laying down any general rule, that the respondent was here entitled to the costs of the case and opinion; but that if the petition had been dismissed for want of prosecution, that the respondent would then not be entitled to such costs; that a case for direction of proofs should be allowed for at some stage of the proceedings; that the filing of the answering affidavit by the respondent is in the nature of issue joined, and appears to be the time at which such case should be allowed.

As a general rule the costs of an attendance on a third party to borrow a necessary document are not allowed; but, if expense is thereby saved, the Taxing Master may exercise his discretion in allowing such costs.

A GENERAL cause petition had been filed in this case on the 2nd of May, 1853, by John Abbot, claiming to be entitled, as heir-at-law of J. T. Abbott, to the lands of Ballyhasty, which had been sold by the said J. T. Abbott to the respondent, the Rev. E. Geraghty, and conveyed by a deed of the 28th of June, 1828. A case was laid before counsel on the 13th of May, 1853, on behalf of the respondent, the Rev. E. Geraghty, and with the case was sent a copy of the answering affidavit of the said Rev. E. Geraghty, which was intended to be filed by him, but which was not filed until the 3rd of June, after the opinion of counsel had been given. The opinion, bearing date the 30th of May, directed a certain deed of the 16th of July, 1849, to be proved. This deed was not in respondent's possession; so his solicitor waited on the solicitor of Lord Bloomfield, and got the loan of it, and the deed was afterwards admitted under the 164th Rule. Several other affidavits were afterwards filed on both sides, and the petition came on for hearing on the 10th May, 1854, and was dismissed, as against the respondent, the Rev. E. Geraghty, with costs, to be paid to him by the petitioner, and it was referred to the Taxing Master to tax the same. Master Rielly, upon the taxation, refused to allow the following items:

		£ s. d.	
No. 52.—Draft case to advise proofs,	...	0	3 1
53.—Copy for counsel,	...	0	2 1
54.—Attending the Attorney-General,	...	0	6 2
55.—Paid him fee,	...	4	4 0
56.—Attending Mr. Disney, solicitor for said Lord Bloomfield, to request a loan of the original deed of the 16th July, 1849, whereby the respondent, Mr. Geraghty, released part of Barnagrotty from his collateral judgment, and which was directed to be proved on Mr. Geraghty's behalf. Mr. Disney promised to write to Lord Bloomfield's agent for liberty to lend me the deeds required, which he afterwards did,	...	0	6 2

The affidavit stated that the case was necessary to

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be laid before counsel. A motion for a review of the taxation with regard to these items was made before his Honor, who referred it to the three Taxing Masters to report in relation thereto, and the following certificates were given, in which the other two Taxing Masters differed from Master Rielly.

**CERTIFICATE OF MASTER RIELLY, PURSUANT
TO THE FOREGOING ORDER.—25TH
JANUARY, 1855.**

"In obedience to the order of the 24th of Nov. 1854, whereby it was referred to the three Taxing Masters of this court to certify to the court in relation to the items Nos. 52, 53, 54, 55, and 56, in the respondent's, the Rev. Edward Geraghty's, bill of costs; I, Thomas Rielly, the Taxing Master who taxed said costs, do humbly certify as follows:—The four numbers, 52, 53, 54, and 55, are the costs of a case for counsel to advise proofs in a general cause petition matter, previous to the hearing thereof, and claimed in analogy to a like case in a plenary suit before the hearing of the cause. I disallow this class of charges, on the grounds that such analogy does not exist—that the charges are against principle, and inconsistent with the law and practice of the court in cause petition matters, as established in the case of *Glascock v. Ross*, (1 Ir. Ch. Rep. 55,) and confirmed by the subsequent cases of *Hatchell v. Egleso*, (1 Ir. Ch. Rep. 215; 3 Ir. Jur. 163,) and *Kirwan v. Lindsay*, and that such case to advise proofs was not a proper charge against the party in party and party costs. Before considering the question, as raised in the bill of costs, I beg to state that I do not hold that a case to advise proofs should never be allowed against the party in a cause petition matter, but that it is not allowable against the opposite party at this stage of the proceedings; such a case would, I think, be a proper charge where the court directs an examination of witnesses, or proofs to be made—in that event I think the analogy to a plenary suit would arise, and a case to advise proofs would be admissible against the party. I have always expressed this view where the opportunity for doing so occurred. I have always understood that before the year 1834 no case to advise proofs was allowed against the party; I am not acquainted with the decision by which the practice was introduced, and therefore cannot say how far the grounds of that decision would bear on the present question; but I presume the principle was, to enable the parties in a cause where the proceedings were of considerable duration, and necessarily accompanied with much expense, to have their respective allegations proved in a legal and technical form, so that neither party be turned round at the hearing, the cause impeded, and further delays and expense incurred. But in a plenary suit there was a fixed period at which the parties could prudently lay a case before counsel—the plaintiff, when he got in all the answers, and the defendant, when issue joined. The parties then knew there was an end to further pleadings in the cause; the case of each party was complete so far as the pleadings were concerned; it required no special application or order of the court (as in

a cause petition) to enable either party to examine; it was the duty of the parties, and they had the right, to examine witnesses on the filing of the replication. But in a cause petition matter the proceedings are not carried on by pleadings, in the technical meaning of the term; there is no period at which the petitioner can say he has in all the answers; there is no replication filed, or issue formally joined, as in a plenary suit; on the contrary, either party may file additional affidavits, without restraint, up to a particular stage, and from thence, with leave of the court, up to the hearing, so that there is no period at which either party can safely consult counsel. I am, therefore, humbly of opinion there is no analogy between a cause petition and a plenary suit as regards the time for laying a case for proofs before counsel, or as to the propriety of charging such against the opposite party. But, in my humble judgment, the question in this case does not depend upon analogies, but is settled and controlled by the above mentioned cases. There has not been sufficient time, since the passing of the Chancery Regulation Act, to establish 'a practice,' even if the practice so far had been uniform; but a perfect uniformity of opinion or practice between the Taxing Masters has not existed, and therefore, and from the importance of the question, not merely as regards this individual case, but whether in all cause petitions, a case to advise proofs may be submitted to counsel before the hearing of the cause, and the costs therefore charged against the opposite party. I therefore presume to go more at length into the question than I would feel justified in doing in an ordinary case. In the case of *Glascock v. Ross*, when the petition in that matter was at hearing, counsel for the petitioner moved 'that in pursuance of the 13th and 14th Victoria, cap. 89, the court might direct that so much of the evidence in this matter as the petitioners might be advised to give for the purpose of proving handwriting to deeds and documents might be taken by affidavit, and that all the other evidence should be taken by examination on interrogatories, or *viva voce* at the hearing, as his Lordship might think fit and be pleased to order, and if by examination on interrogatories, then that his Lordship might be pleased to name a day when such examination should close, and publication pass, and that the respondent should lodge with the proper officer of the court certain specified deeds referred to in the petition, and in the answering affidavits already mentioned.' This application, made as it was by counsel of the highest reputation and rank at the Irish Bar, shows clearly that he was of opinion that no evidence could be taken either by interrogatories or *viva voce*, or even by affidavit, for proving handwriting to deeds and documents, without leave of the court, and that the proper time for such application is, as it was then, made at the hearing, and inasmuch as the court refused the application, and heard and adjudicated on the petition without any such proofs, there is, I humbly submit, no reason or principle to justify a charge against the party for a speculative case prematurely laid before counsel, for an object that could

not be carried out at the period, and could only be brought into operation if leave given by the court at the hearing; but which the court might, as it actually did on that hearing, dispense with altogether. And if it be considered useful or necessary, notwithstanding the above decision, to prove at the hearing 'handwriting to deeds and documents' by affidavit, I am humbly of opinion that the petitioner has a full direction of proofs on the petition, and the respondent in his answering affidavit—both settled by counsel; and, I think, it is not saying too much, or expecting too much from his professional sagacity, that every solicitor is quite competent to prepare any such affidavits. The Lord Chancellor, in giving judgment in the above case, (*Glasscott v. Ross*), states: 'Nor from the general view which I take of the Court of Chancery Regulation Act do I think that it is at all necessary to comply with the motion' (above mentioned) 'on behalf of the petitioner. The Act was, I conceive, passed for the purpose of introducing into all the subjects of equity jurisdiction the ordinary proceeding upon petition, which had been previously found available for certain purposes of the court. It, therefore, studiously draws a line of distinction between proceedings by petition and proceedings in a plenary suit.' It appears to me, therefore, that the Act, in adopting the course of proceeding by petition, did not intend that it should be incumbered by the forms of a plenary suit—the course of proceeding by petition was already known; it was a very simple one—first, the petition was brought to the Secretary's office, the Chancellor then made a fiat upon it, and when the petitioner obtained an order for hearing, he served notice on the respondents, and that notice was brought on to be heard upon the expiration of two days. The petition was frequently merely made ancillary to further inquiry, and accordingly, upon the Trustees Acts and others of a like nature, the course adopted was, a reference to the Master to inquire whether the case was one within the Act relied on. Such was the course, in the first instance, applicable to all cases of petitions before the passing of this Act. What is there to introduce a difference between petitions under it and petitions under former Acts? Taking it, then, that these petitions, with the special exceptions introduced by the Act, are to be dealt with as petitions previously have been, it will plainly be in the power of the parties, according to the practice of the court in such matters, to file their own affidavits, or those of any other person who may be able to support or resist the case sought to be made by the petitioner. And, in fine, I apprehend that all this Act substantially does, as distinguished from the former course of the court in petition matters, is to authorize the petitioner to annex interrogatories to his petition; to verify his petition in a short affidavit instead of a full one; and to enable the respondents to file interrogatories. In this way the Act is most beneficially calculated to bring the parties, and matter of their respective allegations, before the court as speedily and cheaply as possible. The court, no doubt, has power given to it by the Act to direct evidence to be taken *viva voce* or upon affidavit, as well as upon

interrogatories; but I conceive that those directions are to be given, if necessary, upon the hearing of the petition itself, and this course appears to me most conformable to the spirit of the Act. The court can then see whether there is any occasion for further inquiry, or whether it will be proper to issue a commission, or send the case to the Master's office, or direct *viva voce* evidence to be taken, &c.; in other words, to determine the case at once, or to put it in a train of further investigation; but to introduce a system of preliminary interrogatories would amount to the re-introduction of all the expensive machinery so much complained of before the enactment of the statute, and would do nothing towards forwarding the real objects of it. I see no difficulty in acting upon this view of the statute. When the case comes before the court, it can, if the cause then appears ripe for the purpose, determine the matter upon affidavit; but if the cause appear a fit one for a commission, or for *viva voce* evidence, or for the exhibition of interrogatories, or to have a bill filed, or an issue tried, or a trial at law had, the court can, at that time, make the proper direction. I do not deny that difficulties will not occasionally arise by adopting this course; but it would be much more dangerous to introduce a preliminary examination by interrogatories or otherwise. The court has, I think, full power to decide the case upon affidavits, if the necessary information shall appear upon them—and in ninety-nine cases out of a hundred further investigation will not be requisite; it would be a return to the old system of special or general replications to require the evidence to be formally taken in the first instance. His Lordship, on this occasion, referred to the words of a General Order which he had previously contemplated, but which he stated he did not then think it essential to have the object of it established by a General Order, because it appeared to him to be within his own discretion to announce it—not as a General Order of the court, but as the guide of his own course of judicial practice. This contemplated General Order embodies in substance the foregoing observations, and which is given *verbatim* in the report of the above case. In the case of *Hatchell v. Eggleston*, after a full statement of the facts of the case, the report states: 'Finally both the respondents offered to prove the facts and charges set forth by them in such manner as the court should direct, and insisted that the petition should be dismissed with costs.' In this case the court again enunciated the principles upon which a cause petition should be carried on, and the counsel for the petitioner in this case (who was also for the petitioner in *Glascock v. Ross*) stated on argument—'It is a matter of discretion at the hearing whether or not the court will decide the matter upon affidavit. The practice is settled by *Glascock v. Ross*.' In the case of *Kirwan v. Lindsay* counsel for the petitioner, (who had been also counsel for the petitioners in the two former cases,) moved that the petitioner should be at liberty to examine witnesses upon interrogatories previously to the hearing of the cause, and that a commission should be issued for that purpose. Counsel for the respondent opposed

the motion, as dilatory; and, in order to show that the court would not in cause petitions sanction the old system pursued in causes of examining witnesses upon interrogatories preliminary to the hearing, cited *Glascok v. Ross* and *Hatchell v. Eggleso*, and objected to the affidavit upon which the motion was grounded, &c. The court, in giving judgment, and after referring to the above application by counsel in this case, stated: 'I do not, however, in the present case, see that any sufficient grounds are laid for departing from the general rule which I felt it my duty to lay down in *Glascok v. Ross* and *Hatchell v. Eggleso*, in reference to proceedings under the Court of Chancery Regulation Act,' and accordingly the motion was refused with costs. I, therefore, respectfully submit, that if analogy be the rule relied on to ground the present claim for 'a case to advise proofs,' it should, upon the principles announced by the court in *Glascok v. Ross*, be rather with reference to the practice in a petition filed before the Act of 1850, (or perhaps more consistently with a litigated motion) than with the practice on a bill or in proceedings in a plenary suit; but I am not aware of any instances in either of the former cases where 'a case to direct proofs,' was ever charged for, and if charged, it could not, in my opinion, be allowed on taxation. My colleagues, with whom I regret I differ so much on this question, in support of their opinion, seem to rely somewhat on the expression of the Lord Chancellor in giving judgment in *Hatchell v. Eggleso*, viz.: 'But it is said that the true mode of proceeding is merely to throw down the petition and the answering affidavit, and then the court is to decide upon the course to be pursued. I confess that if that was to be the practice I would think it had been better to have left matters as they were before the Act, leaving the parties to decide as to what points they would examine;' but that expression was, in my humble judgment, used by the court with reference to and to repudiate the doctrine or objections urged by the respondent's counsel, viz.: that after the answering affidavit of the respondent further affidavits on the part of the petitioner could not be read at the hearing, without having previously had the permission of the court. Such observation, I respectfully submit, does not affect the question under consideration, viz.: 'a case to advise proofs;' but is perfectly consistent with the doctrine and practice announced by the court in the several cases above mentioned, and negatives the propriety in the first instance of an examination, and consequently of a 'case to advise proofs.' As to No. 56, a charge by the respondent's solicitor for attending on a third party to obtain the loan of a deed considered necessary for the hearing, I beg to say that my uniform practice has been to disallow such a charge when made against the party in party and party costs. As a general rule an attendance to borrow or return a document under the circumstances mentioned by my colleagues in their certificates, is not allowable in any class of costs whether between party and party or solicitor and client; but they consider that the present charge (at No. 56,) is not within that rule, that the deed being necessary to be produced at the hearing, and being in the cus-

tody of a third party over whom the solicitor for the respondent had no direct control, a charge for an attendance on that party should be allowed against the opposite party; but this would, I submit, involve or admit a new principle in taxation, viz.: of allowing a party the costs of getting up his own case. In my opinion such costs are not costs in the cause against an opposite party, and such I thought was the impression and practice of my colleagues. Every party is assumed to know his own case, and to have all documentary evidence necessary to sustain it, save matters of record, such as wills, judgments, &c., for obtaining copies whereof the solicitor is entitled to an attendance, but otherwise a party is not allowed for making out or getting up his own case, and in my opinion the charge at 56 is a charge of that nature, and should not be allowed against the party. The admission of such a principle would open a door to much abuse, and entail hardship on the opposite party. My colleagues consider that it should be allowed on the grounds of economy, a very plausible ground, but one which, in my humble judgment, should be admitted with much caution; it is the common excuse urged for adopting irregular proceedings claiming to be allowed for what ought not to have been done, because the party adopted, in his opinion, a less expensive mode than the regular and legitimate course of proceeding. I do not apply this observation directly to the individual item No. 56, but to one of the grounds, viz.: 'economy,' upon which it is conceived it should be allowed. It is considered also that a discretion should be vested in the Taxing Master as to charges of this nature, that of course is entirely for the discretion of the court; but if I be permitted respectfully to give an opinion it is, that it is much more advantageous to the suitors generally of the court and their interests, that the taxation of costs should be conducted as nearly as possible on established principles, and not left to the discretion of the officer, producing, as I think it does, more or less a want of uniformity in practice, invidious comparisons, and imputations of caprice, if not of injustice. The sum 6s. 2d., charged in this instance, is small; but the principle, if admitted, would have, I humbly conceive, an extensive application. If the individual having possession of the deed lived, not in Dublin, as in the present instance, but in Cork, Galway, or elsewhere, the Taxing Master, I apprehend (the principle once admitted) would find it difficult to resist a charge, (which would not now be admitted) for the solicitor going to the residence of the individual to procure the 'loan' of the document, the solicitor might urge, (and the argument is by no means unusual) that the individual possessing the document was no party in the cause or matter, that he, the solicitor, had no control over him, and that he (the individual having custody of the deed) had confidence only in the solicitor, and would not confide the document to any other person, and then an account should be mentally taken Dr. and Cr. on the score of economy. If an attendance to procure the loan of the document be admitted on principle, a question would arise, why not the procurement therefore the preparation of a deed considered by the party neces-

sary to sustain his interests at the hearing got up during the progress of the suit and produced and proved at the hearing, for instance, a release to a witness, a deed to vest the legal estate or other rights in the party, making a survey to show contents or point out boundaries, &c. Such charges have been made, but uniformly disallowed on the principle that the costs of a party occasioned in getting up his own case is not a proper charge against the opposite party. THOMAS RIELLY."

CERTIFICATE OF MASTER TANDY, PURSUANT
TO SAID ORDER.

"I have read the foregoing certificate of Master Rielly as to items 52, 53, 54, and 55, in the bill of costs in the case of *Abbott v. Geraghty*, being charges in relation to a lease for advice of proofs disallowed by him in taxation, and although I entertain the highest respect for Master Rielly's judgment, yet I cannot bring my mind to agree with him in the view he has taken, and as I have acted on a different principle in some cases of a similar nature which have come before me on taxation, I beg leave, in obedience to the order of the Master of the Rolls, to express my views as to those items, and why I think the charges should be allowed. By the 12th section of the Chancery Regulation Act, the Court of Chancery is empowered to direct evidence to be taken either *viva voce* before the court or upon affidavit instead of upon interrogatories, and the entire policy of the Act appears to have been to reduce the expense of Chancery proceedings as much as possible. In the case of *Glascock v. Ross*, which Master Rielly has referred to, the application was, 'That his Lordship might direct that so much of the evidence as the petitioners might be advised to give for the purpose of proving handwriting to deeds and documents might be taken by affidavit, and that all the other evidence might be taken by examination on interrogatories or *viva voce* at the hearing.' But it should be observed that this application was made before any General Orders were made by the court, and at a time when the course of practice was unsettled. This case has been so very fully referred to by Master Rielly, I need not go further into it than to observe that the petitioner's motion was refused on the grounds that such an order was unnecessary, and that the parties were entitled to file their own affidavits and those of any other persons who might be able to support or resist the case sought to be made by the petitioner; and the marginal note in this case is, that 'cause petitions will be heard in the first instance on petition and affidavit filed in support of or in opposition to the same, and on the answers to any interrogatories which may have been filed, and on such hearing the court may direct that all or any of the matters stated in such petition and affidavits which it may be necessary further to have proved or enquired into, shall be so proved or enquired into by further affidavits or by *viva voce* or written examination.' After the judgment in this case the General Orders of the court in pursuance of the Act were pronounced, and by the 5th General Order each party is allowed to file further or additional affidavits as he may

think proper, in verification and support of the matters contained in the petition and answering affidavits. In the case of *Hatchell v. Eggleso*, which is the first case reported in reference to this question after the General Orders were pronounced, the course which I conceive was laid down in *Glascock v. Ross* was followed. The petition in this case was for a foreclosure, and it was originally treated as coming within the meaning of the 15th section of the Act. At the first hearing the Chancellor directed the case to stand over and notice to be served on the respondent Henry Eggleso, and on Chancellor, a trustee. These parties having been served with notice, the cause came on again to be heard, when the respondents appeared and resisted the granting of an order under the 15th section, when the Lord Chancellor directed the cause to stand for the next Term, the respondents to be at liberty, if they thought fit, to make affidavits. The case was then treated as a general cause petition, and all parties were served with notice. An affidavit was filed by respondents in answer to the petition, and affidavits were filed on behalf of the petitioner in support of the petition. When the cause came on again to be heard, it was contended on the part of the respondents that the affidavit so made on behalf of the petitioner could not be read, same having been filed without the permission of the court, which it was insisted could not be granted until the hearing, and that respondents had not an opportunity of cross-examining. The Lord Chancellor held that the course pursued was the correct one, but at the desire of the respondents liberty was given to the parties to examine and cross-examine on interrogatories, if so advised, and on this hearing the affidavits which had been made in support of the petition were read and entered on the minutes, and the Lord Chancellor in his judgment says: 'But it is said that the true mode of proceeding is merely to throw down the petition and answering affidavit, and then the court is to decide the course to be pursued. I confess if that were to be the practice I would think it had been better to have left matters as they were before the Act, leaving the parties to decide as to what points they would examine, what they would give in evidence, and whom they would produce as witnesses, slow and expensive as experience has taught us that the ancient procedure was.' The 12th section empowers the court to dispense with interrogatories when it pleases, but does not, in my judgment, declare that in all cases under the Act the evidence is to be taken on interrogatories, unless the court shall otherwise direct, and I cannot read the section as amounting to this, viz.: that *no information* is to be given to the court at the first hearing save what appears within the four corners of the petition and answering affidavits. On the contrary, it appears to me that either party may support his case by the affidavit of several parties if necessary. The petitioners accordingly proceeded to examine witnesses, but no examination or cross-examination took place on the part of the respondent, and when the cause came on to be heard a decree was pronounced, and there was no appearance on behalf of the respondent. The costs in this case came before me for taxation, and I allowed a case

to direct proofs as against the opposite party; but as such was allowed after the court had given permission to the parties to examine, such allowance would not, I conceive, affect the principle in the present case, as Master Rielly agrees with me that the court having directed an examination a case to direct proofs should be allowed. In the case of *Wynne v. Longfield*, which I do not find reported, and which was subsequent to the case of *Hatchell v. Eggleso*, the costs of the respondents came before me for taxation. This was a general cause petition to enforce a specific performance of a contract for sale. The same course was pursued as laid down in *Gluscock v. Ross* and *Hatchell v. Eggleso*, as to filing affidavits. All the evidence at either sides was given by affidavits, and there were affidavits of about twenty different persons as witnesses filed *pro* and *con* in lieu of depositions on interrogatories, and the cause was heard on these affidavits and a decree pronounced, and all these affidavits entered as read in the decretal order, and thus, looking on those affidavits as proofs, I allowed a case to direct proofs on the taxation of the costs. I conceive that the practice as laid down in *Gluscock v. Ross*, and followed in *Hatchell v. Eggleso*, was, that in the first instance the proofs were to be made by affidavits instead of depositions on interrogatories, as being a more expeditious and inexpensive mode of determining the rights of the parties, the court not requiring *strict* proof in the first instance. But if, at the hearing, the facts did not appear to be sufficiently disclosed, the court would direct such further enquiry as might be deemed necessary, and as the Lord Chancellor says in the case of *Gluscock v. Ross*, 'The court has, I think, full power to decide the case upon affidavits, if the necessary information shall appear upon them, and in 99 cases out of 100, further investigation will not be necessary.' It appears to me, therefore, that the practice so laid down is not that no proofs are to be made before the hearing of a cause petition, but that a new and less expensive mode of proof is to take place, viz., by affidavit, and as the case is to be now proved in this way, I think the party is entitled to be allowed a case to direct proofs on taxation in like manner as he would be in a plenary suit. The case of *Kirwan v. Lindsay*, which has been referred to by Master Rielly, does not, I think, affect the present question further than confirming the practice as laid down in *Gluscock v. Ross* and *Hatchell v. Eggleso*. In that case the application was for liberty to examine a witness on interrogatories before the hearing on special grounds, the application was refused, the grounds laid not being sufficient. Referring to the bill of costs in the present case, it appears that the cause on coming to a hearing had all the ingredients for proof which would have been necessary under the old practice in a plenary suit, with the single exception of depositions on interrogatories, which was supplied by affidavits. There was a consent to admit proofs under the General Order, there was an order to examine a witness *viva voce* at the hearing, and *subpoena* and *viaticum* for such witness, and also an order to read documents at the hearing, and the costs of all these proceedings, in reference to proofs, have been allowed. As to the precise

time at which a party is entitled to be allowed a case for proofs, I do not think that is of much importance, a party is never allowed more than one case to direct proofs, and it may be left to the discretion of the solicitor as to when he may take those directions; but when the answering affidavit of the principal respondent is filed to the petition, I think the case may be considered as at issue, and the necessary proofs may be directed, the affidavits which are subsequently filed are almost all affidavits of strangers or, I may say, witnesses to support the case at either side, nor can I agree that the party has sufficient in the petition and answering affidavit of the respondent to enable him to shape his proofs, the same might be said in the case of a bill and answer in a plenary suit, and there a case to advise proofs is always allowed. As to a case to direct proofs being allowed in a cause petition matter after a decree, and when the case goes before the Master and he directs the party to go into proofs, I do not think that applies to the present question; such a proceeding is more in analogy to a commission in aid in a plenary suit, when a party would have a case to direct proofs in chief before hearing, and be also entitled to a case to direct proofs in aid after before the Master. I am, therefore, for the reasons stated, obliged to say that, in my humble opinion, I think Master Rielly was wrong in disallowing the items 52, 53, 54, and 55. As to item 56, being an attendance to obtain the loan of a deed to produce and prove at the hearing, it has never been the practice to allow a solicitor an attendance to borrow a document for the purpose of making a copy, or an attendance on the opposite solicitor in the progress of a suit to borrow documents from him, or as against the opposite party for attending to procure any document which was under the control or procurement of the client. In this principle I fully concur with Master Rielly, and have always acted on it; but I think the disallowance of the charge in the present case is an overstraining of that rule. As I understand the charge, it is this, the deed in question was advised by counsel to be proved on behalf of respondent, and was accordingly proved by being admitted under the General Order of the court, and entered as read in the decretal order, the proof of it was therefore costs in the cause against the party, the deed was not the property of the respondent and he had no control over it. The solicitor was enabled at the expense of one attendance to get possession of the original deed, and no charge is made for a copy of it, he was thus in a position to serve a notice under the General Order of the court calling on the opposite party to admit it, it was admitted accordingly and read at the hearing. Had it not been admitted, it should have been proved by affidavit, or it should have been proved *viva voce* at the hearing, for which purpose a *subpoena* would have been necessary to insure the attendance of the witness to it to attend at the hearing to be examined, and a side-bar order entered for liberty to examine him, or had the deed been lost, and the opposite party refused to admit it and it became necessary to prove its contents by secondary evidence, a search for the original should have been proved, and a line of evidence gone into

which might have been very expensive, and which ever line of proof might have been necessarily adopted would have been properly costs in the cause against the opposite party. Thus a charge of 6s. 2d., for one attendance avoided any of those different and more expensive modes of proof, and which was of course a benefit to the opposite party. I therefore think that the attendance in this case should have been allowed notwithstanding the general principle referred to by Master Rielly. I think some discretion should be allowed to the Taxing Master in cases of this nature where an attendance is meritorious and saves expense to parties, and where in similar cases charges may be made for obtaining deeds, which may be exorbitant, the Taxing Master can reduce them within the proper limit. I may add, that if an original will was required to be produced at the hearing from the prerogative, or an original memorial from the registry office, an attendance would be allowed to the solicitor to have such document produced, and this in costs against the party. And by the 156th General Order of the Court, (1843,) all costs between party and party are directed to be taxed as nearly as possible in the same manner as between solicitor and client. **EDWARD TANDY."**

**CERTIFICATE OF MASTER O'DWYER, PURSUANT
TO SAID ORDER.**

In obedience to the order of the 24th November, 1854, I hereby certify to the court in relation to Nos. 52, 53, 54, 55, and 56, in respondent's bill of costs as follows: all these numbers, except No. 56, are the costs of a case for counsel to direct proofs in a cause petition. My office being the first of the Taxing Masters almost all the cases brought before me for taxation were cases upon pleadings by bill and answer and proofs under the old practice, whilst costs of cause petitions were generally brought before Master Tandy and Master Rielly, and when cases of cause petitions were brought before me, I found a difference of practice prevailed in their offices in respect to a case to direct proofs. I cannot find that a case to direct proofs was charged in any costs of cause petitions before me until very recently. In the case of *Reid v. Bonham*, which came before me since the order in this case was pronounced, in which case, concurring in the views stated by Master Tandy, I allowed a case to direct proofs, because although proofs by examination of witnesses, depositions or *viva voce*, are not to be made unless directed at the hearing, as appears by the cases of *Glasecock v. Ross* and *Hatchell v. Eggleston*, referred to by Masters Tandy and Rielly, yet I considered that proofs are not altogether dispensed with, but are to be made by affidavits, and the Lord Chancellor in his judgment in *Hatchell v. Eggleston*, says 'that either party may support his case by affidavits of several people, if necessary.' I do not see how a party is to know what affidavits are necessary to support his case without the assistance of counsel, and that a case for that purpose in the nature of a case to direct proofs is necessary and ought to be allowed. With respect to item 56, it is a general principle of taxation not to allow for an attendance to borrow a document or copy of any

proceeding in the cause, and so I informed Master Rielly when he referred to me on a former occasion; but for the reasons stated by Master Tandy in his certificate, I do not think that principle should be applied to the attendance charged for in this item, and therefore the fee for this attendance should, in my humble judgment, be allowed. **J. O'DWYER."**

The Attorney-General (Brewster) now moved that Master Rielly be directed to review this taxation with regard to these items, and to allow the same.

April 26, 1855.—The MASTER OF THE ROLLS now gave judgment as follows:—In this case, which was heard last Term, and which has been standing over for judgment since, the application was on behalf of the respondent, the Rev. Edward Geraghty, that Thomas Rielly, Esq., the Taxing Master, do review the taxation of the costs directed to be paid by the petitioner to the respondent by order of the 10th of May, 1854. In the bill of costs the items disallowed are first the Nos. 52, 53, 54, and 55; the Taxing Master has disallowed these. [His Honor referred to the items disallowed by Master Rielly, as set out in the statement.] Now, previous to the passing of the Court of Chancery Regulation Act, a case was allowed in a plenary suit for the direction of proofs to the plaintiff, after all the answers had come in, and it was allowed to the defendant after issue joined; and therefore, at that stage of the proceedings, the plaintiff, after all the answers had come in, was entitled, on taxation between party and party, to lay a case before counsel for direction of proofs, and the defendant was entitled to do the same after issue joined. It is scarcely necessary to state, that in ordinary petitions, previous to the passing of the Court of Chancery Regulation Act, no costs were ever allowed as between party and party for the case or opinion of counsel; no matter how heavy the case might be, the costs were never allowed. Master Rielly has disallowed these costs upon this principle—that upon the view taken by the Lord Chancellor in several cases which Master Rielly refers to in the report he made to the court, these should be treated as ordinary petitions; for I referred this case to him, and he made a report, in which he has referred me to two or three authorities, by which it appears that the Lord Chancellor has always treated petitions under the Regulation Act as ordinary petitions. I think that Master Rielly has very naturally come to the conclusion that the costs ought to be disallowed, if the observations of the Lord Chancellor in the cases referred to be considered applicable to every case. One of the cases referred to by Master Rielly in his report is the case of *Glasecock v. Ross*, reported in the 1st vol. of the Irish Chancery Reports, in which the Lord Chancellor made this observation: "The Act was, as I conceive, passed for the purpose of introducing into all the subjects of equity jurisdiction the ordinary system of proceeding upon petition, which had been previously found available for certain purposes of the court; it therefore sedulously draws a line of distinction between proceeding by petition and proceeding in a plenary

suit. It does not prevent any person from filing a bill if he please to do so. No doubt the court would have jurisdiction to deal with the costs of such a suit if improperly instituted, so as to prevent any onerous results to the defendant; but there is nothing in the Act which precludes the filing of a bill, if the claimants so desire. Again, the Act gave the court power to insist upon the course by plenary suit being pursued, if it shall appear that the plaintiff's prayer cannot be safely or conveniently granted on petition, or if the objects of the petition cannot be sufficiently or conveniently attained under the procedure of the Act." And in a subsequent part of the judgment the Lord Chancellor says: "It appears to me, therefore, that the Act, in adopting the course of proceeding by petition, did not intend that it should be incumbered by the terms of a plenary suit—the course of proceeding by petition was already well known; it was a very simple one—first, the petition was brought to the Secretary's office, the Lord Chancellor then made a fiat upon it, and when the petitioner obtained an order for hearing, he served notice on the respondent, and that notice was brought on to be heard on the expiration of two days. The petition was frequently merely made as ancillary to further inquiry, and accordingly, upon the Trustee Act and others of a like nature, the course adopted was a reference to the Master to inquire whether the case was one within the Act relied on; such was the course, in the first instance, applicable to all petitions before the passing of this Act. What is there in the Act to introduce a difference between the petitions under it and petitions under former Acts? There are, no doubt, some points of difference, but not many." Again, in a subsequent portion of the judgment, the Lord Chancellor states: "The Act does provide that these petitions are to be entitled 'cause petitions,' and are to be heard before the Lord Chancellor, and that the proceedings are to be filed in the Rolls' office; but these are mere formal regulations, and with that exception the word 'cause' is not introduced into the Act. Taking it, then, that these petitions, with the special exceptions introduced into the Act, are to be dealt with as petitions previously had been, it would be plainly in the power of the parties, according to the practice of the court in such matters, to file their own affidavits, or those of any other persons who may be able to support or resist the case sought to be made by the petition; and, in fine, I apprehend that all this Act substantially does, as distinguished from the former course of the court in petition matters, is to authorize the petitioner to annex interrogatories to his petition, and to verify his petition on short affidavits instead of a full one, and to enable the respondent to file interrogatories." There are some other passages in the judgment, which, however, it is not necessary for me to refer to. Master Rielly on those has very naturally come to the conclusion—which I am not certain he was wrong in doing—that if these are to be considered as petitions, and not as causes, that these costs ought not to be allowed. I have very great difficulty in coming to the conclusion that he is wrong; nor am I at all sure that in

coming to a conclusion different from his, that I am right in so doing. Master Rielly has dwelt on that decision to show that these cause petitions are nothing more than ordinary petitions, and he has, therefore, very naturally disallowed these costs, which were allowed in plenary suits by him. Master Rielly has explained his views at great length, and in an able manner, in his report to the court; I, however, thought it advisable to ask the opinion of the other Taxing Masters, and they have come to different conclusions from that which Master Rielly has arrived at. Their reasons, however, are not satisfactory; and, of course, there is very great difficulty in dealing with the matter. I have not the least hesitation in saying that I am clearly of opinion that a case for the direction of proofs ought to be allowed at some stage of the proceedings; but the difficulty is to find out what is the stage of the proceedings which, under the Chancery Regulation Act, can be deemed analogous to the time of all the answers coming in, or the joining of issue; which were the periods of the suit, as I have already said, at which the plaintiff and defendant were respectively at liberty to lay a case before counsel for direction of proofs; and at this moment I am not able to lay down any rule on the subject; but under the particular circumstances of the case, the course which I have thought it best for me to adopt is, to direct the costs to be allowed, and let the Lord Chancellor explain the course which should be adopted in such cases. The facts of this particular case were not opened by counsel, nor were they stated in any of the affidavits; but, however, I sent to the Rolls Office, and obtained them. The cause petition was filed on the 2nd of May, 1853. There was some mistake in opening the case, for "1854" was stated by Mr. Brewster. I do not know the exact time of the service of the petition, but it was stated by Mr. Brewster, and I presume it to be the fact that it was served at such a time, that the affidavit filed by the respondent on the 3rd of June was in time, although certainly the twenty-one days had elapsed from the date of the petition; but I suppose it was not served until after the 2nd of May; but, however, no complaint was made on the subject. The case was laid before counsel on the 13th of May, and on this subject it was stated by counsel that it was laid before him after the Rev. E. Geraghty's affidavit had been filed in answer. The dates seem to me to have been quite misconceived, and it is very desirable solicitors should instruct counsel properly on this subject. The case for Mr. Brewster's opinion is dated the 13th May, being previous to the filing of the Rev. E. Geraghty's answering affidavit; but, however, on referring to the case, I find counsel alluding to the answering affidavit of the Rev. E. Geraghty. Now, that was not filed until the 3rd June, but what I think the solicitor probably did was this, he sent the draft of the affidavit, intending it to be filed; and here I may state, that if the petition had been dismissed for want of prosecution by the petitioner himself, as he might have done in his own case, we will say on the 1st of June, then, in that case, I should be clearly of opinion that the costs should not be allowed, for the respondent has no right whatever,

until there is something done in the nature of joining issue, to lay a case before counsel. But that period arrives on the 3rd of June, as the answering affidavit was then filed. I am not considering the previous date of the 13th of May, but as if on the 3rd of June the case was laid before Mr. Brewster, and on that day the time had arrived when issue was joined, and when, I think, the case should be allowed. The answering affidavit of the respondent, the Rev. E. Geraghty, was filed on the 3rd of June, and I am disposed to think that on the affidavit of the respondent coming in it was quite necessary to lay a case before counsel, and the costs of that case ought to be allowed. I shall state what the result was. First, I find that after the answering affidavit of the Rev. Edw. Geraghty was filed, on the 15th of June, there was an affidavit made by his solicitor, another on the 18th of June, another on the same day by the Rev. E. Geraghty, another on the 12th of July on the part of the respondent, another on the 17th of August, and then there were the affidavits in answer; then on the 20th of August there was an affidavit in reply on the part of the petitioner, on the same day another by the same party; then there was an affidavit on the 1st of October, 1854, by way of rejoinder, on the part of the respondent; then, on the 12th January, 1854, another, by way of surrejoinder, by the petitioner, and two more on the same day; then there was another by way of surrejoinder; then there was another by the Rev. Edward Geraghty, in October, 1854, by way of rebutter, and then another: so that here we have affidavits, first by way of answer, then by way of reply, then by way of rejoinder, then by way of surrejoinder, then rebutter and surrebutter, and there might have been, under this course of practice, affidavits for the next twelve months, so as to involve an extent of pleading that there is really no name for. Thus, instead of having a day limited by which every body on both sides should have in all their affidavits, we have here a course of practice allowed which is utterly and entirely inconsistent with the due administration of justice. Each party goes on to see how far his client can screw up his conscience to swear an affidavit, instead of having, on the plain principle of common justice, one day on which all the affidavits should be filed. However, this case ended by the petition being dismissed, and then the question arose, "Was the Rev. E. Geraghty entitled to the costs of the case for direction of proofs?" I feel it extremely difficult to reply to the arguments of Master Rielly, who refers me to those cases decided by the Lord Chancellor; but, however, if I treat this as an ordinary petition, as the Lord Chancellor considers they all are, I am introducing a new practice. On the other hand, I cannot help thinking that, if this case were brought before the Lord Chancellor, he would treat it so. I have read the opinion of the Attorney-General, Mr. Brewster, and as I see that a *bona fide* and necessary case was laid before counsel, and that it was utterly impossible to have the suit conducted without it, I feel very unwilling to have the costs of it disallowed. I understand the solicitor says it is not the amount he cares about so much as having the principle decided. I think the best course for me to adopt is

to express my clear opinion, that under the facts of this case the costs ought to be allowed, although I am not at all saying that Master Rielly was wrong in disallowing them. On the whole of the case I am disposed to treat the affidavit of the 3rd of June, filed in good time on the part of the respondent himself, as in the nature of an issue joined, and if I may so treat it, then the principle of the cases in plenary suits applies, and the costs ought to be allowed. One of the difficulties I feel in this case is this, that a respondent need not file any affidavit at all; from a passage in that case the Lord Chancellor appears to consider so; and unless there are interrogatories in the petition, I think the respondent is not bound to make any affidavit. In this case, however, there appears to be an affidavit properly filed. The case appears to have been conducted very properly, and I think that in this case I may treat the filing of the respondent's affidavit in the nature of joining issue, and if so, it falls under the old system, and he was entitled to lay a case before counsel. I have already stated that this case was laid before Mr. Brewster a few days before the affidavit was filed, which was not till after the lapse of the twenty-one days, and that if the petitioner had chosen to dismiss his own petition, then clearly, I apprehend, the costs ought not to be allowed, but the period having arrived, I think I may treat it as if taken *de bene esse*. I am not however at all prepared to lay down any general rule; I could not do it. Suppose the Rev. E. Geraghty never filed any affidavit, then there would be no issue joined. I really do not see any way of laying down any general rule. The rule Mr. Brewster suggested was this, that on the answering affidavits coming in, then you should be entitled to lay a case before counsel; but the objections to that are, first, the respondent may not file any affidavit at all, and secondly, he might file his answer, the whole of the proofs being made before, and then the curious question would arise, What would be done in that state of things? However, I think it is better to leave the difficulties that may arise in subsequent cases from such questions as that to be decided when they do arise; but in this particular case it has been regularly conducted. But on the whole, I think in this particular case it is better that the costs should be allowed. Therefore I will treat the affidavit of the 3rd June as in the nature of issue joined, and direct the Taxing Master to review his taxation. At the same time, I must say I have great difficulty in meeting his arguments, and I am not able to lay down any general rule. As to item 56, for attending Lord Bloomfield's solicitor to obtain the copy of the deed, it appears from the certificates of the Taxing Masters that it is the general rule of taxation not to allow for an attendance in such case; but as in this case two of the Taxing Masters have thought it right that the item should be allowed, and that a discretion should be allowed to the Taxing Masters in such cases, and that the general rule should not be applied to this case, I do not, in this case, dissent from the general rule as laid down by the Taxing Masters, and if I had not got the report of the other Taxing Masters in favour of allowing the item in this case, I would have disallowed it.

The following order was made :—

"It is ordered by the Right Hon. the Master of the Rolls that Thomas Rielly, Esq., one of the Taxing Masters of this court, do review his taxation of the costs directed to be paid by the petitioner to the respondent, the Rev. E. Geraghty, by the order made in this matter, bearing date the 10th day of May, 1814, by allowing to the said respondent the charges or items in the bill of said costs, numbered respectively 52, 53, 54, 55, & 56, the particulars of which are set forth in the schedule to this order annexed, and which the said Master has disallowed on the taxation thereof."

COURT OF EXCHEQUER.

[Reported by JOHN NORWOOD, Esq., Barrister-at-Law.]

EASTER TERM, 1855.

[*Coram* RICHARDS AND GREENE, B.B.]

BOYLAN AND ANOTHER (ASSIGNEES OF EVANS, A BANKRUPT,) v. THE DUBLIN AND BELFAST JUNCTION RAILWAY CO.—April 17.

Practice—Inspection of premises—Common Law Procedure Amendment Act, sec. 47.

In pursuance of the provisions of 16 & 17 Vic. c. 113, s. 47, where it shall appear to the court or judge that it would be necessary, for the ascertainment of the truth of any matter in dispute, that an inspection or examination of any premises or chattels in the possession or power of either party should be had by the opposite party, or witnesses, jury, &c., the court or judge may order the party, in whose possession same may be, to permit such inspection by the jury, &c., or by such person or persons on behalf of the party applying, and at such times, and under such regulations, as to the court or judge shall seem fit.

Fitzgibbon, Q.C., (with whom was D. C. Heron,) of counsel for the plaintiffs, moved that an inspection or examination of the works at the "Beyne Viaduct," of the "Viaduct," and of the goods, chattels, plant and machinery being in and about the site of the works for carrying on the said structure, might be had by the plaintiffs, their attorney and witnesses; that is to say, that two or more engineers, measurers, or valuers, might be permitted to visit, inspect, and measure same, at reasonable times, during the present or ensuing month. It appeared that Evans, previous to his bankruptcy, had been the contractor for the erection of the Viaduct. The plaintiff Boylan's affidavit stated that one of the most important issues raised by the defence was as to the value of the work and labour done, and materials provided by the said Evans, before his bankruptcy, for the defendants; that the defendants allege, that the sum of £74,584, paid to him before his bankruptcy, was more than sufficient to cover the amount of work done, and materials provided by him; that the plaintiffs were prepared to take issue thereon, and claim a sum of £21,427, as still due to them as assignees, on foot of said work,

materials, &c., provided by Evans; that they have been advised, and believe it to be necessary, that the works should be inspected and valued by competent engineers and valuers; that plaintiffs' attorney had repeatedly applied for permission to inspect and value, but had been refused. The attorney corroborated the above statement, and verified a letter written by him to the attorney of the company, requiring access to the works, for measurers and valuers, &c., and the letter, from the company's solicitor in reply, denying the right to measure, and refusing access to the works. It appeared, from the statement of counsel that the bankrupt had expended no less a sum than £80,000 in sinking for and erecting one of the piers on which the viaduct rests, and alleged that when he had proceeded a certain way with the works, the company, acting under the provisions of a certain clause contained in the contract-deed, had turned him out after he had expended nearly £100,000 in furtherance of the works, and before he had brought same to a successful termination. The company, in their defence, relied on this contract-deed under seal, and the plaintiffs had filed thereto a replication alleging fraud in the execution of the deed. [*Richards, B.*—What is the character of the fraud?] The company, having advertised for tenders for the execution of the works, published, for the guidance of intending contractors, cross sections of the River Boyne, on which were depicted three irregular and nearly parallel lines, showing the usual high-water mark, the layer of mud at the bottom of the stream, and the rock-stratum under the mud, all which purported to be framed in accordance with actual survey, and were stated to be the result of proper and scientific borings. These cross-sections, moreover, were authenticated by the signature of the company's engineer-in-chief, Sir J. McNeill, but, eventually, turned out to be a misrepresentation, inasmuch as they were not the result of proper borings, or of actual survey; for where the stratum of rock was represented to lie at a certain depth below the mud and silt of the river-bed, no such stratum existed. The deed, as executed, contained a covenant that the contractor should sink down to and build upon the rock-stratum; and, relying on the correctness of the cross-sections thus furnished by the company's engineers, he executed the contract-deed, and commenced the undertaking. He sank upwards of forty feet through the bed of the river to find the rock, and it was not until he had gone thirty feet lower, at a cost of about £1,000 per foot, that he reached it. This misrepresentation on the part of the company, and the unexpected expenditure and delay, caused the contractor's bankruptcy. His assignees now seek to recover the value of the plant, machinery, and certain materials used and expended in the progress of the works, and it becomes necessary for the plaintiffs to measure and inspect the works and plant still remaining on the ground, and to this inspection and examination they are entitled under the Common Law Procedure Amendment Act, (16 & 17 Vic. c. 113, s. 47,) and the court has clearly the power to order same. This inspection cannot prejudice the defendants, and will be had at the plain-

stiff expense. If the deed be void, the assignees become entitled to be paid for the works done. [Greene, B.—Is not your application somewhat premature, while the demurrer is pending?] No; for we claim in our summons and plaint for works executed outside the deed. [Greene, B.—You seem *prima facie* to be entitled to have an order for an inspection.]

Mr. Dowling, Q.C., and Alex. Norman contra.—

As to the plea of fraud, we have demurred, and shall deal therewith when it comes on for argument. The specification contains an express covenant, requiring contractors to satisfy themselves of the existence of the rock, of the correctness of the borings, and of the accuracy of the surveys, before they should contract, and expressly stating that the Company will not be answerable for the rectitude thereof. The contractor did not take the trouble to assure himself of these matters, and finding his error, he should have ceased the work. There is no reasonable ground alleged to sustain this application. They have concealed the important fact from the court that they have already had an inspection. An inspection now will be valueless, for the materials have been since worked up in the viaduct, and the plant used in its construction, consequently it will be impossible, without the wildest guesses, to separate the work executed by the bankrupt from that finished, subsequent to his stoppage, by the Company. The application then is, under all the circumstances, too late, and yet it might, in another point of view, be considered premature until after the argument be had of the demurrer now pending. The court will hesitate to exercise this—a new jurisdiction—unless a fair case be made out. The plaintiffs had every opportunity, at the period of the commencement of the new works, at which point of time it was most important that the evidence should be directed to their state, to examine and inspect them; and evidence tending to show their extent and condition at that time would in reality be valuable; it will be otherwise with the testimony derived from an inspection had at this period. It may be questioned whether this is a *bona fide* application to sustain the case. The exercise of this new jurisdiction may be very useful in actions such as those for dilapidations and injuries to freehold property, and for breach of covenant to repair; but it should not be had recourse to in a speculative case like the present. No one can tell where the works of the one party ended, or where those of the other party began.

D. C. Heron in reply.—No inspection, as alleged on the other side, of the works by an engineer ever took place. One of the pleas filed by the defendant is the occasion of the present application. There will arise no difficulty as to where the works of one party ended, or those executed by the other commenced, as the original lithographic plans, made at the time of the bankrupt's ceasing to be concerned in the works, are still in existence. [Greene, B.—The 47th section of the Common Law Procedure Act requires that the court must be satisfied of the necessity for the inspection. What do you say as to that?] Counsel relied on the affidavit filed by the assignee. [Greene, B.

—If the bankrupt had made an affidavit that he was unable, without an inspection of the works, to impart full information to the assignees, that would, I think, be sufficient. You have not, however, done so.] We have shown reasonable grounds to entitle us to carry our application. We applied for liberty to have an inspection, and at our own expense; the defendants have the matters to be inspected and examined within their power and possession, whereas plaintiffs have no such advantage. It is for the advancement of justice that the motion, being *bona fide*, should be granted. It appears exactly to come within the class of cases contemplated in the "Second Report of the Commissioners for inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law," page 87. It is stated: "Inspection by parties and their witnesses is in many cases requisite, in order to do equal justice. The party in whose possession the object sought to be inspected is, has opportunities of showing it to any person, and selecting such only as are favourable to his own views; other evidence, equally important, may be excluded altogether if the opposite party be debarred from obtaining an inspection." The Commissioners then recommend—"that either party may be at liberty to apply to the court for an order for the inspection....by himself or his witnesses of any premises or chattels, the inspection of which may be material to determine the question in dispute." An additional reason for adopting this recommendation is, that the controversy between the parties might be decided by the inspection, and the principle of the recommendation is fully recognized by the 15 & 16 Vic. cap. 83, s. 42, in cases of infringements of patents.

RICHARDS, B.—We are bound to assume that the question for trial is either a matter of necessity or nothing. If the demurrer be overruled, the action must be tried, and then it is important that an inspection should be made. If the action had been brought immediately after the work done, no resistance, I think, could be justly, made to the granting of the application; but unfortunately, in consequence of the bankruptcy of the contractor, and the appointment of assignees, who then became entitled to sue in his name, considerable delay, perhaps unavoidably, has arisen; yet important information may, even at this distance of time, be acquired from an inspection by qualified persons who may be able and competent to distinguish between the several works and portions of the viaduct executed by the different parties. If we believe this to be a *bona fide* action, we ought not to deny the plaintiffs the right to have an inspection, for which, I think, they have made out a fair case. We need not, however, make the order finally, until the decision of the question raised by the demurrer. Let the plaintiffs be at liberty to make an inspection and examination of the works by engineers—persons of respectability—whose names they must furnish to the defendants; the plaintiffs to take out this order at their own cost, and likewise bear the expense of the inspection, which is not to be made until after the decision of the demurrer, until which event a stay will be put on the order.

Rule accordingly.

DIXON v. FRANKS.—April 26.

Practice—Additional defences—Pleading—Slander—Privileged occasion—Common Law Procedure Act.

In an action for slander, a plea of privileged communication will be allowed to be filed along with pleas denying the speaking of the words, and the meaning imputed by the innuendoes.

In this case, the pleadings in which have been already given in 7th Ir. Jur. 239,

Hayes, Q. C., (with whom was *J. Clarke*), moved on behalf of the defendant that he might be at liberty to file additional defences to the 1st, 2nd, 3rd, 4th, and 5th counts of the summons and plaint. The former defences to these five counts or paragraphs had been set aside by the court on motion (vide ante 239.) The present motion was grounded on the affidavit of the defendant, which stated that the action was brought for words used in a conversation with the Rev. W. R. L. on two separate occasions, and also for words alleged to have been used to one M. P. on another occasion, that the said five counts are conversant with the words alleged to have been used by defendant to said Rev. W. R. L. on the 6th of March, 1854. That the entire of said conversations with Rev. W. R. L. on that day, and all the words he did use upon that occasion, and which he believes are the words and occasions referred to in the said five counts, were used while defendant was acting as a Stipendiary Magistrate for the Queen's County, while he was endeavouring to collect evidence in that capacity, and in pursuance of his duty as such magistrate, and while he was examining the said Rev. W. R. L. for the purposes of a prosecution then pending against the plaintiff in this action on a conspiracy to shoot one T. B. and which charge, and the evidence in support of which, it was defendant's duty to investigate and collect. That said words were used without the slightest malice and solely in the necessary and proper discharge of defendant's duty as such stipendiary magistrate while collecting evidence. That he is advised that it is necessary to file a defence to said five counts setting out the foregoing circumstances and raising the question of privileged communication. The clerk of the defendant's attorney also filed an affidavit to support the applications, stating the absence of the defendant and his attorney in the country, and that he had been advised that it was not only necessary that the speaking and publishing of the words should be traversed, but also to plead that they were not spoken maliciously or in the defamatory sense imputed. That he really believed there was just ground to traverse the said several allegations, and that the matters sought to be pleaded by way of confession and avoidance are true in substance and in fact. The additional defences sought to be pleaded to the five causes of action were similar, and stated that, before the time when the words complained of were spoken, informations on oath were duly made before the defendant then and there being a Justice of the Peace in and for the Queen's County, by which information it was sworn and deposed that one P. B. had been fired at, &c.; that it became and was de-

fendant's duty as such Justice of the Peace to use all lawful means to discover the person who fired such shot, and to ascertain all circumstances connected therewith and collect all such evidence relating to the said outrage as might lead to the discovery of the perpetrator, &c., and to bring him or them to justice; and that on the day and at the time when the said words, in the said 1st and other causes of action complained of, are therein alleged to have been spoken, the said defendant did for the purpose and with the view aforesaid, examine one Rev. W. R. L. upon oath, and take down in writing the depositions of the said Rev. W. R. L. relative to the said T. B. and to the said plaintiff respectively, and to the supposed cause of the said outrage, and that defendant, &c., spoke the words in the said cause of action mentioned, while he was engaged as such Justice of the Peace in examining the said Rev. W. R. L. and in taking his depositions relative to the said outrage and not maliciously, but in the discharge of his duty as such Justice of the Peace, as he the said defendant was privileged to do. [*Richards, B.*—Do you justify the words?] No, my Lord; but the plea does. [*Greene, B.*—The question is, does your plea raise such a defence as will prove a good ground of defence to the action? What the court required the other day (vide ante 240) was, that you should show, such an occasion and circumstance as will, *prima facie*, be a good defence to the action, as no facts were formerly stated, we required them to be so. Facts appear now to be put forward.]

Denis C. Heron contra.—The affidavit concludes the defendant from pleading the three defences, as he does not venture to deny on oath the words alleged in the five counts. The defence does not aver the legal requisites of an information, viz., that it should be taken down in the presence of the party accused; nor does it aver that the expressions used were relative to the inquiry; nor are the words spoken justified in the sense imputed in the plaint; nor are they averred to be necessary, material, or, at all, relevant to the alleged inquiry. These words were not spoken on a privileged occasion, as not being in the course of a judicial, but of an administrative, enquiry. The affidavit made to support the defence is sworn by the defendant's attorney's clerk. The defendant's affidavit admits the use of the words. (reads it.) [*Greene, B.*—That means any words that he did use.] The first two pleas cannot be permitted to stand. *Wilson v. Armstrong*, (7 Ir. Jur. 47.) [*Greene, B.*—The application is to admit an additional defence, and we cannot now fall back on the others.] We cannot demur to this plea. It fails in the respect of not showing a justification on a privileged occasion. Defendant does not state anything to show that he believed the truth of his statements; and that the information should be taken down in the presence of the parties accused is shown by Car. Crim. Ca. 12-13. What occasions are privileged is shown in Stark. Sland. (2nd Ed.) 292.

RICHARDS, B.—The defendant puts forward a plea on a very important point, and the plaintiff can demur if he please. Let the defendant be at liberty to file the additional defences sought, the plaintiff to have the costs of this motion as costs in the cause

(measured to £3); the defendant, in no event, to have the costs of the motion.

GREENE, B.—The court merely gives liberty to file an additional defence; but does not thereby sanction any form of defence. If the defendant places on the file an embarrassing or bad plea, you can set it aside. The defendant puts forward his defence at his peril.

Rule accordingly.

TOOLE v. MACKEN AND ANOTHER.—June 5.

Demurrer—Consequential damage—Plea of reasonable care and diligence.

To a summons and plaint averring the plaintiff to be possessed of a store, &c., adjoining premises of J. M. and part of which store was and of right ought to be supported and enclosed by a wall between it and the defendant's premises, and that the defendant J. M. took down the said wall, whereby he caused the part of the store to fall, and it and the plaintiff's buildings were injured, and he was deprived of the support of the wall and his store rendered useless, the defendant pleaded that he caused the said wall to be taken down with all reasonable and proper care and diligence to prevent injury to the plaintiff's store. This defence was held, on demurrer, to be insufficient.

ACTION for dilapidations. The first cause of action in the summons and plaint mentioned was "for taking down a certain boundary wall, part of the plaintiff's property, between the close of the defendants and the plaintiffs." The second cause of action was as follows: "and because the plaintiff was possessed of a store, stable, and building adjoining certain buildings and premises in the possession of the defendant J. M. and part of which store was and of right ought to be supported and enclosed by a wall which stood between it and the said buildings and premises of the said defendants: yet the said defendants took down and removed the said wall, whereby they caused part of the said store to fall down, and it and the said stable and buildings of the said plaintiff were thereby injured and partly thrown down, and the plaintiff was deprived of the support and benefit of the said wall, and his store and stables were rendered useless to him." The third cause of action was for negligently and improperly pulling down and altering the wall and buildings, whereby the plaintiff suffered damage, &c. The fourth defence was as follows: "and for a further plea to the said second cause of action, the said J. M. says that he caused the said wall therein mentioned to be removed and taken down with all reasonable and possible care and diligence in so doing to prevent any injury to the said store or premises of the plaintiff." To this defence a demurrer was taken, because the said defence "did not set forth any sufficient ground of defence to the said second cause of action, because the care and diligence of the defendant in doing the injury complained of by pulling down the wall is no justification or defence, the right of the plaintiff to the support of the wall being admitted, and the said defence neither traverses any material fact alleged in the

plaint, nor sufficiently confesses or avoids the cause of action to which it is pleaded, and therefore, &c.

J. B. Walsh, (with whom was **Fitzgibbon, Q.C.**) in support of the demurrer.—In *Humphries v. Brogden*, (12 Q. B. 739,) it was held that the action lay, although there was no negligence. This was an action for digging for minerals so as to injure the surface; the jury negatived negligence. **Campbell, C. J.**, says, *ib.* 747, "the case of common occurrence and nearest to the present is, where the upper story of a house belongs to one man and the lower to another. The owner of the upper story without any express grant or enjoyment for any given time has a right to the support of the lower story." As to the right being acquired by time to have a building supported on a neighbour's soil, counsel cited *Stansell v. Jollard*, (Sel. Ni. Pri. 11th Ed. 457, tit. "Consequential Damage"); *Hide v. Thornborough*, (2 Car. & Kir. 250,) and the several cases collected in the note to *Smith v. Martin*, (2 Saund. 400.) The following cases afford precedents without the allegation of negligence in defendant. *Slingsby v. Barnard*, (1 Rol. Rep. 430); *Smith v. Martin*, (2 Saund. 394, 395, 395 a.) *Roberts v. Read*, (16 Ea. 215.) As to the want of precise averment in the declaration of how the right is claimed being only the ground of special demurrer—*Sands v. Trefusis*, (Cro. Car. 575)—counsel commented on *Browne v. Windsor*, (1 Cr. & Jer. 20); notes to *Coryton v. Lithby*, (2 Saund. 114, 114 a); and *Trower v. Chadwick*, (3 Scott, 1st Series, 699–722; s. c. 1 M. & G. 799.) The cases like *Walters v. Pfeil*, (M. & M. 363); *Peyton v. Mayor of London*, (9 B. & C. 725,) and *Wyatt v. Harrison*, (3 B. & Ad. 871,) are cases where no right of support existed, and where the whole ground of action was carelessness, similar to the various cases in which the maxim *sic utere tuo ut alienum non laedas* applies; but here it is a case of *utere meo*.—*Vaughan v. Menlove*, (4 Sc. 244.) We have the very point discussed in *Trower v. Chadwick*, (3 Sc. 699, 3 Bingh. n. c. 334; and s. c. in error, 8 Sc. 1; and 6 Bingh. n. c. 1,) wherein the first count averred, as here, a right to the support of a cellar in general terms, *ib.* 3 Sc. 718, 719, and the second count averred nothing but adjoining premises, *ib.* 721, 722. The second count was held bad on error for complaining of not shoring up, which was no duty. *Hilton v. Whitehead*, (12 Q. B. 734,) is relied upon on the other side; but that is unsustainable under the new system of pleading. Com. Law Pro. Act, ss. 10 and 16. In that case there were two interests in title, and a special case of title was to be made out. [**Greene, B.**—That is a most unsatisfactory report.] To upset a course of precedent which has been followed for years would certainly be a strong measure.

M. Kenna (with him **O'Hagan, Q. C.**) for the plaintiff.—We are entitled to succeed on two grounds; First, on the defect in the summons and plaint not setting out specially the facts which show the plaintiff's right to the support of this wall; Secondly, because from the wording of the pleadings to the cause of action disclosed in the second count, the plea is a sufficient defence. As to the first point, the case of *Hilton v. Whitehead*, (12 Q. B. 734,) decides expressly that the allegation

in the summons and plaint is insufficient. In that case the declaration alleges that the plaintiff was possessed of a dwelling-house, and defendant of a coal mine lying near to and under it, and that the dwelling-house was supported in part by land between the same and the mines, and that the plaintiff, of right, was entitled to have had his said dwelling-house so supported by said land, and it was held after verdict, on motion in arrest of judgment, that the declaration was bad for not stating the grounds on which the plaintiff was entitled to have his house supported by the land above the mine. It is impossible to distinguish that case from the present. Every argument used here by the counsel for the plaintiff and every case cited was pressed in argument in support of the declaration, and after a consultation the court decided that the declaration was bad, and although the judgment is short, and does not go into a review of the cases, the decision is sufficient for us, as the case was fully argued and considered and is, exactly, in point. As to the sufficiency of the plea, it appears that there is no property claimed in the wall by the plaintiff, he merely states he has a right to the support of the wall which the defendant pulled down. Now, if defendant acted with proper care in taking down that wall, there has been, as regards the plaintiff, no wrongful act of the defendant. That wall may either be taken as the wall of a third person or of the defendant, and, in either view, defendant's pulling it down gives no right of action to the plaintiff, unless by gross negligence, there has been damage inflicted on the plaintiff. Again, we may take this as a boundary wall, it would be contrary to reason and law to say that an intervening wall such as this could under no circumstances, be touched, as, if A's house require repair and be in part supported by a boundary wall in a ruinous condition, A has a right to take down that wall if he use all proper care. Now, taking it that this is an ancient wall, from the way in which the question has been left to the jury, in such cases, in order to constitute a cause of action, the wall should be an ancient wall, and thus giving a right to its support to the occupier of the adjoining house, and also there should be neglect and want of care. [Pennefather, B.—The error of your argument is taking it as if the plaintiff claims no property in the wall. He claims a right to its support; you have interfered with it, and should have excused yourself. The plaintiff says he had a right to the support of the wall, and if your case was, that it was necessary to take down the wall, that it was in a ruinous condition, and that, in so necessarily taking it down, you used all proper care, that would be a good defence. You have not excused an act which was wrongful.] The case of *Dodd v. Holme*, (1 Ad. & Ell. 493,) shows that it is necessary, in order to constitute a right of action, that the plaintiff should have a right to the wall, and that the defendant should have been guilty of negligence. That was a case of an, admittedly, ancient wall, which involved a right to its support by the plaintiff, and yet the question as to negligence by the defendant was left to the jury, and, because they found there was negligence, there was a verdict for the plaintiff. The full court up-

held the direction of the judge who thus left the case to the jury. The following cases show that both those elements, namely, the having a right to the support of the wall, and negligence in taking it down, are necessary to constitute a cause of action. — *Wyatt v. Harrison*, (8 B. & Ad. 871); *Payton v. The Mayor of London*, (9 B. & C. 785); *Brown v. Windsor*, (1 Crom. & Jerv. 20); *Trower v. Chadwick*, (6 Bing. N. C. 1). Counsel also commented on *Seymour v. Maddox*, (16 Q. B. 826); *Cane v. Chapman*, (5 A. & E. 647); *Priestly v. Fowler*, (3 M. & W. 1); *Dodd v. Holme*, (1 A. & E. 493); *Pratt v. Road*, (16 East. 215.)

PENNEFATHER, B.—The plea is no answer to the plaintiff's complaint, as set forth in his summons and plaint. The case of the working of a mine, which has been referred to in the course of the argument, is distinguishable from the present case. Before the passing of the Common Law Procedure Act this would have been, I take it, under all the precedents, a good declaration. It was never intended that a bad plea was sustainable by the allegation that the plaint or declaration is a bad one, and not so full as it might be. The defence here is insufficient, and the defendant cannot now fall back on the plaint, which appears to be, under the provisions of the Common Law Procedure Act, good. The demurrer must be allowed, with costs.

Demurrer allowed.

TRINITY TERM, 1855.

Coram PENNEFATHER, RICHARDS, AND GREENE, B.B.

HUTCHWAITE v. DUNNE AND ANOTHER.—June 5.

Demurrer—Promissory note—Insufficient defence Common Law Procedure Act, s. 81.

In an action by indorsee against the makers of a joint and separate promissory note, the defendants pleaded that one J. J. H. was, at the time of the making of the note, negotiating on the part of the defendants with one M. C. for sale of certain property of defendants, and that it had been agreed that the amount of the note should be paid to J. J. H. by M. C. out of the purchase-money on the completion of the sale, and that, in pursuance of the agreement, J. J. H. obtained, at the time of the making of the note, a written order authorising him to retain the amount of the note out of the purchase-money on the completion of the sale, which defendants further pleaded was as yet incomplete, and, also, averred the want of value or consideration for the endorsement by J. J. H. of the note to the plaintiff, who took it when indorsed, with notice of the premises, and after the said note had arrived at maturity. Held, that this defence was insufficient.

THIS was an action on a promissory note. The plaintiff, as indorsee, sought in his summons and plaint to recover from the defendants the amount of a promissory note, bearing date the 28th of May, 1854, now overdue, whereby the defendants jointly and separately promised to pay to one J. J. H. or order

the sum of £16 10s., three months after the date thereof. The said J. J. H. had endorsed the said note to the plaintiff, and the defendants had not paid the said note when due or since. The defence stated that at the time of making the said promissory note, the said J. J. H. (the payee) was negotiating on the part of the defendants with one M. C. for the sale of certain property then belonging to the defendants, and it was then agreed between the said J. J. H. and the defendants that the amount of the said note should be paid to the said J. J. H. by the said M. C. out of the purchase money of the said property when said purchase should be completed; and that, in pursuance of said agreement, the said J. J. H. obtained from the defendants at the time of making the said note an order in writing authorising him to retain the amount of said note out of the purchase-money payable by said M. C. for the purchase of said property when same should be completed; and the defendants say that the purchase of said property is not yet completed, and that there never was any value or consideration for the endorsement of said note by the said J. J. H. to the plaintiff, and that when said note was endorsed to him he took it with notice of the premises, and after said note had arrived at maturity. To this defence the plaintiff demurred on the following grounds: 1st, the agreement stated in the defence could not control or qualify the note; 2ndly, that such agreement, if at all binding, should have been in writing, and it is not stated in the defence to have been in writing; 3rdly, it is not stated that it was part of the agreement that the note should not be sued on until the purchase was complete; and 4thly, the defence is bad as not stating that there was no consideration for the making of the note.

J. A. Lawson in support of the demurrer, contended that the defence should have alleged a want of consideration from Hardy for the note. Such an agreement should have been in writing as a contemporaneous parol agreement cannot vary or control a promissory note. *Hoare v. Graham*, (3 Camp. 57); *Mosely v. Hanford*, (10 B. & Cr. 729); *Campbell v. Hodgson*, (Gow. 74); *Adams v. Wordley*, (1 M. & W. 374.) All the cases on this subject will be found collected in Chitty on Bills, (last Ed.) 142. It is no defence by the payee who indorses a note for the accommodation of the maker, that the parties agreed it should not be put in force. *Free v. Hawkins*, (8 Taunt. 92.)

W. Duggan and Lynch, Q.C., contra.—This case does not come within the class of cases referred to by the opposite side; it does not appear by this defence that the agreement relied on was by parol, and the court will not assume it. It is decided that a written contract may be varied by a contemporaneous writing. In *Bowerbank v. Monteiro*, (4 Taunt. 844,) it was held that a written agreement to renew was good as between the original parties. In *Carr v. Stephens*, (9 B. & Cr. 758,) it was held that where the drawer by writing agreed to indemnify the acceptor against a claim by other parties for a portion of the sum for which the bill was drawn, and the acceptor having afterwards paid a part of that claim, the acceptor's lia-

bility on the bill was held to have been reduced *pro tanto*. *Spincer v. Spincer*, (2 Man. & Gr. 295.) In *Brown v. Langley*, (4 Man. & Gr. 470,) Tindal, C. J., referring to the case of *Bowerbank v. Monteiro*, (4 Taunt.) says, "That although the general rule was that the absolute contract contained in a bill or note could not be varied by a parol agreement, the rule did not apply to a contemporaneous agreement in writing between the parties." *Innes v. Munro*, (1 Exch. 473.) This principle is also recognised in *Salmon v. Webb*, (3 H. of Lds. Cas. 510.) Since the late Act the want of an allegation that the agreement was in writing, is not demurrable.—Common Law Procedure Act, (s. 81.)* Such an averment is not necessary in pleading.—Pearson's Precedents, 38, note (4.) But, even if necessary to be pleaded that it was in writing, the objection is only one on special demurrer.—Byles on Bills, 77, (6th Ed.) As to the 2nd ground of demurrer, it sufficiently appears on the face of the defence that the agreement was, that the note should be paid, not by the defendants, but by M. C. out of the purchase money when the sale should be completed. An averment that the agreement was to suspend an action for a limited time would make the plea bad. *Ford v. Beach*, (11 Q. B. 852.) [*Pennefather, B.*—This case does not establish that such a plea would be bad, as Baron Parke says only that a suspension of suing will not be enforced unless there be a clear averment.] I have not been able to find any case in which such an averment has been introduced. As to the third point of demurrer, the order given by defendants to J. J. H. constitutes written evidence of the agreement; but even if it do not, it was unnecessary to set out in the defence that the agreement was in writing. *Kearns v. Durell*, (6 C. B. 596.) As to the fourth ground of demurrer, it is not the case of the defendants that there was no consideration for the note, and, therefore, it was no part of their case to plead a want of consideration, but their case is the agreement.

PER CURIAM.—This defence is objectionable. Let the demurrer be allowed with costs; but let the defendants have liberty to amend within a week.

Demurrer allowed.

CIRCUIT CASES.

ARMAGH SUMMER ASSIZES—1855.

[*Coram TORRENS, J.*]

IN RE KAYE, CORONER.—July 19.

Coroner—*Inquest attendance-fees to the medical officers of union workhouses*—9 & 10 Vic., cap. 37, sec. 32.

The medical officer or surgeon of an union work-

* 16 & 17 Vic. c. 113, s. 81, enacts that no objection by way of general or special demurrer for formal matters only shall be allowed, and no pleading shall be deemed insufficient for any defect hereafter to be objected to only by special demurrer, and wherever issue is joined on any demurrer the court to proceed and give judgment according to the very right of the cause without regarding defect in or lack of form, &c., and every pleading which states, with reasonable clearness, such matters of fact as are necessary to ground the action, defence, &c., shall be sufficient, and the adoption of technical or formal language or manner unnecessary.

house is not entitled to fee or remuneration for instituting a post-mortem examination, pursuant to the directions of the coroner, or for attendance at an inquest held on the body of a person dying within the union work-house, it being a public institution within the meaning of the 9 & 10 Vic., cap. 37, sec. 32.

J. Norwood applied, on behalf of A. R. Kaye, the Coroner for the District of the County Armagh, in which the City of Armagh is situate, that his Lordship should direct the Grand Jury to present the sum of £2 2s., being the amount of the fee paid by the coroner to the medical officer of the Armagh Union Workhouse for attending an inquest and making a *post-mortem* examination, in pursuance of the coroner's directions, under the following circumstances:—A poor woman had been delivered of an infant on the road-side, near to the workhouse, and some persons, seeing her weakly condition, had conveyed her to that establishment, wherein she had only been lodged for a few hours when the infant, which had been, apparently, of a healthy constitution, and was seen alive and well about half an hour previous to its decease, was found dead in the bed beside its mother. The coroner held an inquest, and, as the cause of the sudden death of so young an infant could not otherwise be accurately known, directed a *post-mortem* examination to be made by the medical officer of the workhouse, which, having taken place, the surgeon deposed at the adjourned inquest, that the infant had died of *asphyxia*. The woman had not been entered as a pauper in the workhouse books, nor been in receipt of relief, although the surgeon had ordered her such medicines as were suitable to her state. The Grand Jury had declined to present the sum paid to the surgeon, although they had hitherto, invariably, made presentments for fees paid to the medical officers of workhouses for attendance on inquests held within those establishments. They grounded their refusal on their construction of the 9 & 10 Vic., cap. 37, "The Act amending the Laws relating to the office of Coroner, and the expenses of Inquests," the 32nd section of which enacts that "When any inquest shall be held on the body of a person who shall have died in any hospital or infirmary, county or other lunatic asylum, or in any public infirmary or other public medical institution, whether the same be supported by endowments or by voluntary subscriptions, no remuneration shall be presented to the medical officer whose duty it may have been to attend the deceased person as a medical officer of such institution.*" It is in the discretion of the coroner to direct analyses and post-mortem examinations, and to summon such medical witnesses as are required,

and those witnesses are subject to a penalty for non-attendance. Can it be said they are not to be paid? The Grand Jury have construed the clause erroneously, it never having been intended that workhouses should be included within its operation. If the Legislature had contemplated to bring workhouses within the provisions of this Act, which received the royal assent in July, 1846, those establishments, constituted under the "Poor Relief Act for Ireland," (1 & 2 Vic., c. 36, ss. 34, 35, *et seq.*) would have been, doubtless, mentioned *nominatim*. Their not being specifically named, in a section which was framed as comprehensively as possible, seems to be conclusive evidence of their not being public institutions within the meaning of the statute. [Torrens, J.—What then are public institutions within the purview of the Act?] Such, for example, as St. Patrick's Hospital for Lunatics, founded by Swift, and Dr. Stevens' Hospital, supported by the endowments of benevolent persons, or "The City of Dublin Hospital," sustained by voluntary contributions, or "Bartholomew's Hospital," in London, maintained by parliamentary grants of forfeited estates, or again, hospitals dependent on the Consolidated Fund. These institutions differ from workhouses, inasmuch as their very nature requires the constant medical inspection of the inmates by the physician in attendance, whose office is peculiarly, by *post-mortem* examinations and otherwise, to ascertain the nature of diseases and the cause of death in patients; but it is no portion of the duty of the medical officer of an union workhouse to attend the inquest of a person dying under the circumstances of this case, and certainly it cannot be contended that it is his duty to make *post mortem* examinations gratuitously, especially when, as in this case, the deceased person was not regularly an indweller of the house. Workhouses are not public institutions supported by voluntary contributions or endowments, within the meaning of the Act, being sustained by rates, and this is the distinction between institutions, drawn, in England, on the construction of the analogous section of the Act, 6 Wm. 4, c. 89. The refusal to present these fees would probably have the injurious effects of causing coroners to hesitate ere they directed the making of *post-mortem* examinations, and thus, perhaps, of frustrating the ends of justice.—Baker on Coroners, 14. It was the rule in England to allow the fees on inquests to the medical officers of workhouses. It appeared from "*The Lancet*," which, though not a legal authority, was a journal of eminence in the medical world, and edited by Mr. Wakley, a coroner of many years' experience in a most important district, (vol. 1, 347,) "That the surgeons of workhouses in England are entitled to fees when summoned to attend inquests on the bodies of persons who have died in the workhouse;" and page 768: "that a workhouse is not such a public institution as contemplated by the Act;" and, consequently, that it was the invariable rule in Middlesex to pay the surgeons of workhouses their fees for attendance at inquests held therein. A like practice has, it is understood, been followed in this country; but if even his Lordship should be of opinion that this fee ought not to have been presented, counsel

* In England, by the Medical Witnesses' Act, 6 & 7 W. 4, c. 89, the coroner is empowered to summon medical witnesses, and to direct the performance of *post mortem* examinations, the fees to whom are to be paid out of the funds collected for the relief of the poor, and no fee for *post mortem* examination, made without previous direction of the coroner, shall be payable. The fifth section of this Act is the same as the 32nd section of 9 & 10 Vic. cap. 37, and many others of the sections of the two Acts are analogous. *Vide* also 7 W. 4, & 1 Vic. c. 68.

submitted that the Grand Jury could not now disallow the sum, inasmuch as the "actual disbursements having been made by the coroner, such as the fees of medical witnesses," &c., it must be repaid to him, and this whether the inquest was properly held or not.—*Jervis on Coroners*, (2nd ed.) 86; *Reg. v. Justices of Carmarthenshire*, (10 Q. B. 796;) *Baker on Coroners*, 14.

TORRENS, J.—It appears to me that the Grand Jury have a discretion either to present or withhold the fees now sought to be recovered, and the application must be refused.*

MASTER BROOKE'S OFFICE.

—v. M'COWAN.—September 7, 1855.

Mortgage—Annuity—Priority—Voluntary Deed
—10 Car. 1, sess. 2, c. 3, Ir.

Certain premises were, by a post-nuptial and voluntary deed, dated 28th Feb. 1826, charged with a rent-charge of £40 per annum. A judgment was obtained by a creditor in Easter Term, 1836, for the penal sum of £900, and duly registered, charging the premises, and on the 21st day of November, 1846, the premises were mortgaged for £700. A bill having been filed for the foreclosure of the said mortgage, and the fund proving deficient, the rent-charge was declared to be void as against the mortgage, but good as against the judgment; that the mortgagee, though subsequent in point of time to the judgment creditor, should have the first claim on the fund, to the extent of the value of the rent-charge as calculated by a jury; that the judgment creditor should stand second for his whole demand; the mortgagee third in respect of the balance of his demand, and the residue, if any, to go to the owners of the rent-charge.

In this case a cause petition had been filed under the Chancery Regulation Act to foreclose a mortgage, and was referred to Master Brooke. A question was subsequently raised with respect to the settlement of the priorities of the creditors, who had proved on the cause. Judgment was this day (Sept. 7) delivered by—

* The following observations appear in the *Lancet*, vol. ii. p. 180, on the point at issue: "The Medical Witnesses Act does not apply to Ireland. In England a clear line is drawn between public and merely local medical institutions. A jail which is supported by the county rates is not held to be a public institution within the meaning of the Act; but a jail, like the Model Prison at Pentonville, which is supported by the State, is held to be a public institution. Hence the surgeons of the Cold Bath Fields Prison, Clerkenwell, are paid their fees at inquests, whereas the surgeons of the Model Prison, which is sustained by payments out of the Consolidated Fund, are not paid at inquests. The medical officers of hospitals, being public institutions within the meaning of the Act, are not paid at inquests. Workhouses are not deemed to be public institutions within the meaning of the Act, and their medical officers are always paid. Since the decision of Lord Campbell in the Court of Queen's Bench on the *Carmarthen case*, (*Baker on Coroners*, 14; s. c., 9 *Law Jour.*, 267,) it has been established that magistrates have no discretionary power with regard to payments made to medical witnesses by coroners. In England the medical witnesses are paid at inquests in cases in which the coroners themselves are denied payment. This seems unjust and absurd enough; but such is the fact and the actual state of the existing law."

MASTER BROOKE.*—This is a cause petition, under the 15th section of the Chancery Regulation Act, 1850, filed for the foreclosure of a mortgage of 21st of November, 1846, whereby the respondent, Thomas M'Cowan, in consideration of a loan of £700, mortgaged to the petitioner, for a term of 500 years, premises in Tralee, held by him for lives renewable for ever. A charge has been filed by the children of Thomas M'Cowan, and they have proved, that he, by a post-nuptial and voluntary settlement of 28th February 1826, duly registered the same year, charged the same premises with a rent-charge of £40 a year, to the use of the issue of his marriage, the rent-charge to commence upon the death of the father and mother. Another charge has been proved by a judgment creditor of Easter 1836, against the same respondent, for the penal sum of £900, which judgment has been duly registered. The only question is, how to arrange the priorities, the judgment creditor insisting that, by the operation of the Statute, which gives the mortgage precedence over the voluntary deed, his entire judgment is lifted up into a primary charge. In considering this question, it is necessary first to ascertain whether it is governed by the law of *Huthwaite's case*, (2 Ir. Chan. Rep. 54,) in which the Judicial Committee of the Privy Council settled the interpretation of the 9 Geo. 4, c. 35, (commonly called Moore's Act,) by so great a weight of authority, that if this were a question arising upon the same Act, I ought not to permit it even to be argued. But the matter under discussion must be determined by the words of the well-known English Statute against fraudulent conveyances—27 Eliz. c. 4, adopted by the Irish Parliament as 10 Car. 1st. sess. 2, ch. 3; and Mr. Decuoleyns, as counsel for the minors before me, has justly observed that there is an important difference between the wording of the two Statutes, to which I shall presently advert. Besides, the English Act has been in existence nearly three centuries, and has undergone repeated investigation and discussion both by the bench and the press, and no one seems ever to have applied to it such an interpretation as that now contended for, though the difficulty which this interpretation professes to solve must often have occurred. It appears to me therefore, that the question in this cause is not absolutely governed by *Huthwaite's case*, and that it is my duty respectfully to examine the grounds of that decision, in order to see whether they are such as to oblige me to apply the same rule in the construction of the 27 Eliz. c. 4. It will facilitate the enquiry to confine it to the naked case of three incumbrancers upon the same estate, of which the first, in order of time, has omitted some precaution required by Statute to secure his demand (A) against future purchasers for value. The second has adopted the statutable precaution which secures his demand (B) against future purchasers; but has not thereby expressly acquired any priority against A. Therefore, if the estate were sold, before any third claimant intervened, B would attach upon only so much of the purchase money as would remain after fully paying off A. It will answer every purpose of my argument to

* We are indebted to the kindness of Master Brooke for a copy of this important judgment.—*Ed. I. J.*

consider A as always £1000 and B £2000. The third is a purchaser or mortgagee, whose demand (C) is subject to B, but as against which the Statute has made A wholly void. It will be found that every difficulty arising from every possible combination of the three incumbrances A, B and C, will come under consideration if we reduce them to three classes: 1, when $A=C$; 2, when A is less than C; 3 when A, is greater than C; or consider as before, A £1000, B £2000, and C either £1000, £1500 or £500, and let the letter M designate the amount of purchase money for which the estate has been sold. If this case had occurred before the determination of *Huthwaite's case*, I should have had no difficulty in applying to it the rule by which Master Henn arranged the priorities in his report of 19th January, 1832, in the case of *Barclay v. O'Brien*; a rule so simple and so just, that it was acquiesced in without any opposition in that much litigated cause, and though I have often since reflected upon it, I have been unable to imagine a case calling for its application, of which it did not satisfactorily solve all the difficulties. In that instance the priority of C over A, was not caused by statute, but by covenant; this distinction, however, causes no difference. The difficulty in both is the same, and the plan which was successful in one will equally suit the other. The rule there adopted was to consider C's owner the assignee of A, or of so much of A as was necessary to secure C. In other words A and C changed places so far as that could be done, so as never to permit the original rights of the owner of B to be in the least interfered with. In applying Master Henn's rule to the three classes I have mentioned, the first class would stand thus: C £1000; B £2000; A £1000, a simple transposition of the whole of A and the whole of C. In the second class the arrangement would be: part of C £1000; B £2000; residue of C £500; A £1000—a partial transposition. The necessity of preserving B's rights forbids a total transposition, C can take only that which A formerly possessed. In the third class they would stand thus: C £500; part of A £500; B £2000; residue of A £500; another partial transposition, C not needing more than part of A, and in other respects leaving A as it was. These three combinations agree in two particulars—viz., that B is never interfered with, and that A's rights are never sacrificed to B, nor in any respect interfered with beyond what is necessary to give effect to the statute. Let me now try, upon these three cases, the effect of the Privy Council Rule, according to which B always stands first, C second, and A third. First Class—B, £2,000; C, £1,000; A, £1,000. Second Class—B, £2,000; C, £1,500; A, £1,000. In both these classes, so long as M is equal to or exceeds the sum of B and C, the rule works well; that is, it produces precisely the same result as the former rule, paying off the whole of B and C, and giving the surplus, if any, to A. But suppose M to fall short of the sum of B and C; suppose it, for example, only equal to B, i.e., £2,000, then B is paid in full, and C gets nothing. By what reason can this strange result be justified? The owner of B has no equity against either A or C. The statute was passed without the least regard to his ad-

vantage; his only right is, *not* to be prejudiced; yet here he is placed in a condition of advantage to which he had originally no pretence, and the only reason assigned by the judges in the Privy Council is, that this arrangement is necessary to secure to C his statutable rights, and yet the result is, that B is paid more than his right, and C loses all. Surely in this arrangement C is injured, and B unfairly favoured; because there was originally A's £1,000 prior to B—to which, as between B and C, the former has no just claim. The statute was passed for C's benefit, not B's; and therefore this primary charge of £1,000, which A has forfeited by the statute, ought surely to belong to C, and not to B. So far the contest has been only between B and C; but in the Third Class, (that in which A is greater than C,) both A and C may be prejudiced. Suppose them arranged according to the Privy Council Rule: Third Class—B, £2,000; C, 500; A, £1,000. In every instance of this class, in which M is less than £2,500, C will be in part, or entirely, sacrificed to B; and A will be so altogether. And yet the primary £1,000, which originally belonged to A, and to which B never had any just claim, would be sufficient, if left in its own place, to pay C in full, and to leave £500 in part payment of A, without in the least disturbing B's rights. I have observed upon the hardship of preferring B to C, to the serious detriment of the latter; but I think the preference of B to A, in the case last put, is just as hard. It is admitted on all hands that, for so much of A as is wanted to secure C, the claim of A must be postponed; but when a surplus remains, which originally belonged to A, I am at a loss to understand why it should be taken from A, and given to B, when the statute may be fully carried out, by Master Henn's arrangement, without any such transfer of rights. The principle I contend for was clearly laid down by the Master of the Rolls in *La Touche v. O'Brien*, (10 Ir. Eq. Rep. 121); but unfortunately another totally distinct principle was adopted in that case by that learned judge, which renders his decision justly open to the observations of the Lord Chancellor in *Huthwaite's case*. By it, A was paid a part of his demand in preference to C, and C was subjected to the risk of losing his whole statutable benefit, in favour of B, who, under the circumstances, had no rights whatever. In that case A was a judgment on which £6,315 remained due; B, a recognizance to abide the event of a suit still undetermined; C, the amount of the arrears of an annuity—£827; M, £1,441; it was, therefore, a case of the Third Class, with a very deficient fund, and Master Litton's Report, arranged the priorities in accordance with Master Henn's Rule. But the Master of the Rolls ordered the £827 to be impounded, to abide the decision of the cause that would determine how much was due to B, and the balance of the £1,441 was paid to A. Now it is to be observed that B originally was subject to A, and the fund being wholly insufficient for A, the security of B was from the beginning utterly worthless. The statute, indeed, transferred to C a portion of A's demand, but of that B had no right to complain; it was something to which he never had any

just claim, and the gift in no way affected his position. Until the prior £6315 was paid off, B had no right at all, and it no way concerned him in what manner the Legislature divided that prior charge between A and C. If the principle of that decision was well founded, if the mere fact of B's priority to C entitled B to lay hold upon every advantage which, either by statute or private arrangement, C might obtain against A—then this strange result would follow, that as soon as B obtained the fund, the very same principle would justify A in snatching it from B, and then C would by statute have a right to take it from A, and so on, round the circle for ever. In considering whether the rule in *Huthwaite's case* is to be applied, for the first time, as I believe, to the English statute of fraudulent conveyances, it has been justly observed by counsel that the English Act, and the Irish one which follows it *verbatim*, both contain the emphatic word "*only*," which is not found in Moore's Act. The conveyance is "*to be deemed and taken to be void, only against the subsequent purchaser, and those claiming under him*." Now, if I declare A to be void, not *only* against C, but also against B, who does not in any way claim under C, am I not violating the express terms of the Act? To come now to the case before me. The judgment creditor, if my construction is well founded, has a right to sell the land, but *subject to the future rent-charge*. The mortgagee has a right to sell the term *discharged of the rent-charge*. If there was the least chance that by setting up the term for sale, *subject to the rent-charge*, enough would be obtained to pay both mortgage and judgment in full, it would be as of course so to do; but the land is of so little value, that that seems quite impossible, and, anticipating a deficient fund, I must sell the term discharged of the rent-charge. In order, then, to ascertain to what extent the mortgagee is to stand as the first incumbrancer, I must have the present value of the future rent-charge calculated by a notary, and to that amount declare the mortgagee to have the first claim on the fund. The judgment creditor will stand second for his whole demand; the mortgagee third for the residue of his demand, and, if anything remains, the children may claim against it.

COURT OF COMMON PLEAS.

[Reported by WILLIAM ROPER, Esq. and THEODORE RYLAND, Esq. Barristers-at-Law.]

REDMOND v. BUTLER.—May, 23, 1855.

Practice—Summons and plaint—Paragraphs—34th General Rule.

The court will not set aside a summons and plaint on the ground that such cause of action was not commenced in a new paragraph, as directed by the 34th General Rule, where it does not appear that the defendant has been embarrassed.

Semble, the 34th General Rule as to engrossing pleadings with proper margins and paragraphs, is directory to the officer of the court; but does not affect the rules of pleading.

THIS was a motion on behalf of the defendant that

the summons and plaint be set aside or taken off the file, upon the grounds that each cause of action in the said summons and plaint was not commenced in a new paragraph as required by the 34th General Rule, and that the same was not legibly engrossed, as required by the said rule, and also that the copy served might be set aside on the grounds of certain inaccuracies and mistakes in it. The action was brought for overmarking an execution and selling the plaintiff's goods under it at an under value, and for an excessive distress, and for trover, and for money had and received. The plaintiff had joined the overmarking and selling at an undervalue in one cause of action, concluding with the words "whereby the plaintiff has been injured," &c. Then followed the words "and the plaintiff further complains," setting out the excessive distress, concluding as before. Similarly, the distinct causes of action for trover and money had and received, began and ended respectively with the words "and the plaintiff further," &c., and "whereby," &c. Several notices had passed between the parties, in one of which defendant alluded to the *four* causes of action in the summons and plaint.

Kernan for the defendant.—There is a difficulty in pleading, as the causes of action are not distinguished by paragraphs. [*Monahan, C. J.*—Each cause of action commences with the words "and the plaintiff further complains." What course would you adopt if there was a separate paragraph for each of these statements?] I might then move to set aside the first as containing two causes of action. The overmarking an execution is quite distinct from selling at an undervalue, so that the two ought not to be joined together.

Fitzgibbon, Q. C., and *Carr* contra.—Paragraph means, according to Johnson's Dictionary, "a distinct part of a discourse," and does not of necessity begin with a longer or shorter line than the other lines in the document. [*Monahan, C. J.*—It is not duplicity to insert several torts in one cause of action according to the old practice. *Ball, J.*—The general rule seems to be applicable to the officer, and not to the pleader.]

Kernan in reply.

PER CURIAM.—The notices that passed between the parties show that the defendant knew that there were four causes of action. There was no embarrassment, for there is no dispute in this case as to the beginnings and ends of the statements. Without laying down any rule as to cases in which the want of paragraphs might embarrass the pleader, we must refuse this motion with costs, as there was not any embarrassment.

Rule refused with costs.

HATCHELL v. WISE.—April 19, 23, 1855.

Attachment order—Distributive share—Incumbered Estates Court.

This court will not grant an order to attach a judgment debtors' presumptive share of assets lodged in the Incumbered Estates Court.

Rogers moved to attach a sum of £8000 now lodged in the Incumbered Estates Court on behalf of a

judgment creditor. This money had belonged to a person who had died intestate, and the debtor was one of his next of kin. The object of this motion was, to prevent the distributive share from being paid over either to the next of kin or to any one on his account. The Court of Exchequer granted a similar application on a judgment of that court against the same party. The court has power to make the order under section 135 of the Common Law Procedure Act. [*Monahan, C. J.*—If the Incumbered Estates Court had once pronounced an order in favour of the judgment debtor, then you might apply for an attachment order; but since that court must first pay the money over to a third party, we cannot grant it now. *Torrens, J.*—We might, by granting this application, stop from the administrator assets which should be applied to the payment of other debts.]

PER CURIAM.—Let this motion stand until we hear from the Court of Exchequer the nature of the order made by it, and the circumstances connected with it.

April 23.—PER CURIAM.—When money lodged in the Incumbered Estates Court must be paid over to an executor or administrator, we cannot give an order charging the presumptive share of the next of kin. It must be first paid to the executor or administrator.

Rule refused.

COURT OF EXCHEQUER.

[Reported by JOHN NORWOOD, Esq., Barrister-at-Law.]

EASTER TERM, 1855.

[*Coram* RICHARDS AND GREENE, B.B.]

BOYLAN AND ANOTHER v. THE DUBLIN AND BELFAST JUNCTION RAILWAY Co.—April 28.

Practice—Amendment of demurrer-books—Common Law Procedure Amendment Act, sections 231, 233—General Orders, 11th Jan., 1854, 50, 51.†*

* Section 233 of the Common Law Procedure Amendment Act enacts: "That it shall be lawful for the judges, &c., from time to time to make all such General Rules and Orders for the effectual execution of this Act, and for establishing a simple code of practice, pleading, and evidence in the said courts and in the Court of Error, in accordance with the intention and object of this Act, and for apportioning the costs of issues, and for fixing the costs to be allowed for and in respect of the matters herein contained or prescribed by such General Orders, and the performance thereof, and for the purpose of enforcing uniformity of practice and pleading in the said courts, and of ensuring an equal division of business among said courts, &c., and all such Rules so made shall be valid and effectual, and shall be observed until varied or altered by the like authority; and any expenses which the judges shall certify to have been properly incurred in giving effect to the provisions of this Act shall be charged and paid in like manner and as part of the incidental expenses of the said court: provided, that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said courts, or of the judges thereof, to make Rules or Orders, or otherwise to regulate and dispose of the business therein."

† 50th General Order—11th January, 1854: "When a demurrer shall have been filed, the party filing same shall,

In an action for work and labour, and materials provided therefor, several defences were pleaded, and leave being given to the plaintiffs to plead and demur, replications were filed to the fourth and seventh defences. To these replications demurrers were taken; the demurrer-books were deposited in the office of the Clerk of the Rules in due course, pursuant to the provisions of the 50th of the General Orders—11th January, 1854. Subsequently, when the arguments on the demurrer were about being opened, it was discovered that the books were defective, and the court, being of opinion that they had full power to make the amendment sought, notwithstanding the 50th Rule, granted an application to amend the demurrer-books by introducing therein such portions of the pleadings as had been, through inadvertence, omitted relative to the subject-matter to be argued, and which it was necessary should be transcribed, as including the seventh defence, and the replication, and the demurrer thereto. The applicant was ordered to pay the costs of the present motion, and of the previous day, when the demurrer was on for argument, because it was through his negligence the error had arisen.

THIS was a motion that the demurrer-books lodged for the use of the judges on the 16th March might be amended by the defendants being permitted to have the several issues in law properly stated therein, that is to say, by introducing the plaint or the substance thereof, the residue of the fourth defence, which has not been transcribed into said books, and all other the defences in which the defendants rely upon the contract-deed, and also the seventh defence, and the replication and demurrer thereto; or that, according to the terms of the 51st Rule, the said demurrer-books might be amended by the statement therein of such parts of the pleadings as relate to the subject-matter to be argued. This was an action for work and labour, and for materials provided for the same, and no fewer than fifteen defences had been filed, and leave having been given to the plaintiff to demur and plead, replications had been filed to the fourth and seventh defences,

within six days thereafter, make up the paper-books for the judges, and deposit same in the office of the Clerk of the Rules, where they shall remain two days for the examination of the opposite party, on the expiration of which period they shall be delivered to the judges by the Clerk of the Rules, and the case set down by either party for argument by side-bar rule; and if the books be not made up and lodged within the specified time, the demurrer shall be considered as set aside, and the opposite party shall be at liberty to proceed as if no such demurrer had been filed; and if there be a demurrer on the part both of the plaintiff and defendant, the plaintiff shall be considered as the party bound to make up the books; and, in case he shall fail so to do, his demurrer shall be considered as set aside, and that of the defendant allowed. The costs of the books shall in all cases follow the judgment on demurrer."

51st General Order.—"All paper-books for the judges, on demurrer, shall be fairly written upon post paper, book-wise, with a margin of two inches, and shall contain only such parts of the pleadings as relate to the subject-matters to be argued, with the names of counsel and attorneys on both sides, and also a specification of the grounds of demurrer, and shall be noted in the margin, and contain an index denoting the page at which each pleading may be found."

and demurrers taken to those replications. The argument of the demurrer had been adjourned from a former day, in consequence of the discovery of the defects in the demurrer-books, which omitted those portions of the pleadings now sought to be inserted, and in order to allow of this motion being made.

F. M'Donagh, Q.C., (with whom was *Alexander Norman*,) was in support of the motion, which he grounded on an affidavit of the clerk to the defendants' attorney, which stated that he had been entrusted with the conduct of the cause from its commencement; that, pursuant to an order of Greene, B., in Chamber, bearing date the 23rd February, 1855, the last pleading, the demurrers and rejoinders, on the part of defendants were filed on the 9th of March; that he had been instructed by his principal to prepare the demurrer-books for lodgment with the Clerk of the Rules, and he, accordingly, took steps for having the same done properly, but distrusting his own knowledge and capability, and with the view of having the said business confided to him well and correctly performed, he employed, with the sanction of his principal, a person, of great skill and experience in transacting such business, to make up the said demurrer-books, and to this person, whom deponent believed to be competent, he handed the brief of the pleadings, and while this person was so employed in preparing the books, Mr. Norman, counsel for defendants, on being so instructed, prepared and specified, without delay, the points for argument, which points are applicable to both the demurrers taken by the defendants, and the pleadings to which they relate; these points were handed to the person preparing the books, with the view of being placed thereon; that Mr. Norman and the defendant's attorney both left town to attend a commission, for the examination of a witness, in England in this cause, and deponent, in the absence of his principal, completed and lodged the demurrer-books on the 16th of March, the last day for so doing, having previously compared one of the demurrer-books with the person preparing same, and that he verily believed said books to be correct, and positively swears that the mistake which has occurred was not intended by him, nor, he verily believes, by the person so employed, nor did he attempt to mislead the court, or do anything for delay or any improper purpose; that the incorrectness which has occurred, in not having transcribed into the demurrer-books the proper pleadings to which the demurrers relate, arose entirely from inadvertence and ignorance, and notwithstanding his conscientious endeavours to do his duty; that the demurrers had been submitted to and approved of by the Solicitor General and the other counsel for defendant; that the briefs of the demurrer-books had been only sent to counsel the afternoon before the argument, and, in the course of opening the demurrers, counsel discovered that the books were incorrect, of which fact deponent then first became aware; and deponent further stated that defendants' attorney was absent in London on parliamentary business, and hence it was impossible to procure an affidavit from him within

the time limited by the court. The facts above stated were corroborated by the person who had prepared the demurrer-books, and who stated he had used his best judgment in their preparation; that he had no intention of misleading the court, or causing delay or embarrassment, and that the mistakes occurred through an error of judgment, arising from the voluminous and difficult nature of the pleadings.

The application is not for the amendment of a record or pleading of the court; but to supply an omission in a transcript. To do so the party is entitled at Common Law; all we ask for is leave to amend that which is merely for the purpose of assisting your Lordships in the hearing and decision of the demurrer, and we are of opinion that it is, almost, as a matter of course to amend. It is contended on the other side that we are without remedy, because the New Rules have the force of a statute, and are obligatory on the judges, and the 50th Rule directs that a party filing a demurrer shall, within six days thereafter, make up the paper-books for the judges, and deposit the same in the office of the Clerk of the Rules, &c., "and if the books be not made up and lodged within the specified time, the demurrer shall be considered as set aside." But we are not remediless. The Rules have not been violated; and, even if they were, are we to be damnified by a mere slip by a clerk? Our application here is, not for leave to lodge the demurrer-books after the lapse of the prescribed six days, but, merely to amend a copy of the record. We have been in sufficient time; besides, the opposite party had two days, during which they might examine the books lodged. The Rules framed under the 233rd section of the Common Law Procedure Act are for the purpose of carrying out and furthering the intention of the Act, and must be so construed. By the 231st section of the same Act the powers of amendment conferred on the courts and judges are far more extensive than any previously exercised, and the Legislature, obviously, never meant to abridge or circumscribe those powers heretofore exercisable. Mr. Ferguson, in his note, p. 254, to this latter section, remarks: "That the courts always exercised a common law jurisdiction of amendment, and very extensive powers of amendment by statute; but it was a rule that to amend under the statutes there should be something to amend by—*Cheese v. Scales*, (10 M. & W. 488)." Everything in paper could, at common law, be amended—1 Tidd, p. 712-14; the common law right still exists, and it surely cannot be withdrawn. Take, for example, a case of judgments, which is somewhat analogous, you may set aside judgments for many reasons; but can it be said that you shall not set aside a judgment wherein an error was committed through the mistake of a clerk? Certainly not; for the court would set aside such a judgment on an affidavit of merits. Are the Rules to be masters, and not the creatures of the courts which called them into being? Are the judges to be the servants of the Rules? [*Greene, B.*—The judges are to be the servants of Acts of Parliament.] The inherent jurisdiction of the court still remains; even suppose we had done

nothing at all, the court could extend the time. The 231st section confers the largest amending powers ever granted by an amending statute, and, where justice is to be effected, and the real point at issue, as here, to be determined, the court can amend, and to do so is rendered mandatory, and not, as formerly, in cases where the courts had something to amend by. The hands of the court are here unfettered, and we claim the amendment as a matter of right and *ex debito justitiæ*. If the Rules be construed strictly, as the other side contend, could a special verdict be amended? but such has been amended, and in a case of greater difficulty—*Fitzgerald v. Roddy*, (6 Ir. Jur. 268.) To construe the Rules as they seek would be in effect to allow of their contradicting the statute to further the ends of which they have been framed. It must not be lost sight of that here we are not applying to amend the original record.

J. Napier, Q.C., (with whom was *D. C. Heron*), contra.—The question here turns on the effect of the 233rd Rule, in conjunction with the Act of Parliament. Is it a case in which you can or ought to amend? If it were a case in which the books were prepared by a public officer of the court charged with that duty, but out of the power and control of the parties, then, we admit, the court would amend. Are the Rules to be a "fast and loose" concern? Are your Lordships, two puisne judges, which we urge with all respect, to amend the code of Rules settled by nine judges, three of them being chiefs of their courts?—*Ferg. Com. Law Pro. Act*, *Introduc.*, 44, 45. The Rules must be considered obligatory until they are altered, varied, or amended; for Rules made under and pursuant to the powers delegated by the Act of Parliament assume the force of the statute itself. The 50th Rule is precise and clear. Here we have distinct demurrers taken to the replications to the fourth and seventh defences. Now the Rule sets aside the demurrer in cases where no paper-books are furnished; here there was no demurrer-book furnished for the demurrer filed to the replication to the seventh defence, and they now, in fact, apply for leave to argue a demurrer already, by the terms of the Rule, set aside, and this without authority. If this application be granted, there will no longer exist an uniform rule for all the courts. We submit that the judges cannot vary the Rules, alterations in which can only be made by the same authorities who, under the provisions of the statute, originally framed them. This is not a case in which the court ought to relax its Rules or grant indulgence; here no case of fatality has arisen; the mistake occurred "through ignorance and inadvertence." Would your Lordships alter the Rules in every case wherein ignorance and inadvertence may be pleaded? Certainly not; the parties who have violated the Rules of the court are the persons to pay the penalty, which, in this case, is nought but the being debarred from arguing a very technical demurrer; no harm will thereby be done, but the case will be tried on its merits. This demurrer is a separate and distinct one, and this application is to insert a wholly distinct demurrer, and not to amend one; in fact, they ask your Lordships to

permit them to make up new demurrer-books. They employed incompetent persons to transact their business, and they must submit to the loss and penalty. The refusal of this application will have the salutary effect of making parties more accurate, and henceforth such motions will become unnecessary; but if you grant this prayer it will render parties careless. No injustice will be inflicted or grievance caused by such refusal. We admit that if a case of fatality occurred, you might relax the rules, but no case of urgency has here been brought before you. The court has no dispensing power in this case, and such amendments would not be suffered under the former system. *Marjoribanks and others v. Daly*, (1 Hud. & Bro. 135.) "Inadvertence or ignorance" is no ground for relief, and such cannot be pleaded here, for the office of the defendants' agent is one of the most eminent in the city, his staff most efficient, and, besides, he had the benefit of the advice of some of the ablest counsel at the Bar in consultation. *Dorsett v. Aspin* (2 Lo. Max. & Pol. 625, *et seq.*) If you permit these amendments, you must likewise allow several other important amendments on the record.

Norman was not called on to reply.

RICHARDS, B.—We are of opinion that this application should be granted. Were we to hold that we possessed no jurisdiction to amend, under the circumstances of the case, the error arising through the inadvertence of the clerk, we should be pronouncing a decision which would, likely, be productive of much mischief. We have authority to amend independently of the provisions of the 233rd section of the Common Law Procedure Act, and which has not abridged or abrogated the common law jurisdiction of amendment inherent in the court. The only question then to be determined is, whether this is a case in which the court ought to interpose? Though the Common Law Procedure Act has caused many difficulties, and no little perplexity, it deserves commendation in that it has swept away all technicalities and frivolous objections, and special demurrers can no longer be taken for technical or formal grounds; but a demurrer must, now, be on substantial grounds and go to the merits of the cause, and consequently a judgment on demurrer is a decision in the merits of the suit. We would be slow to allow an error to be repaired in a case where a special demurrer, such as I have described, was to be argued; but here the merits and justice of the suit may be heard, and determined in the course of the proceeding, and we think it to be a fair case for amendment, and that we ought not to shut out the applicant from an opportunity of obtaining the judgment of the court; but, inasmuch as, through the negligence and mistake of the plaintiff this application was necessitated, he must pay the costs of the present motion, and also the costs of the former day, when the demurrer was about to be argued.

GREENE, B.—We are not obliged, nor indeed required, in this case to dispense with or absolutely disregard the 58th of the General Orders, nor do I think we would have power so to do. I am of opinion, however, that point does not arise; for the 58th Rule has been partially, though somewhat im-

perfectly, complied with. If no demurrer-books had been made up and lodged within the specified time, then the demurrer would be considered as set aside, because it amounts to a tacit acknowledgement of an abandonment of the intention to argue the demurrer; here, however, books were furnished. It has been urged, as showing the violation of the rule, that while two distinct demurrers were taken to both the replications to the fourth and seventh defences, yet the demurrer-books have been made up and lodged only as one. That statement is not quite accurate, because the intention of the applicant to argue both these demurrers is, clearly, intimated by the fact that in the margin of the paper-books containing the specifications of the grounds of demurrer, the points for argument include those taken to both pleadings. If we were to refuse this application we should be creating a rule that in cases where even a couple of lines were omitted, no demurrer-book was furnished, and should, in effect, be holding, that where an error arises, as here, through the inadvertence of a copying-clerk, the party damnified is without remedy. That would be most mischievous. It is competent for the court, in the present case, to supply the deficiency which was occasioned by the slip of the clerk in making the transcript. We have authority to make the amendment sought, and we think this to be a proper case for the exercise of that power. The applicant must pay the costs of the present motion, and of the previous day.

Rule accordingly.

TRINITY TERM, 1855.

SMITH v. DUBLIN AND DROGHEDA RAILWAY COMPANY.—May, 24.

*Practice—Pleading framed to embarrass—Special damage—Common Law Procedure Amendment (Ireland) Act, sec. 83.**

In an action to recover damages for injuries sustained by a railway collision, the plaintiff averred, inter alia, in his summons and plaint, that in consequence of the wounds, &c., inflicted, he had been obliged, at great cost, &c., to send one of his clerks to travel on his business, to solicit orders and collect accounts from his customers in the country, and at great expense to contract with and employ a person to travel on his business, and was, by means of his wounds, prevented from collecting, in person, several large sums of money due to him by his customers, and sustained great loss by the non-payment of divers moneys, and was obliged to borrow large sums to meet his liabilities. Held, that this portion of the summons and plaint being calculated to embarrass and prejudice a fair trial, be struck out, unless the plaintiff furnished the names of the persons sent to travel on his behalf, and the

names of the customers by the non-payment of whose debts he sustained the special damage complained of.

THIS was an action against the defendants as carriers of goods and passengers for hire and reward, to recover damages for injuries sustained by the plaintiff, while a passenger on their line of railway, and the summons and plaint averred, *inter alia*, "that, through the negligence, carelessness, unskilfulness and default of the defendants and their servants, soon after the carriage, in which the plaintiff had taken his seat (for the purpose of being conveyed from Drogheda to Dublin, in pursuance of the contract and agreement with the defendants,) began to move towards Dublin on the journey, the said carriage was run into and came into violent collision with a certain goods train of the defendants then proceeding from Dublin to Drogheda, by means of which collision the plaintiff was violently thrown forward against the opposite seat of the carriage, and was, thereby, severely wounded and hurt in his head, &c., injuriously affected in his health and power of vision, and was obliged to expend, &c., £100 in and about the curing of his wounds, &c., and lameness; that he was for a long time thereafter by reason of the said injury to his health and vision, prevented from attending to his trade or business of a merchant, and from travelling to solicit orders and collect accounts from his customers in the country," and was, in consequence of said wounds, &c., obliged at great loss, inconvenience, costs and expenses, to send one of his clerks to travel on his said business and solicit orders and collect accounts from the said plaintiff's customers in the country, and having been unable by reason of the injuries received as aforesaid to travel into the country on his said business as he had been accustomed to do, he was obliged, at great expense, to contract with and employ, and did actually contract, &c., &c., a person to travel into the country on plaintiff's said business for the purpose aforesaid; that plaintiff was obliged to withdraw his attention altogether from business in endeavouring to affect the restoration of his health, and thereby lost great gains and profits, &c. And by reason of his said wounds, &c., was prevented from collecting, in person, large sums of money due to him by his customers, and sustained great loss and inconvenience by the non-payment of divers of the said sums, and was thereby, and by reason of the grievances aforesaid, rendered less able to meet his debts, liabilities, and engagements, and was obliged, and did actually borrow large sums of money to meet same, and was otherwise greatly injured, &c.

S. Ferguson on behalf of defendants, moved that the summons and plaint being so framed as to prejudice a fair trial, be set aside or amended by the plaintiff stating therein the names of the persons alleged to have been sent out and employed to travel on his business, and the names of the customers by the non-payment of whose debts he sustained the special damage in that behalf complained of. A notice of the motion had been sent, and an offer to sign a consent on the part of the defendants for the amendment of the summons and plaint, in the terms of the notice, had been made by the de-

* 16 & 17 Vic. c. 113, sec. 83.—"If any pleading, &c., be so framed as to prejudice, embarrass or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, the court or a judge shall make such order respecting same, and the costs of the application, as to the court or judge shall seem fit."

fendants' attorney. The motion was grounded on an affidavit of the conducting clerk of defendants' attorney, which stated that it was necessary for the defence and fair trial of the action that the names required should be stated by the plaintiff, that none of the said names were known to the deponent, or, as he believes, to any of the persons having the conduct of the defence, and that the defence and fair trial will be greatly embarrassed unless such names be given. [*Richards, B.*—The cause of special damage lastly alleged, namely, the borrowing of certain moneys, appears to me to be too vague; probably they will consent, at the other side, to strike that out. *Greene, B.*—It has been decided, under the old system of pleading, that the allegation of the loss of moneys by the loss of divers customers, does not amount to special damage. The special damage here alleged does not directly grow out of the injury said to have been sustained. That is the real distinction.]

O'Hagan, Q. C., (with him *H. Devitt*), for plaintiff.—The object of this motion is manifestly to delay the trial of the action, the defendants having, by their consent, required that the time for taking defence should run from the date of the proposed amendment; which, if acceded to, would have postponed the trial of this cause until after Michaelmas Term. The defendant cannot be embarrassed in the preparation of his defence by the absence of the particulars required, because special damage is not traversable in cases where its averment is not necessary to sustain the action. *Custis v. Sandford*, (6 Ir. Jur. 309.) If the special damage be not averred with sufficient certainty, the judge at Nisi Prius will not receive evidence of it, and the only course open to defendants is to object at the trial and prevent the plaintiff from proving any special damage not properly laid. The damage laid in this plaint could be proved as general damage; plaintiff having been prevented by his injuries from attending to his business in person, recompence for any natural consequences resulting from his non-attendance may be recovered as general damage, and need not be averred as special damage. In an action by a dissenting minister for slanderous words used by defendant, who imputed incontinence to him, whereby "the persons frequenting his chapel had refused to permit him to preach there, and had discontinued giving him the gains," &c., this averment was held sufficient to entitle plaintiff to prove the special damage as laid, although the persons who, as alleged, had so acted were not named. *Hartley v. Herring*, (8 T. R. 130.) The damage, the naming of the averment of which is objected to here, need not have been set out at all. Damage which is the necessary result of defendants' conduct, may be proved, although not alleged in the declaration. *Ward v. Smith*, (11 Price, 19.) In that case it was decided that evidence was properly received by the judge at Nisi Prius of loss of customers, by reason of defendant's conduct, although no customers were named in the declaration; the averment of the damage having been singly "whereby the plaintiff sustained loss." In *Westwood v. Cowne*, (1 Starkie, 172,) which was an action for irregular distress, the plaintiff averred that he had lost divers lodgers, but did

not name any. Lord Ellenborough rejected evidence of the damage; but did so because defendant was only prepared to prove that he had lost in fact one lodger, observing that "the number was not so great as to excuse a specific description on the score of inconvenience." In the present case, therefore, evidence of loss in respect to a single customer might not be admissible on the trial; but no objection lay to the plaint on the ground suggested. The plaintiff's attorney had made an affidavit that he believed that this motion was brought forward for delay, and to deprive plaintiff of his right to have the cause tried in the next after sittings. No authority had been cited under the Common Law Procedure Acts, either in England or Ireland, for the motion, and none was to be found.

RICHARDS, B.—Under the provisions of the 83rd section of the Common Law Procedure Act, pleadings found to prejudice, embarrass or delay, may be struck out or amended. The question is, whether this paragraph in the summons and plaint, averring that the plaintiff, in consequence of his wounds, was obliged at great costs, &c., to send one of his clerks to travel on his business to solicit orders and collect accounts, and was compelled to contract with a person to travel on his business into the country, and, that relative to the customers by the non-payment of whose debts the plaintiff sustained the special damage complained of, be calculated to embarrass. It appears to me, certainly, to describe a very roving commission. No particular debts, no distinct transactions, no names are stated, and, consequently, the defendant cannot, possibly, know what evidence he ought to adduce in order to contravene the charge in the summons and plaint; no fair or reasonable intimation is given to him of the case he is called on to meet. I think the judge at Nisi Prius would be justified in declining to allow evidence of special damage to be given; consequently, *a fortiori*, we ought to strike out this portion of the summons and plaint. But, it has been said that this relied on a general damage; the very fact of that statement being made, shows that it is doubtful in its nature, and therefore, calculated to embarrass. Unless the plaintiff furnish the names of the persons specified in the notice of motion, and mentioned in the summons and plaint as having been employed to travel, collect accounts, and solicit orders, &c., and of the creditors by whose non-payment of their debts he sustained the special damage alleged, &c. within four days, let the portion of the summons and plaint referring thereto be struck out; the defendant to take short notice of trial. The costs of the present motion to be costs in the cause.

GREENE, B.—The question is, whether under the 83rd section of the Common Law Procedure Amendment Act, the summons and plaint is framed in such a way as to embarrass and prejudice the fair trial of the action. If the damages are likely to be increased by the alleged loss of customers, it is but just that the defendant should be enabled to meet the allegations, which he cannot do unless the names of the customers and travellers be furnished. One of the objects of the new Act, and system, which we are now administering, is to bring the

parties to issue as soon as possible. The very fact of the uncertainty existing as to whether the defendant here is to give evidence as to special damage or not in consequence of the omission of those names, is sufficient to show that it is calculated to embarrass.

RICHARDS, B.—This is a collateral matter not naturally flowing from the nature of the accident.

Rule accordingly.

LIMONIUS v. MICHELLI.—June 9, 11.

*Practice—Security for costs—Affidavit of merits—Common Law Procedure Act, sec. 52.**

In support of an application, made under the provisions of 16 & 17 Vic., c. 113, s. 52, that the plaintiff be restrained from further proceedings until he shall have given security for costs, as he resided out of the jurisdiction, the defendant's affidavit stated that he had not as yet filed his defence, as the time within which he was bound to appear had not expired; that the plaintiff lived in Liverpool, and had no residence or property in Ireland; "that the defendant had a good, substantial, and sufficient defence on the merits, and that this application was not made for the purposes of delay." This affidavit was held to be insufficient, inasmuch as it did not disclose facts sufficient to satisfy the mind of the court that the defendant had a defence upon the merits.

Collins moved, on behalf of defendant, that the plaintiff be restrained from taking any further proceedings until he shall have given security for costs, inasmuch as he resided out of the jurisdiction of this honourable court, and had no property therein. A notice had been, previously, served on plaintiff's attorney, requiring him to have security given for such costs, with the terms of which, however, he did not think fit to comply, and a copy of the affidavit, on which defendant's counsel relied in support of the motion, had also been furnished to him. The affidavit of the defendant, who was resident at Queenstown, in the County of Cork, and was Austrian Consul, stated that the plaintiff had issued a writ of summons and plaint, to which defendant had not yet appeared or filed any defence, the time within which he would be bound to appear not having expired; that the plaintiff resided at Liverpool, in England, and had not any residence or property in Ireland; that defendant had a good, substantial, and sufficient defence upon the merits to the said action, and he was advised that, in the event of the plaintiff's discontinuing or being non-appeared or nonsuited, or of a verdict being had against him, the defendant would not be able to

recover his costs, unless this honourable court compel him to give security, and that this application was not made for the purposes of delay. Counsel cited *Eyre v. Sparks*, (3 Ir. Com. Law Rep. 542, C. B.) to show that it was sufficient if defendant's affidavit state that he has a good defence on the merits, and that the affidavit need not state the nature of the defence. In *Higgins v. Bourke*, (7 Ir. Jur. 80, Q. B.,) Crampton, J., says: "If it were positive as to merits, without anything further, I would hold it good enough." *Spencer v. Campion*, (3 Ir. C. L. R. 231, Q. B.); *Brindley v. Hemans*, (6 Ir. Jur. 164, Q. B.); *Taylor v. Low*, (3 Ir. Com. Law Rep. 223, Q. B.)

Edward Sullivan contra.—The affidavit is insufficient; it should satisfy the mind of the court by the statement of some facts tending to show that the defendant has a good, valid, and legal defence on the merits, and should contain some particulars, or a specific averment of those merits—*Shaw v. Craig*, (3 I. C. L. R. 231, Q. B. in *notis*); *Spencer v. Campion*, (*ib.*; s. c., 6 Ir. Jur. 240.) In this latter case the decision was not by the full court. *Pordage v. Carter*, (6 Ir. Jur. 236); *Martin v. Titmarsh*, (6 Ir. Jur. 269); *Murphy v. Nugent*, (6 Ir. Jur. 280.)

Cur. adv. vult.

June 11.—GREENE, B.—This is not solely a question of practice. The Legislature intended that applications of this nature, often resorted to for the purpose of delay, ought to be placed under some restrictions and subjected to some modifications. The 52nd section requires that "no order for security for costs shall be made, at the instance of any defendant, unless upon a satisfactory affidavit that such defendant has a defence upon the merits." What is the reason of the employment of the word "satisfaction?" It evidently implies, I think, that the affidavit of the defendant shall state explicitly the ground of his defence. Not that he is required to expand on his affidavit all the minutiae of his case, but mention such facts as will satisfy the court of his having a reasonable defence, as, for example, that he intends to defend the action on the ground of his having already paid the money, &c., and that the application is not made for the purposes of delay. We do not consider that it inflicts any hardship to require the affidavit to state, not all the circumstances, but such facts as will satisfy the judicial mind. The Courts of Common Pleas and Queen's Bench seem to have considered it sufficient to follow the words of the Act and to say that the defendant has a good defence on the merits. That I consider would not be sufficient. The Legislature have introduced into the section the word "satisfy." The court must be satisfied. With great respect to the Court of Queen's Bench we are not, when we require facts to be disclosed, trying the case on affidavits. It does not follow because this court requires facts to be stated that those facts are to be tried on affidavit, or their truth decided. All we require is the statement of such facts as will satisfy the mind of the court. The grounds of the decision come to by this court do not appear to have been quite fairly stated in the argument of the case in the Court of Common Pleas, and, it does appear to me, that

* 16 & 17 Vic., c. 113, s. 52.—"Any defendant served with any writ of summons and plaint in any action shall thereupon be deemed to be in court for the purpose of making application to the court or a judge to compel the plaintiff to give security for costs and for other like purposes: provided, that no order for security for costs shall be made by reason of any plaintiff being resident out of the jurisdiction of the court, at the instance of any defendant, unless upon a satisfactory affidavit that such defendant has a defence upon the merits."

there has not been in that court such a full consideration of the Act of Parliament as to warrant us in giving thereto a different construction from that we have hitherto been in the practice of adopting. I think that it is important to consider the 233rd section of the same Act, in connection with the 52nd section, as enabling the courts more fully to extend and enlarge the terms of the enactments of the new Act, and more effectually to carry out the objects and views of the Legislature in passing it.

RICHARDS, B.—It is quite erroneous to suppose that we have declined to hear this question fully argued. We have heard it debated on more than one occasion, and we have come to a deliberate opinion thereon. We read this proviso of the Act of Parliament [reads section] as imposing on the court the necessity of considering the nature and sufficiency of the affidavit. If the Legislature intended that the affidavit should merely follow the words of the section, and barely state that the defendant has a good and sufficient defence on the merits, there would be no meaning in the use of the word "satisfaction." We protest against the opinion thrown out, that we have come to an hasty conclusion. There has not been such an affidavit in this case as satisfies the judicial mind that there is a good defence on the merits. The section was introduced to put an end to the mischief which existed; of such applications being, often, resorted to for the mere purpose of delaying the recovery of *bona fide* claims where no defence existed, and, solely, because the party suing has been out of the jurisdiction.

PENNEFATHER, B., concurred.

PIGOT, C. B.—This is not a mere matter of practice; but one involving the construction of an Act of Parliament, and is a question of law, concerning which there seems to be some diversity of opinion. The only way uniformity can be reached is, by the minority of the courts conforming in their practice with the majority. Now, there is the deliberate opinion of another court conflicting with that expressed and acted on here. I am disposed to follow the decisions of those courts, and hold this affidavit to be sufficient; but the opinions of the other members of the court being contrary to mine, I yield thereto, though still with some hesitation, being inclined to think that it would be desirable to defer to the decision of the other courts.

*Motion refused with costs.**

CLANCARTY AND FOWLER v. ORMONDE.—
June 9 and 11, 1855.

Practice—Mistake in execution of Bond and Warrant of Attorney—Entry of Satisfaction on Record of Judgment—Common Law Procedure Amendment Act, sec. 144.†

* *Vide Bell v. Shannon*, (7 Ir. Jur. 23; s. c. 4 Ir. C. L.R. 15, Ex.)

† "It shall be lawful for the court or a judge to order a memorandum of satisfaction to be entered upon the record of any judgment, judgment-roll, or judgment-book, if it shall appear that the debt or damages for which the said judgment was obtained have been fully satisfied and discharged."

A judgment having been obtained on a bond and warrant of attorney of the defendant, to secure the sum of £4000 and interest, the fortune of the Lady A. W. B., and it being declared by the settlement executed on the marriage that said judgment was to be vested in the Earl of E. and Sir T. S. upon certain trusts, with power, when said judgment should be paid off, to lend the moneys arising therefrom on other securities, it appeared that the bond and warrant of attorney was executed by mistake to the Earl of C. and R. F. also trustees, for other purposes, in the said settlement, but having no interest in the judgment, instead of the Earl of E. and Sir T. S., and that the judgment had been fully paid off and satisfied to the said Earl of E. and Sir T. S. The Court granted an order that the Master should enter satisfaction on the roll of said judgment, unless cause should be shown to the contrary within six days after personal service of the rule upon the said Earl of E., Sir T. S., the Earl of C. and R. F., and conceded the space of one month to applicant for the effectuation of such service.

THE plaintiffs were the trustees named in the settlement, dated in March 1838, and executed on the marriage of J. A. Wynne with the Lady Anne W. Butler, and it appeared by the affidavit of said J. A. W., that the marriage settlement was executed between O. W., deponent's father, of the first part, said J. A. W. of second part, the Marquis of Ormonde (defendant's father) of the third part, the Earl of Ossory and Lord Walter Butler of the fourth part, the said Lady A. W. B. of the fifth part, Viscount Cole [now Earl of Enniskillen] and Sir T. Staples of the sixth part, Edward Cooper and James Hawkins of the seventh part, and the said plaintiffs of the eighth part, and it was thereby agreed that the sum of £4000 should be vested in the plaintiffs on certain trusts, and that the Marquis of Ormonde with the Earl of Ossory and Lord William Butler, had thereupon executed a joint and several bond with warrant, &c., to the said trustees conditioned for the payment of said £4000 as the marriage portion of the said Lady A. W. B., and the said indenture declared that the said bond and warrant and judgment to be entered thereon, should be vested in the said Lord Viscount Cole and Sir T. S. and their executors and administrators, until the said marriage and after the solemnization thereof, upon trust, whenever the same should be paid in with the consent of said J. A. W. and the Lady A. W. B. or the survivor, or if both should die, then, of their own authority, to invest the net moneys to arise therefrom at interest, or in taking proper assignments of the debts or incumbrances mentioned in the said schedule to the indenture, or in the stocks or other public securities, and from time to time to vary and transfer, &c., same, and to permit the deponent J. A. W. to receive the annual proceeds of said £4000 during his life, and after his decease to permit the said Lady A. W. B. to receive the dividends, &c., and after the death of survivor, then on certain trusts expressed therein before respecting certain charges for younger children; that the said plaintiffs were made parties to said settlement, as being trustees of a term of 500 years,

for the securing of a jointure to said Lady A. W. B., and charges for younger children; that the said Lady A. W. B. died in November, 1849; that although, by said indenture, the said bond and judgment for £4000 is vested in the said Viscount Cole, now Earl of Enniskillen, and Sir T. Staples, nevertheless the said bond was confessed and judgment entered thereon in this court at suit of said Earl of Clancarty and Robert Fowler, against the said Marquis of Ormonde alone, in or as of Trinity Term, 1838, and as the deponent J. A. W. believed, through mistake or misapprehension of the attorney who prepared same. The said Marquis died in May, 1838, leaving the said Earl of Ossory, his heir-at-law, him surviving. That a desirable opportunity for investing the £4000 in an eligible purchase of lands about to be sold in the Incumbered Estates Court presenting itself, deponent, J. A. W., having applied to the said Earl of Enniskillen and Sir T. Staples, they advanced said sum of £4000 so vested in them, and which had been paid to them—a portion, by the said Marquis of Ormonde in his lifetime, and the remainder after his decease by his executrix—to deponent, and were secured the repayment thereof by a mortgage on the lands so purchased; that the executrix having demanded a satisfaction of the said judgment, applied to the plaintiffs, whose attorney declined to advise his clients to satisfy same, but was willing that there should be an application to the court to satisfy said judgment, which still remains outstanding in the said plaintiffs, and has not been assigned or satisfied; and that the said plaintiffs have no interest in the said judgment.

E. S. Dix, on behalf of the said J. A. Wynne, now moved that the proper officer of the court do enter satisfaction on the record of the judgment in the cause entered as of Trinity Term, 1838, for £8000 debt besides costs. The application is made under the provisions of the 16 & 17 Vic. c. 113, sec. 144. Counsel cited *Chittick v. Balfour*, (2 J. & S. 88, in notis, s. c. 2 I. L. Rep. C. B. 166,) wherein a party refused to take sum due for principal and interest on certain judgments, unless he were paid in British currency. A conditional order was granted; defendant to be at liberty to lodge the money due, and, then, that plaintiff should execute warrant to satisfy. That case is reported in a note to *Quinn v. Eastwood*, (2 J. & S. 86, s. c. 2 J. & L. 165.) Order was refused on the ground that the defendant had been guilty of laches, having delayed to make any application from March, 1838, to November, 1839, on the last day of Term, and sum due was not clearly given. But Perrin, J., says, "In the next Term such an application may be made, but, in the meantime, the court is unwilling to tie up a party by a conditional order." In *Executors of Birch v. Meredith*, (3 I. L. Rep. 138,) a judgment creditor had got possession of the lands of his debtor by *elegit*, and the officer had reported, on a reference to account, that he had been overpaid his debt, and which report was confirmed, the court granted a conditional order why satisfaction should not be entered on roll, and that same might be served on attorney of deceased conusee, whose representatives resided abroad. In

Wilkinson v. Meredith, (ib. 139,) a like application was refused where the only evidence of the payment of the judgment was an alleged admission, in conversation, by plaintiff's attorney, that the debt had been paid, the representatives of the conusee residing out of the jurisdiction. In *Wise and another v. Creed*, (8 I. L. Rep. 222, Q. B. 1845,) a judgment had been obtained in 1832 against Edward Creed by Thomas Wise and Richard Lee, as trustees in a deed. Wise alleged he had never acted, and refused to execute the warrant to satisfy, and had executed a deed of disclaimer of the trusts, both as regarded this judgment and the mortgage with which it was collateral. The amount of the judgment was in the hands of the conusor, ready to be paid off. Perrin, J., made an order to satisfy on a warrant executed by Richard Lee only.

PER CURIAM.—Let the Master of the court enter satisfaction on the roll of the said judgment, unless cause be shown to the contrary, in eight days after personal service of this rule upon the said Earl of Enniskillen, Sir Thomas Staples, the Earl of Clancarty, and Robert Fowler, the said J. A. Wynne to have one month's time to effect such service.

*Rule accordingly.**

TRENCH AND ANOTHER v. CASSIDY.—April 28.

Demurrer—Tithe rent-charge—Sufficiency of averment of defendant's estate—Tithe-Composition Act—2 & 3 W. 4, c. 119, ss. 17 et seq.—1 & 2 Vic. c. 109, ss. 7, 8,†

In an action to recover money payable for rent-charge, in lieu of tithe-composition, the plaintiffs averred in their summons and plaint that an annual sum was duly apportioned on certain lands in which the defendant was and still is, and, previous to the passing of the "Act to abolish tithe-composition in Ireland and to substitute rent-charges in lieu thereof," was, owner of the first interest, equivalent to a perpetual interest within the meaning of the said Act, under which, or derived wherefrom, there was not, at the time of the passing of the said Act, or since, any such estate or interest, no landlord having undertaken the payment of said composition under the provisions of the Act of the 2nd and 3rd years of the reign of King William the Fourth, relating to tithe-composition, whereby the defendant became liable to pay the annual sum, being three-fourths of the said composition. The defendant having demurred, on the ground that the plaintiffs did not, in their pleading, show "that the defendant had such an estate of inheritance, or such an estate at all, as would render him liable to pay tithe-rent-charge, in the parcels of land, within the meaning of the 1st and 2nd Victoria; that the nature of the perpetual estate or interest of the defendant is not otherwise mentioned than in vague and general terms, it was held that the summons and

* Vide *Irwin v. Irwin*, (3 I. L. Rep. 273); *Peyton v. Lambert*, (1 Smythe, 95); *In re Lyons v. Warren*, (L. Rec. O. S. 49.)

† The "Act to abolish compositions for tithes in Ireland, and to substitute rent-charges in lieu thereof."

plaint sufficiently set forth the estate of the defendant in the parcels of land.

THE summons and plaint stated: "That the defendant was indebted to the plaintiffs in the sum of £15 sterling, for money payable by the defendant to the plaintiffs for three years' rent-charge, in lieu of tithe-composition due and ending the 1st of November, 1854, and theretofore and immediately preceding, of which tithe-rent-charge the plaintiffs, during all the period aforesaid, were and are the owners, the previous tithe-composition, in lieu of which the same is, having, previously, belonged to the Dean and Chapter of Kildare, to whom the rectorial tithe-composition of the parish of Lea, in the Diocese of Kildare, belonged, the same having been duly certified as payable to them, and of which the said rent-charge now demanded forms part, and the said Dean and Chapter having demised the said rectorial tithe-composition of the said parish to one M. T. for a term of twenty-one years by indenture bearing date the 13th day of May, 1839, he, by deed of assignment, bearing date the 2nd of February, 1841, assigned the said tithe-composition to the plaintiffs; and the plaintiffs say that an annual sum of £6 13s. 4d. was duly apportioned on certain lands in the said parish, of which the defendant, during the said period of three years, was, and still is, and previous to the passing of the Act to abolish tithe-compositions in Ireland, and to substitute rent-charges in lieu thereof, was owner of the first interest, equivalent to a perpetual interest within the meaning of the said Act, under which or derived wherefrom there was not, at the time of passing of the said Act, or since, any such estate or interest, no landlord having undertaken the payment of said composition under the Act of the 2nd and 3rd years of the reign of King William the Fourth relating to tithe-compositions, whereby the defendant became liable to pay the annual sum of £5, being three-fourths of the said composition; and the defendant was also indebted to the plaintiffs in the further sum of £15, for three years' rent-charge in lieu of tithe-composition, payable out of certain lands of the defendant, and of which, during the period of the accrual thereof, he was the owner liable to pay the same, within the meaning of the statutes relating thereto; and the plaintiffs say that the defendant is also indebted to them for £15, on accounts stated," &c. To this summons and plaint the defendant filed a demurrer, on the ground that "the summons and plaint did not disclose any cause of action good in substance, for that the plaintiffs have not shown that the defendant had such an estate of inheritance, or such an estate at all, as would render him liable to pay tithe-rent-charge in the parcels of land therein mentioned, within the meaning of the 1st and 2nd Vic.; and that the nature of the perpetual estate or

interest of the defendant is not otherwise mentioned and described than in vague and general terms."

John V. Cassidy in support of the demurrer.—The summons and plaint in this case claims the sum of £15, three gales of tithe-rent charge payable out of certain lands, (under 1 & 2 Vic.,) and it states "that the defendant was, and previous to the passing of the Act for abolishing tithe composition and substituting tithe-rent charge in lieu thereof, owner of the first interest, equivalent to a perpetual interest within the meaning of said Act, under which, or derived wherefrom, there was not any such estate or interest, no landlord having undertaken the payment of said composition pursuant to 2 & 3 W. 4." The demurrer objects that the summons and plaint does not disclose any good cause of action, as it does not show that defendant had such an estate as would render him liable within the meaning of the 7th section of this Act. This section charges the first estate of inheritance, or other perpetual interest, as thereafter defined, save as therein-after excepted, with the payment of the rent charge thereby substituted for tithe compositions. The 8th section goes on to give this definition and to make the exceptions. These two sections are thus incorporated and must be construed together; the second is imported into and made a part of the first. *Vasasour v. Ormrod*, (6 B. & C. 430.) Being thus incorporated they are but one section, and the exceptions made must be, specifically, negated. In 1 Chitty on Pleading, 6 ed. 223, it is laid down that "in pleading upon statutes where there is an exception in the enacting clause the plaintiff must show that the defendant is not within the exemption." *Galway v. O'Meara*, (1 I. C. L. R. 235,) is exactly in point. There on demurrer it was decided by the whole Court of Queen's Bench that the omission to negative a tenancy by the courtesy or a tenancy in dower in the declaration was a good cause of general demurrer. The action in that case, with one exception, is identical with the summons and plaint in this case. The two points for which we contend are there expressly decided, viz., that the two sections are to be construed together, and that in declaring on them it is necessary to negative the exceptions they contain.

Henry J. Leslie contra.—Even admitting the authority of the case cited at the other side, all exceptions are negated in the pleading, which does not merely state that the defendant was seized of an estate in fee but of the first interest equivalent to a perpetual interest within the meaning of the Act, &c., under which, or derived wherefrom, there was not, &c., any such estate or interest.

PER CURIAM.—Let the demurrer be overruled. Judgment for the plaintiffs.

Demurrer overruled.

DIGEST OF THE CASES

DECIDED IN THE

COURTS OF LAW AND EQUITY

In Ireland,

AS REPORTED IN THE THIRD VOLUME OF THE IRISH CHANCERY REPORTS, THE
THIRD VOLUME OF THE IRISH COMMON LAW REPORTS, AND IN THE
SEVENTH VOLUME OF THE IRISH JURIST.

BY

SAMUEL V. PEET, ESQ., BARRISTER-AT-LAW.

DUBLIN :

EDWARD J. MILLIKEN, 15 COLLEGE GREEN.

1855.

Law and Equity Index

TO THE

IRISH JURIST,

INCLUDING

A DIGEST OF THE CASES DECIDED IN THE COURTS OF COMMON LAW AND EQUITY IN IRELAND, AS REPORTED IN THE SEVENTH VOLUME OF THE IRISH JURIST, AND THE THIRD VOLUMES OF THE IRISH COMMON LAW AND CHANCERY REPORTS.

* * The letters at the conclusion of each paragraph indicate the titles of the Reports digested; thus—*Ir Jur.*, *Irish Jurist*—*I. C. L. R.*, *Irish Common Law Reports*—*Ir. Chan. R.*, *Irish Chancery Reports*—*C.*, *Chancery*—*R.*, *Rolls*—*Q. B.*, *Queen's Bench*—*C. P.*, *Common Pleas*—*E.*, *Exchequer*—*Cir. Cas.*, *Circuit Case*—*Ex. Cham.*, *Exchequer Chamber*—*Reg. C.*, *Registry Case*—*Crim. Ap.*, *Court of Criminal Appeal*—*I. E. C.*, *Incumbered Estates Court*—*Adm.*, *Admiralty Court*—*M. O.*, *Master's Office*—*Consol. Cham.*, *Consolidated Chamber*—*P. C.*, *Judicial Committee of Privy Council*—*Bkt. C.*, *Bankrupt Court*.

ABATEMENT.

Plea in.—See CRIMINAL LAW.

Of suit in Equity.—See PRACTICE.

ABSTRACT.

Of Issues for Nisi Prius.—See PRACTICE.

ACCOUNTANT-GENERAL, See
PRACTICE.

ACCUMULATION.

A testator devised the lands of Q in trust, after his decease to sell and dispose thereof, and that the sale monies thereof, together with the rents and profits until the sale, should be considered as part of, and applied in the same manner, as his personal estate. He gave the latter to certain trustees upon trust to pay his personal expenses, debts, and certain legacies, and in trust to apply in payment of debts and legacies, until the same should be satisfied, the yearly produce of the personal estate thereby directed to be laid out in land, and the rents and profits of the lands to be purchased therewith. As to the residue of his personal estate, he gave same in trust for the purchase of fee simple lands to be conveyed to his grandson A T and his heirs, subject to a charge for renewing certain chattel leases, and for that purpose he directed a term of

years to be created out of such purchased lands, and also in trust until purchase, that the money should be laid out at interest, and should be applied towards discharging the purchase; and he directed the trustees to renew the chattel leases which he had bequeathed to A T for his life. The testator died in 1771, and from that to 1837 A T continued in possession of the lands of Q, and the chattel leases. From 1820 to 1837 he paid large sums for renewal fines. Held, that the accumulation of the rents of the lands of Q was to cease at the end of a year from the testator's death, and that the rents from that period to 1820, when the trust to raise the renewal fines arose, belonged to A T, but that subsequently to 1820 the rents were to be set off against the renewal fines. *Smith v. Lord Dunganon*, 3 Ir. Chan. R. 316, C.

ACKNOWLEDGMENT, See LIMITATIONS,
(STATUTE OF.)

ACT OF PARLIAMENT, See STATUTE.

ACTION, See RESPECTIVE TITLES.

ADMINISTRATOR, See EXECUTOR AND
ADMINISTRATOR.

ADMINISTRATION SUIT, See COSTS,
PRACTICE.

ADMIRALTY.

To recover full compensation for injuries sustained by a collision, the party complaining must be prepared, in the first place, to prove that the accident was not occasioned by any fault of his, and that the entire conduct of those concerned, or having an interest in the injured vessel, was blameless, and clear of wilful neglect and gross negligence. *The "Victoria,"* 7 Ir. Jur. 94. Adm.

A vessel anchoring upon, the known track pursued by river steamers, or within a few yards of the channel, and without exhibiting a light, will be deemed open to the charge of wilful neglect and gross negligence. *Ib.*

At any time, (whether required by the harbour regulations or not,) in a close river, where there are a number of vessels passing and repassing, it is only an act of proper seamanlike precaution to exhibit a light; and in a suit for collision a crew neglecting to take such a precaution will not be held altogether blameless. *Ib.*

In a suit to recover the value of a vessel and her cargo, which was lost in a collision, the promovent ship being at the time at anchor in harbour, and the impugnant ship under weigh coming to her moorings, this court will award the full amount of the damage sustained, if it appear that there was a want of nautical skill exhibited by the crew of the latter vessel. *The "William,"* 7 Ir. Jur. 229. Adm.

The full amount of damage will be given, even although it may appear that the promovent vessel did not take up a proper position in the harbour, or exhibit a light, if the court is of opinion that the collision was not in any degree caused or promoted by these circumstances. *Ib.*

In a suit for collision, where the promovent vessel was anchored in harbour, and in an improper position, according to the harbour regulations, and did not exhibit a light, which was also in opposition to the harbour regulations, and the impugnant vessel was under weigh, this court held that each party should bear the loss sustained moietywise, and pay their own costs, reversing the decree of the Court of Admiralty, which held, that the impugnant ship, which was unskillfully manœuvred, should pay for all the damages and costs. (*See* 7 Ir. Jur. 229.) *The "William,"* 7 Ir. Jur. 354. Delegates.

It is the duty of a vessel which is even properly placed in harbour, and which complies with the harbour regulations, to do all in its power to prevent a collision, or if a collision unfortunately takes place to prevent further damage, if possible. *Ib.*

This court will admit additional evidence upon an appeal, if it appear by affidavit that it was impossible for the party or parties in the court below to tender it at the original hearing, the witnesses examined being nautical men, whose attendance is not always available. *Ib.*

◆
AFFIDAVIT, *See* ATTORNEY. CROWN
PRACTICE. PRACTICE.

◆
AGENT, *See* ATTORNEY.

The defendant had acted gratuitously as the agent of the plaintiff, transmitting to her the interest of

charges to which she was entitled. One of the charges was paid to the defendant, which the plaintiff directed him to invest on a specified real security, which he was unable to do, but which, without her authority, he lent to L., for whom he was also agent, and who was indebted to him on the security of a bond and warrant of attorney to enter judgment. He enclosed the bond and warrant of attorney to her in a letter, in which he stated, contrary to the fact, that the money had been applied to pay off a charge on his estate. L. afterwards, on his son's marriage, conveyed a part of the estate in trust to pay off charges on his estate, another part to the use of his son and his issue, and the lands of C in trust to secure his debt to the defendant. The defendant, in several letters, offered to give the plaintiff's claim priority over his demand in the lands of C. L. being dead, leaving no assets to pay the plaintiff's claim, the court, on a bill filed by her, declared the plaintiff entitled to a specific performance of the contract contained in the letters, and that the defendant was a trustee for the plaintiff, as to so much of his security on the lands of C as would be sufficient to pay her claim, and ordered that he should execute a deed declaring the trust. *O'Beirne v. Cornwall,* 3 Ir. Chan. R. 130. C.

As to the right of an agent to sue in his own name for monies paid by him out of his own pocket, under protest on behalf of his principal—*Coatesworth v. Walsh,* 3 Ir. C. L. R. 93; s. c., 5 Ir. Jur. 253. Q. B.

In an action of trespass for false imprisonment brought against the Marshal of the Marshalsea of the Court of Queen's Bench by a prisoner, it was proved that the plaintiff had made use of strong expressions at the refusal of the officers of the gaol to afford medical assistance to one of the female attendants, who was taken ill: and that the Deputy Marshal had accordingly confined the plaintiff in the punishment cell of the prison for several hours, but that previous to his so doing he had neglected to commit to writing (as required by the 27th Rule of the prison) the particulars of the charge and evidence relating thereto. The Marshal was not present at the time of the imprisonment, but no evidence was given to point out exactly where he was at the time, or how long he was absent. Held, that the Marshal was not liable, merely as such, for the act of the Deputy Marshal. *Hassard v. Caulfield,* 7 Ir. Jur. 85. Ex.

Held also, that the requirements of the 27th Rule not having been complied with, an act of false imprisonment had been committed. *Ib.*

Semble, that if the Marshal had returned to the gaol before the imprisonment had terminated, or had been within its precincts during the arrest, he would have been liable. *Ib.*

Quere, as to what will amount to "absence" on the part of the Marshal to enable the Deputy Marshal to act as Marshal. *Ib.*

◆
AGREEMENT, *See* CONTRACT.

◆
AMENDMENT, *See* CIVIL BILL. COSTS.
PRACTICE.

Of proceedings in equity.—An order was made

under the Trustee Act, 1850, appointing new trustees, and vesting the trust funds in them, and the order not having been got out of the office in time to be stamped, the court allowed it to be re-issued, as of the date of the application. *In re Molloy's Trusts*, 7 Ir. Jur. 50, R.

A cause petition was allowed to be amended by stating that one of the respondents was in insolvent circumstances, and had taken possession of a part of the assets which were necessary for payment of the petitioner's demand. *Taaffe v. French*, 7 Ir. Jur. 234, R.

Leave was also given to enter a side-bar order to strike a respondent out of the petition, on payment to him of his costs up to the time of the notice, but without prejudice to the petitioner having his costs at the hearing, if the court should think fit. *Id.*

Form of side-bar order entered in the office without motion. *Id.*

A cause petition had been filed by A, the owner of certain lands, against B, his agent, praying an account of the monies received by him. B then brought an action at law against A for bills and monies handed to him, and for salary and receivers' fees; but it appearing that these matters were all a part of the same transaction, the petitioner was allowed to amend his petition, setting out these facts and praying an injunction to stay the proceedings at law, and the petitioner giving a consent for judgment in the action, an injunction was granted to stay the proceedings in this action till the hearing of the cause petition. *White v. McCarthy*, 7 Ir. Jur. 353, R.

Of proceedings at law.—A motion to amend a *postea* must be made to the judge by whom the case has been tried; to amend the judgment in accordance therewith to the court of which it is a judgment; and to amend the transcript, where it is before a Court of Error, to the Court of Error. *Anon.*, 3 Ir. C. L. R. 119.

With respect to the amending of writ of summons, see *Stephens v. O'Beirne*, 3 Ir. C. L. R. 66; s. c., 5 Ir. Jur. 223, E.

As to amending judgment, see *Wilcox v. Lowe*, 3 Ir. C. L. R. 470; s. c., 6 Ir. Jur. 101, E.

Where the defendant had put upon the file a defence calculated to embarrass the plaintiff, and applied for leave to amend, the court required an affidavit of merits. *Bishop v. Wigram*, 7 Ir. Jur. 22, E.

The court will give leave to amend the copy filed of the summons and plaint, by inserting the name of the attorney. *Palliser v. Furlong*, 7 Ir. Jur. 32, E.

Terms on which variance between original writ and copy will be amended. *Barrett v. Wilson*, 7 Ir. Jur. 39, Q. B.

The court will confirm the amendment of the *postea* by the judge who has tried the case. *Guinan v. The Hope Insurance Company*, 7 Ir. Jur. 119, E.

Where a defence was irregular for want of an indorsement of particulars of payment, and after service of a notice of motion to set aside the same,

a notice in reply offering to amend, with an undertaking "to pay all costs properly and necessarily incurred in and about the service of said notice," is not sufficient to exonerate the defendant from the further costs of the application, but he is bound to offer to pay all costs incurred, up to that time, by reason of his mistake. *Keating v. Johnson*, 7 Ir. Jur. 148, Q. B.

The court will give liberty to amend the record of the judgment on consent, if it appear that there are no judgments against the defendant subsequent to the one sought to be amended. *Elliott v. Elliott*, 7 Ir. Jur. 168, E.

In an action brought to recover £28 1s., the defendant pleaded as to £23 4s. 10d. a plea of tender accompanied with the usual lodgment in court, and as to the residue a denial of the cause of action. A verdict was found for the defendant upon the latter issue, and for the plaintiff upon the issue joined upon the plea of tender, but without assessing damages. Judgment having been marked for the defendant, it was ordered by the court, on a motion under Rule 200, that the judgment should be set aside, and the *postea* amended by inserting nominal damages, and that it should thereon be delivered to the plaintiff in order that he might mark judgment thereon, and so become entitled to the general cause of action. *Lynch v. The Guardians of the Poor of Colbridge Union*, 7 Ir. Jur. 253, Q. B.

In an action for work and labour, and materials provided therefor, several defences were pleaded, and leave being given to the plaintiffs to plead and demur, replications were filed to the fourth and seventh defences. To these replications demurrers were taken; the demurrer-books were deposited in the office of the Clerk of the Rules in due course, pursuant to the provisions of the 50th of the General Orders—11th January, 1854. Subsequently, when the arguments on the demurrer were about being opened, it was discovered that the books were defective, and the court, being of opinion that they had full power to make the amendment sought, notwithstanding the 50th Rule, granted an application to amend the demurrer-books by introducing therein such portions of the pleadings as had been, through inadvertence, omitted relative to the subject-matter to be argued, and which it was necessary should be transcribed, as including the seventh defence, and the replication, and the demurrer thereto. The applicant was ordered to pay the costs of the present motion, and of the previous day, when the demurrer was on for argument, because it was through his negligence the error had arisen. *Boylan v. The Dublin and Belfast Railway Company*, 7 Ir. Jur. 392, E.

ANNUITY, See CHARITABLE BEQUEST. PRIORITY.

A, tenant for life without a leasing power, had made a lease in 1832 to F for three lives or 31 years, G, who was the sister of F and the petitioner in the suit, being one of the *cestui que vies*. F left the country in 1834, and had not since been heard of up to the commencement of this suit, and

G entered into possession of the demised premises. The rent having fallen into arrear, an ejectment was brought by A, but subsequently an arrangement was entered into between A and G that the latter should pay the rent in arrear and give up possession, and that she should receive an annuity for life to the amount of the profit rent in the premises. There was no written agreement produced, except letters from A, and B, his son, to G, relative to the payment of the annuity. Upon the death of A, B took possession as his heir-at-law, being also his personal representative, and he having refused to continue the payment of the annuity, upon the ground that A had no power to create such a charge beyond his own life, G filed a petition praying for an order that B should pay what was due on account of the annuity, and for a decree that the annuity was an equitable charge upon the lands demised, and for the appointment of a receiver, and that the annuity should be payable out of the assets of A. Held, that G was entitled to a personal annuity for her life, and that the assets of A were liable thereto. *Gibbon v. Lord Cloncurry*, 7 Ir. Jur. 171, C.

Held also, that the real estate was not liable to the charge. *Ib.*

Held also, that the petition was not bad for multifariousness or misjoinder. *Ib.*

ANSWERING AFFIDAVIT, *See PRACTICE.*

ANTICIPATION, *See MARRIED WOMAN.*

APPEAL.

From decision of judge sitting in chamber to full court.—*See COSTS. PRACTICE.*

From Master in Chancery to Master of the Rolls.—*See PRACTICE.*

Civil Bill.—*See CIVIL BILL.*

Poor law.—*See POOR LAW.*

To House of Lords.—*See HOUSE OF LORDS.*

Registry.—*See REGISTRY APPEAL.*

In revenue cases.—*See CROWN PRACTICE.*

APPOINTMENT, *See POWER.*

The rule, that where a general power of appointment is exercised in favour of a volunteer, he is a trustee for the creditors of the appointee, holds where the power is to be exercised by will only. *Edie v. Babington*, 3 Ir. Chan. R. 568, R.

A power is general, though there be a restriction against exercising it in favour of one person. *Ib.*

A marriage settlement recited an intention to secure a jointure for the wife; and the property (which was the husband's) was vested in trustees to secure same, and subject thereto upon such uses and for such persons as the husband should appoint by deed or will, and in default thereof for the children of the marriage, share and share alike. Held, that the power was a general one and not restricted

to children of the marriage by the subsequent limitation in their favour. *Lanauze v. Malone*, 3 Ir. Chan. R. 364, C.

The settlor, by his will referred to the settlement, and confirmed the jointure and bequeathed the lands *nomination*, and all his other property, to trustees for the benefit (in the events that happened) of his only daughter (who afterwards died under age, &c.) with remainders over, but he did not refer to the power. Held, that the power was well executed by the will in favour of the first remainderman. *Ib.*

The statute, as to illusory appointments (1 W. 4, c. 46,) made the appointment of a nominal or illusory share, which was a valid appointment at law, valid in equity, but it did not make that which was an invalid appointment both at law and in equity, because some of the objects of the power were excluded valid in equity. *Mitchin v. Minchin*, 3 Ir. Chan. R. 167, R.

An appointment, under a power which does not warrant the exclusion of any of the objects of it, to some of same, and if they should die under age and without issue to the others, is invalid. *Ib.*

A power to appoint to and amongst children, in such shares and proportions, or to appoint a sum "to be divided to and amongst children in such shares," &c., as the donee of the power shall appoint does not authorize the exclusion of any of the children. *Ib.*

A fund was, by a marriage settlement, directed to be divided among children as the husband and wife, or survivor of them, should, by any deed or writing or by his or her last will and testament limit and appoint. The wife made an appointment by her will, which was written by the husband himself, and proved by him after her death. Held, that the will was inoperative either as a joint appointment or as an appointment by the survivor. *Ib.*

A father having a power of appointment over property, consisting of money and land, in favour of his two children A and B, by deed poll reciting, that £1000 had been paid to A as a marriage portion out of the trust fund, and that it was intended as her share of the trust fund and a satisfaction of her claim thereon, appointed and declared that the said sum of £1000, part of said trust fund, should be the full share of A; and he appointed the remainder of the property to B. By a deed executed five days afterwards, reciting a mortgage by the father, of property not the subject of the power to secure a portion of the trust fund lent to him; and that the father was indebted in another sum of £200, and that he had agreed to convey his equity of redemption; in consideration of B, the son, securing an annuity to his mother and charging the equity of redemption with a debt of £200, the father conveyed the equity of redemption to B, and B charged it, and the trust property which had been appointed to him, with an annuity for his mother and with the debt of £200. Held, in the absence of evidence of the value of the equity of redemption, that the appointment could not be impeached by A, as against a purchaser without notice from B. *Mills v. Spear*, 3 Ir. Chan. R. 304, C.

An estate was settled upon trust for the separate use of a married woman, "or for such other person or persons as she shall, by any writing under her hand, direct or appoint." Her husband, having incurred debts, and borrowed the sum of £500, gave his bond and warrant of attorney for the penal sum of £1000, conditioned for the payment of £500 and interest, which bond was also signed by his wife, and the latter gave to her husband's creditor a guarantee in the following words:—"My dear Sir, You hold a bond, dated August, 1841, for £500 sterling, signed by my husband, T. K. Hannington, and myself. I hold myself accountable for the payment of this bond, with interest at 6 per centum, against the lands of, &c., and should Mr. Hannington die, or should I die, my son, James C. Hannington, whom I have made my heir, shall hold himself accountable to you for the amount of the bond of £500, and cause you to be paid, retaining you, or, in the event of your death, your son, J. C. Wilcocks, as agent to the lands of, &c., until said bond be discharged." Held, to be a valid declaration of trust sufficient to charge the separate estate. *Wilcocks v. Hannington*, 7 Ir. Jur. 281, C.

APPORTIONMENT.

Lands were devised in 1805, prior to the passing of the 4 & 5 Wm. 4, c. 22, for a term of lives and years still subsisting, and in 1835, after said Act passed, the reversion in fee expectant on said leases was settled upon A for life, remainder to B in tail. After the death of A in 1853, in the middle of a current half year, his executor claimed from B an apportionment thereof pursuant to the 4 & 5 W. 4, c. 22, s. 2. Held, that inasmuch as the lease was prior to the passing of the Act, the case was not provided for, and no apportionment could take place. *Stuart v. Henkey*, 7 Ir. Jur. 254, Q. B.

A portion of the above lands were set by A to tenants from year to year. B permitted them to continue in possession, and received the current half-year's rent. Held, that inasmuch as the several tenancies from year to year had expired with the determination of A's life estate, the representatives of A would have been entitled to maintain an action pursuant to the 23 & 24 Geo. 3, c. 46, (Ir.) to an apportioned rent for the broken gale, and might recover the same as against B for money had and received to his use. *Ib.*

APPRENTICE, *See* ATTORNEY.

APPROPRIATION, *See* LEGACY.

ARBITRATION, *See* AWARD. PRACTICE.

ARREST.

Privilege from.—A magistrate attending Petty Sessions in the discharge of his duty is privileged from arrest. *Clendinning v. Browne*, 3 Ir. C. L. R. 115; s. c. 6 Ir. Jur. 143, E.

A party coming to the Petty Sessions Court, in pursuance of his recognizance to answer a criminal

charge is privileged from arrest. *Savage v. Kelly*, 7 Ir. Jur. 42, C. P.

Under writ of ne exeat regno.—A transferred and handed over to B, her attorney, certain shares and money, for the purpose (as he afterwards alleged,) of assisting in the compromise of a suit. B, on being required to return them, refused to do so. A then filed a cause petition against B, and, apprehending that he would abscond, obtained a writ of *ne exeat regno* against him. Before the writ could be executed B absconded, whereupon A proceeded against him criminally, and procured a magistrate's warrant, under which he was arrested in England, and brought back to Ireland, where the writ of *ne exeat* was put in force. A afterwards abandoned the prosecution against B, who was acquitted of the criminal charge. B now moved that he might be discharged from custody under the writ of *ne exeat*, alleging that this prosecution was a mere contrivance to bring him within the jurisdiction of this court, and not intended as a *bona fide* proceeding. Held, that under all the circumstances of the case, the abandonment of the prosecution did not necessarily prove it to have been originally merely colourable or fraudulent, and that if this prosecution were not merely a colourable proceeding, the detention of B under the writ of *ne exeat regno* was not irregular, and would not be interfered with, *Kelly v. Birch*, 7 Ir. Jur. 73; s. c. 3 Ir. Chan. R. 466, C.

Under fiat to hold to bail.—*See* MESNE PROCESS.

Under commitment of Insolvent Court.—*See* INSOLVENT COURT.

ASSETS, *See* EXECUTOR.

A fund was bequeathed in trust for the separate use of A for life, and that she should be at liberty to dispose of it by her last will and testament, provided the power should not be exercised in favour of B. A having survived her husband made a will appointing the fund, Held, that the appointees were trustees for the creditors of A and the fund assets for payment of his debts. *Edie v. Babington*, 3 Ir. Chan. R. 645, R.

ASSIGNEE, *See* BANKRUPT. JUDGMENT.
SCIRE FACIAS. SUGGESTION.

ASSIGNMENT, *See* EVIDENCE. JUDGMENT.
PLEADING. PRIORITY.

ASSISTANT BARRISTER, *See* CRIMINAL
LAW.

ATTACHMENT, *See* ATTORNEY. COSTS.
PRACTICE.

For contempt of court.—*See* O'Donnell v. O'Donnell, 3 Ir. C. L. R. 29; s. c. 5 Ir. Jur. 107, Q. B.

ATTORNEY AND SOLICITOR, *See*
ARREST. CONTRACT. COSTS.

S K obtained probate of the will of E K. The

next of kin of E K appealed from the sentence of the Prerogative Court, and the Court of Delegates reversed that sentence. In contemplation of such reversal, S K had transferred a considerable fund, alleged to be a portion of the assets of E K, to B in order to retain the dominion over it if administration were granted to her opponent. The sentence of the Delegates was ultimately reversed under a Commission of Review, and S K called on B to refund the property; B not having complied S K filed a cause petition, on which an order in the nature of a decree *pro confesso* was made against him. B was, by a subsequent order, permitted to file answering affidavits upon the terms of not relying on any defence save that the said property was a gift to him. Held, that if there had been any illegality in the original transaction, it could not, in that position of the cause, impede the petitioner's right to recover, even though appearing in her own case. *Kelly v. Birch*, 3 Ir. Chan. R. 478, C.

Semble, that B being an attorney, and having suggested the arrangement, without having stated to S K that it would be impossible to compel him to refund, would not, under any circumstances, have been permitted to rely on the illegality of the transaction as a defence to S K's suit. *Ib.*

Observations upon the inconvenience of appointing the same professional person to act for both borrower and lender of money. *Waring v. Waring*, 3 Ir. Chan. R. 397, C.

An attorney retained for the conducting of a Chancery suit, and accepting such retainer, thereby enters into a specific contract to carry on the proceedings, and cannot, without due notice, and before the suit is terminated, rescind that contract and sue on a *quantum meruit*. *Coppinger v. Synnott*, 3 Ir. C. L. R. 563, Q. B.

With respect to the admission under special circumstances of parties who have not served a regular apprenticeship, see *In re McNally*, 3 Ir. C. L. R. 518, 576; s. c. 6 Ir. Jur. 63, 342, E.

An attorney, being the assignee of a bankrupt, cannot enter satisfaction on a judgment without a warrant of attorney. *Hodder v. Kift*, 3 Ir. C. L. R. 22, Q. B.

Admission of attorney under special circumstances who had not completed the full term of his apprenticeship. *In re Hyland*, 7 Ir. Jur. 127, C. P.

In order to obtain the benefit of the provisions of the 1 & 2 Geo. 4, cap. 48, persons who seek to be admitted to practise as attorneys after a service of three years only, in consequence of being Graduates of one of the Universities, must have completed their undergraduate course within six years from the date of their matriculation, and have taken that degree previous to being bound apprentices, the intention of the Legislature being to secure the undivided attention of clerks to the acquisition of the knowledge of their profession during the term of apprenticeship. *In re Foot*, 7 Ir. Jur. 289, E.

The courts require the existence of very special circumstances to induce them to relax the strict provisions of the Acts of Parliament regulating the admission of attorneys. *Ib.*

Where a solicitor, without using due precaution, assisted his client in drawing out of funds in court

the amount of an incumbrance, to which another party subsequently proved to have been entitled; Held, that although no fraud or collusion could be imputed to him, he was personally liable to replace same. *Keogh's Estate*, 7 Ir. Jur. 3, P. C.

A Dublin attorney, residing in the country, and seldom coming to town, employed a nonprofessional agent to transact his business, with instructions that whenever a plain and simple case came into his hands he might commence proceedings and sue out writs of summons, without communicating with his principal, and also that he should procure for him all the business he could. It did not appear that the agent had received instructions to inform his employer what was done in the conduct of such suits as might be commenced without the knowledge of the latter. A conditional order for an attachment against the attorney and agent was made absolute, upon the ground that such a practice was a violation of the provisions of 13 & 14 Geo. 3, c. 23. *Wisdom v. Kelly*, 7 Ir. Jur. 6, E.

In an action for oral slander a compromise was entered into between the parties, but before the sum agreed upon had been paid over, the plaintiff's attorney having been informed of the intended settlement of the action, warned the plaintiff not to settle the demand without his intervention, but the plaintiff directed him to proceed no further in the action as a compromise was in progress, and the sum of £10 as damages, and £3 as costs, had been offered by the defendant. The plaintiff's attorney objected to the amount of costs, stating that he would abide by the taxation, and proceeded with the action, and served a cautionary notice upon the defendant not to proceed in the compromise without paying him the costs due. The plaintiff then entered a rule to change his attorney, and the sums of £10, and £3 costs, were subsequently paid to the plaintiff. Upon an application by the plaintiff's attorney that the defendant should pay him the amount of taxed costs: the court (upon consideration of the peculiar circumstances of the case,) ordered that the applicant should be paid the sum of £5 by the defendant. *Grace v. Lewis*, 7 Ir. Jur. 78, E.

Semble, where the plaintiff and defendant fix upon a certain sum to be paid by the latter as a compromise of the suit, and the plaintiff's attorney serves the defendant with a cautionary notice not to pay over that sum to the plaintiff until his costs be paid, the plaintiff's attorney has, in such cases (as well as where the damages are ascertained by verdict or award) a lien for his costs. *Ib.*

A solicitor bidding at a sale in the Incumbered Estates Court, and signing his name in the book "in trust," without disclosing the name of his *cestui que trust*, under the circumstances of this case held personally liable for the deficiency which arose on a resale of the same lands. *John Bindon Scott's Estate*, 7 Ir. Jur. 239, I. E. C.

AWARD, See CONTRACT. PRACTICE.

BANKERS' ACTS.

The Crown is not bound by the Bankers' Acts—33 Geo. 2, c. 14, (Ir.) and 40 Geo. 3, c. 22, (Ir.);

and there is no distinction in this respect between a Crown debt proper and one upon foot of a receiver's recognizance, which is executed for the benefit of the subject, and is in reality a security between private parties. *R. v. Guinness*, 3 Ir. Chan. R. 211, C.

BANKRUPT.

In order to constitute a fraudulent preference, it is not sufficient that a payment or security was voluntary, and made at a time when the trader was in insolvent circumstances. It is necessary to show that it was made in contemplation of bankruptcy. *In re Ryan*, 3 Ir. Chan. R. 38.

After a judgment debtor has become bankrupt, a receiver cannot be appointed on petition of the judgment creditor, though cause is shown only by a puisne mortgagee in possession. *Ryan v. Lefroy*, 3 Ir. Chan. R. 351, C.

Rights of assignee of a bankrupt shareholder as against a railway company in respect of shares upon which calls had been made prior to and subsequent to the bankruptcy. See *Turner v. The Dublin and Belfast Junction Railway Company*, 3 Ir. Chan. R. 526; s. c., 6 Ir. Jur. 225, C.

Rights of assignees of a bankrupt as against execution creditor, where the act of bankruptcy was committed after the seizure of the goods but before sale, and the sale was completed before the issuing of the commission, see *Gill v. Wilson*, 3 I. C. L. R. 544; s. c. 6 Ir. Jur. 132, Q. B.

A commission of bankruptcy will be renewed though after the lapse of upwards of thirty years, no proceedings having been taken in the meantime, the bankrupt also being dead for several years. *In re Doherty*, 7 Ir. Jur. 303, C.

A flax-spinner, holding a mill and premises under a lease for lives renewable for ever, had mortgaged the entire mill and machinery to a banking company. Portions of the machinery consisted of boilers embedded in mason-work, and of a steam-engine; the latter was attached to the boilers by pipes, but could be separated from them by loosening screws. It was also attached to a platform of stone-work (upon which it rested) by means of bolts passing through apertures in the stone-work, and secured below by pins, and also connected with the engine; but the engine could be detached from the stone-work by removing the pins and withdrawing the belts, and without disturbing the mason-work. The machinery also included shafting, gearing, water-pipes, (called gas-fittings,) and several other articles. In the year 1850 the above mortgage was effected, but the mortgagor still continued to work the mill and use the machinery, and in 1854 he became a bankrupt. The mortgagees claimed the machinery by virtue of their mortgage, and the bankrupt's assignees also claimed it upon the ground that it passed to them under the "reputed ownership" clause of the Bankrupt Act, 6 W. 4, c. 14, (s. 86.) Held, that the boilers, steam-engine, shaftings, gearings, and gas-fittings, passed to the mortgagees, and did not vest in the bankrupt's assignee; but that the remaining moveable machinery of the mill passed to the assignee. *In re McKibbin*, 7 Ir. Jur. 342, C.

BARRISTER, See ASSISTANT BARRISTER.
REVISING BARRISTER.

BENEFICE, See ECCLESIASTICAL LAW.
SEQUESTRATION.

With respect to rights of the personal representatives of deceased incumbent against his successor, under the Ecclesiastical Building Acts, see *Curr v. Harpur*, 3 I. C. L. R. 258; s. c. 5 Ir. Jur. 261, C. P.

BILL OF EXCEPTIONS, See PRACTICE.

BILL OF EXCHANGE, See EVIDENCE.
PROMISSORY NOTE.

BILL OF PARTICULARS, See PRACTICE.

BOND, See SUGGESTION OF BREACHES. TRUST.

A father, on the marriage of one of his daughters, passed a bond to A and B, conditioned for the payment of £2000, and was a party to the settlement, whereby the sum secured by the bond was limited upon the trusts therein contained. The father by his will directed his debts and legacies to be paid, and charged same upon his real estate in aid of his personalty, and devised the lands of D to the said A, and appointed H and two others his executors; the said A received sufficient assets for the payment of said bond debt, but did not in fact retain or pay same. The lands devised to the said A were sold in the Incumbered Estates Court. Held, that, under the above state of facts, the said bond debt was payable out of the proceeds of the said sale. *Carew's Estate*, 7 Ir. Jur. 1, P. C.

Richards v. Molony overruled. *Ib.*

BREACHES, See SUGGESTION OF BREACHES.

BURGESS, See REGISTRY APPEAL.

CALLS, See RAILWAY COMPANY.

CANAL COMPANY.

As to leasing powers of the proprietors of the Grand Canal Company, see *McDonnell v. The Grand Canal Company*, 3 Ir. Chan. R. 578; s. c. 5 Ir. Jur. 197, C.

CAPIAS AD SATISFACIENDUM, See
EXECUTION.

CARRIER, See LIMITATIONS, (STATUTE OF.)

CERTIORARI, See CROWN PRACTICE.

CHANCERY REGULATION ACT, See
PRACTICE.

CHARGE, *See* DEED. TRUST.

By an indenture of 1799 A and B, in order to make provision for C and her issue, granted certain lands to D, as trustee for 500 years, in trust among others to raise £6,000 to pay off incumbrances, then for A, his executors and administrators, for his own use. Part of the £6,000 was applied to pay off certain mortgages, and the residue, amounting to £1,846 3s. 1d., became the property of A, who died in 1835. Held, that the legal personal representatives of A were entitled to interest on the £1,846 3s. 1d. from 1835, notwithstanding the Statute of Limitations. *Wyse v. Gore*, 7 Ir. Jur. 241.

By deed bearing date July, 1823, certain lands were conveyed to trustees, subject to a power enabling one of the parties to borrow or take up at interest the sum of £100,000 on the security of these lands, and to charge all or any of the lands in question with the payment of that sum, with a proviso that the lands should stand in the hands of the trustees as a security for that sum, with power to them to raise the sum by mortgage. In the year 1830, by deed of that date, the donees of the power, in consideration and for securing the payment of the sum of £5,800 advanced by J H, assigned to the latter, and his assigns, the principal sum of £100,000, together with all lien and securities, right, title, and interest thereon, upon trust to recover payment of that sum, and after retaining the sum of £5,800, or so much as should be due, together with all interest thereon, to pay over the residue. This deed contained a clause of redemption upon payment of the original sum of £5,800, with interest. Held, that interest upon the sum of £5,800 was payable from the date of the deed of 1830, and was not limited to six years by the provisions of 3 & 4 Wm. 4, c. 27, s. 42. *Brand v. Greenly*, 7 Ir. Jur. 309, C.

Tithe rent.—*See* TITHES RENT CHARGE.

CHARGING ORDER, *See* DEED. PRIORITY.

A judgment had been obtained in the year 1847 by J P against S G. J P died intestate, and administration was granted to H P, who revived the judgment, and by deed of assignment in the year 1852 assigned all benefit in the said judgment to C K, and constituted the latter her attorney to receive the same. C K had obtained a charging order to attach certain funds standing in the name of the Master of the Court of Queen's Bench to the credit of the consors of the judgment, by affidavit stating the above facts, and craving for C K a charging order. Application to set aside the order so obtained, refused. *Powder v. St. George*, 7 Ir. Jur. 31, E.

A charging order will be granted on a sum of money lodged in the Incumbered Estates Court to the credit of a judgment debtor. *Browne v. Ellis*, 3 Ir. C. L. R. 106, C. P.

Where the defendant, as executrix, had recovered judgment against a third party for a sum lodged in court to the credit of the action, the court, at the instance of a creditor who had ob-

tained a judgment against the defendant as executrix, granted an order to charge that sum pursuant to the 16 & 17 Vic., cap. 113, sec. 135. *Buckley v. Devereux*, 3 Ir. C. L. R. 107, C. P.

Where the defendant, as executrix, had obtained a judgment against a third party for a sum of money lodged in court to the credit of the action, the court refused to charge that sum with the payment of a judgment recovered against the defendant personally, there being nothing to show that she had a beneficial interest in the sum lodged in court. *Butler v. Devereux*, 3 Ir. C. L. R. 108.

A recovered judgment against B is an action of libel for £350. Prior thereto the estate of A had been vested in C, the *ad interim* creditors' assignee under the Insolvent Court. C, after judgment marked and execution issued on foot of said judgment, having applied to the court for an order for the payment of said money, either into this court or the Insolvent Court, for behoof of creditors, was refused on the ground of absence of jurisdiction to make such an order, independently of any other difficulty arising from the nature of the judgment. *Dowling v. Browne*, 7 Ir. Jur. 5, Q. B.

The court will grant an order charging the interest of the defendant in a fund lodged to the credit of a cause in the Incumbered Estates Court, the affidavit showing distinctly the defendant to be entitled to the residue of the fund, after payment of prior demands, and that a large surplus will be coming to him, although the fund be not yet allocated. *Syman v. Tuthill*, 7 Ir. Jur. 286, E.

A party seeking a charging order, under the provisions of the 135th section of the Common Law Procedure Act, must satisfy the court as to the existence, nature and extent of the interest claimed by him, and specifically state the rights of the parties. *Bolton v. Byrne*, 7 Ir. Jur. 269, E.

This court will not grant an order to attach a judgment debtors' presumptive share of assets lodged in the Incumbered Estates Court. *Hatchell v. Wise*, 7 Ir. Jur. 301, C. P.

CHARITABLE BEQUEST.

Bequest of an annuity to the monks of S to provide clothing for the poor children attending their schools, Held to be valid. *Carberry v. Cox*, 3 Ir. Chan. R. 231, C.

Held also, that the bequest showed a general charitable intent, which the court would effectuate, though the school should be accidentally discontinued, or should cease to answer the very description of it in the will. *Id.*

Bequest of an annuity to the parish priest of D to provide for the expense of an organ and organist for the chapel of B, Held valid. *Id.*

A testator bequeathed an annuity to the monks of M, to be appropriated to the improvement of the chapel of M. The abbot of M, at the time of the testator's death, had died. Held, that his successor had no right to the annuity, and that there was no general charitable purpose for which a scheme should be directed. *Id.*

CHARTER PARTY, *See* CONTRACT. SHIPPING.

CHILD, *See* LEGACY. MINOR.

CHOSE IN ACTION, *See* PRIORITY.

CHURCH, *See* BENEFICE.

CIVIL BILL, *See* CRIMINAL LAW.

(Decree.) A having obtained a decree in a Civil Bill Court for the sum of £20, on foot of which £10 had been paid, brought an action in this court on the decree, for the balance. Held, per Menahan, C.J., and Ball, J., that the action was well brought, and per Torrens and Jackson, J.J., that the remedy must be pursued in the Inferior Courts, and that no action in the Superior Courts would lie. *Moffitt v. Burrows*, 7 Ir. Jur. 275, C. P.

Berkely v. Elderlin, (1 Ell. & B. 805,) and *Austen v. Mills*, (9 Exch. 288,) considered. *Ib.*

A civil bill ejectment for nonpayment of rent had been brought to recover the possession of certain premises held by the tenant under a lease for lives, one of which was subsisting at the time of the bringing of the civil bill; but the tenant was erroneously described in the process as being a tenant from year to year. The defendant was regularly served, but did not appear at the trial, and the civil bill having been verified in the ordinary way, a decree was pronounced for the plaintiff. The tenant having brought a cross ejectment in the Superior Courts, upon the ground that the proceedings below were erroneous. Held, that the error in the civil bill being of such a nature as that the Assistant Barrister might have amended the pleading, and there appearing upon the face of the proceedings below sufficient to give the Assistant Barrister jurisdiction, the decree below was a bar to the present action. *Cotton v. Earl of Kingston*, 7 Ir. Jur. 247, C. P.

The court will intend that errors of this nature have been regarded as merely technical by the court below. *Ib.*

Semble, an Assistant Barrister may amend a civil bill ejectment, where the error consists in a misdescription of the tenancy. *Ib.*

Quære, whether a cross ejectment will now lie in the Superior Courts in cases where the prior ejectment (being a civil bill,) was *coram non judice*. *Ib.*

CLERGY, *See* BENEFICE. EXECUTION.

COMMISSIONERS OF DRAINAGE.

A declaration made by the Board of Works under 5 & 6 Vic. c. 89, s. 60, as to the amount to be levied on the county or barony, is not conclusive on the county or barony; but the sum properly payable by the county or barony is to be determined on a traverse to the presentment. *Ex parte Drainage Commissioners*, 3 I. C. L. R. 140, Reserved Case.

For remedies against Commissioners of Public Works for damage occasioned by their acts as such,

see Malley v. Hornsby, 3 I. C. L. R. 381; s. c., 6 Ir. Jur. 5, E.; also *Malley v. Hornsby*, 3 Ir. Chan. R. 520; s. c., 6 Ir. Jur. 121, C.

COMMITTAL, *See* INSOLVENT COURT.

COMMON LAW PROCEDURE AMENDMENT ACT, *See* PLEADING. PRACTICE.

COMPENSATION, *See* COVENANT. RENEWABLE LEASEHOLD CONVERSION ACT.

CONDITION, *See* BOND. COVENANT. EJECTMENT.

CONDITIONAL ORDER, *See* PRACTICE.

CONFIRMATION, *See* RELEASE.

CONSENT, *See* MARRIED WOMAN.

CONSENT FOR JUDGMENT, *See* PRACTICE.

CONSIDERATION, *See* CONTRACT. INDEMNITY.

CONTEMPT, *See* ATTACHMENT. INSOLVENT COURT. PRACTICE.

CONTRACT.

A Railway Company served a notice to treat for the purchase of land, and persons in their employment, who either were or acted as if they were authorized to arrange on the price, obtained the vendor's signature to a printed form of agreement fixing the sum. Held, that the Company were bound to specifically perform this agreement, though not signed by them under their corporate seal. *Smith v. Dublin and Bray Railway Company*, 3 Ir. Chan. R. 225, C.

Semble, an award made after the date of said agreement, and under the vendor's protest, by the arbitrator, pursuant to 14 & 15 Vic. c. 70, was a nullity. *Ib.*

Semble, had the price to be paid for the land been ascertained by parol only, after the service of the notice to treat, the contract would still have been binding. *Ib.*

As to the right to recover money for which an I O U had been passed, paid provisionally under a contract for the sale of land, not enforceable under the Statute of Frauds, which had been rescinded by mutual consent, but without both parties having been restored to their original position, *see Rainford v. Eagar*, 3 I. C. L. R. 120; s. c., 6 Ir. Jur. 240, E.

An attorney retained for the conduct of a Chancery suit, and accepting such retainer, thereby enters into a contract to carry on the proceedings, and

cannot, without due notice and before the suit is terminated, rescind that contract and sue on a *quantum meruit*. *Coppinger v. Synnott*, 3 I. C. L. R. 563, Q. B.

Where a party is sued on a contract made in a foreign country, the court will presume that it is a legal contract according to the law of that country, unless the contrary be proved, and the onus of such proof lies on the party objecting to its legality. *Russell v. Kitchen*, 3 I. C. L. R. 613; s. c., 6 Ir. Jur. 218, Q. B.

The plaintiff, as assignee of a bankrupt, entrusted goods to the defendants, a Railway Company, to be forwarded to D, which the agent of the Company undertook to do on the following day; but in the meantime, being apprised of an adverse claim to the goods by a third party, refused to do so unless the plaintiff would furnish them with an indemnity. The plaintiff having agreed to this furnished the defendants with a letter, by which he agreed to indemnify them from the consequences of forwarding the goods to D, and that they should be at liberty to detain the goods until satisfaction of the plaintiff's title. Held, in an action of trover brought against the defendants to recover the goods, that the second agreement was binding on the plaintiff, it being competent for the parties, before the breach of the first, without any new consideration to have substituted another, and that the plaintiff was, therefore, bound to prove that he had, before bringing the action, satisfied the defendants as to his title to the goods. *Scott v. Midland Great Western Railway Company*, 3 Ir. C. L. R. 59, C. P.; same confirmed in error, *See* 3 Ir. C. L. R. 573; s. c. 6 Ir. Jur. 73, Ex. Cham.

An action was brought upon a contract under seal, whereby the defendant bound himself to deliver certain quantities of coal under certain terms, as to quality, condition, and price, at the places and in the quantities to be ascertained by a notice in writing to be furnished him on the part of the Board of Ordnance. One of the conditions in the contract was: that the coal offered for delivery should be inspected by a board of officers, whose decision should be final and binding on all parties; and in case they should see fit to object to the fitness of the coal, and that same should be thus rejected, it should be immediately removed by the contractor, and a proper supply forthwith delivered in lieu thereof: with a further stipulation for enabling the board to obtain a fresh supply in case of the default of the contractor, and to charge the loss to his account. The summons and plaint alleged a requisition in writing to the contractor to deliver coals at several places, and alleged in respect of each place a general non-delivery. A pleaded that he was at all times ready to deliver the several quantities required of him at the several places and times pursuant to his agreement, but that the plaintiffs refused to accept the coal so ready for delivery. He further alleged the tender of different portions on several days at Cork Barracks, and that the plaintiffs refused to accept same, and that the coal so ready for delivery, the several portions whereof were so tendered as aforesaid, was of good and unexceptionable quality, dry, and sufficiently round.

Held, on general demurrer, that the plea was no answer to the action, inasmuch as the defendant ought, according to the terms of the contract, to have tendered the coals at the particular places for a survey, the result of which was to be conclusive between the parties; and that a general allegation of readiness and willingness and of a refusal by the plaintiffs to accept, did not disclose a valid dispensation with this condition. *The Principal Officers of the Board of Ordnance v. Lewis*, 7 Ir. Jur. 17, Q. B.

An agreement had been entered into between A and B, by which the latter was to demise to the former three denominations of lands, R, S, and T, containing 400 acres, at an acreable rent of 14s. per annum, for a term of five years. B put A into possession of one of these denominations (R), but was unable to make out title to the others, and when about two years of the term had expired, B sued A for the rent due out of the lands of R, at the rate of 14s. per acre, which the latter paid. A then brought the present action against B, for having failed to fulfil his contract, as to the other lands, but averring no special damage; and the jury found damages by their verdict for the plaintiff, acquitting the defendant at the same time of fraud or negligence as regarded the title to the lands. It was proved that R was not worth 14s. per acre, per annum. Held, that a contract for the sale or demise of lands does not *per se* contain a warranty of title as to the lands contracted to be sold or demised; but that inasmuch as the plaintiff had paid a certain sum as the annual rent of that portion of the lands into possession of which he had been put, exceeding the yearly value, he was entitled to a verdict for the amount of the difference between the actual value and the amount paid by him. *Fitzgerald v. Browne*, 7 Ir. Jur. 90, E.

A contracted with B by charter party to carry from X to Y a cargo of goods, at the rate of 15s. per ton of 20 cwt., "the said charterers thereby agreeing to pay for 240 tons whether that weight should be shipped or not, the said freight to be paid in cash on right delivery of the cargo." It was alleged in the declaration that said cargo was shipped on board the vessel at X and conveyed to Y, and that A there made a right delivery of the cargo. A sued for £33 0s. 9d., which was the balance, after giving credit for a payment on account of the freight on 240 tons. The defendant, by his plea, admitted the contract as alleged; that the vessel only received on board and carried to Y 194 tons; that it could have received and carried 35 tons more, but that the captain of the said ship, acting on behalf of B, refused to receive more than 194 tons, and that the money credited by A was sufficient to satisfy the freight on 194 tons. Held, that this defence was a good answer to the action, inasmuch as the readiness and willingness of A to carry the entire 240 tons was a condition precedent to his right to recover dead freight up to that amount, and the defence showed that freight had been paid for the quantity actually carried. *Clements v. Russell*, 7 Ir. Jur. 102, Q. B.

A purchaser of lands by public auction agreed to pay the purchase money in March, 1852, and

fulfil the conditions of sale, one of which was, that the purchaser should be entitled to the rents and profits from the 1st November, 1851, and if the completion of the purchase should be delayed "from any cause whatsoever" beyond March, 1852, that he should pay interest on the purchase money from November, 1851. The vendor agreed to furnish an abstract of title within four days, but it was not sent within the specified time, and the title was not completed until January, 1854. The purchaser had, previous to March, 1852, drawn the amount of the purchase money out of the funds, and lodged it in bank to be ready for payment, but received little or no interest upon it: and, in the beginning of the latter month, he sent an agent to the vendor, offering the money, and declining to pay interest upon it after that date, but the vendor refused to receive the principal until the title should be completed, and in the latter end of the same month the purchaser wrote a letter to the vendor stating that if the abstract of title should be furnished within one week he was ready to complete the contract, provided that his right to the rents and profits should not be interfered with, and that he should not be asked for interest upon the purchase money. No direct reply was given to this letter, but negotiations were continued, and finally a petition having been filed by the vendor to compel the purchaser to complete the purchase, and pay interest upon the purchase money, Held, that the purchaser was not liable for interest upon the purchase money, the vendor having been in default. *Kellett v. Farrelly*, 7 Ir. Jur. 184, C.

Held also, that the purchaser was entitled to the rents and profits of the lands. *Ib.*

A deed had been executed by A in the year 1833, granting to B and C an annuity of £80 a-year, and the only consideration set forth upon the face of the deed was "natural love and affection;" but it appeared from the deed that the object of A was, that B and C should maintain and support the children of A, who was the only executing party to the deed. An arrangement had been made prior to the execution of the deed that C, (who was the wife of B,) should take charge of the children, and receive the annuity of £80 for doing so, and she accordingly did take them under her care and provided for them, and received the annuity for several years. In the year 1843, A executed another deed to an insurance company for valuable consideration, and an action having been brought, in which the validity of the deed of 1833 was brought in question, as against the deed of 1843, Held, that the deed of 1833 was not voluntary and fraudulent, because of the omission in it of a contract on the part of B and C to maintain the children of A, or because the deed was only executed by A, and not by B or C. *Bodkin v. Barton*, 7 Ir. Jur. 213, E.

Held also, that the jury were not obliged to confine themselves to what appeared upon the face of the deed, but were at liberty to take into consideration the facts appearing by parol evidence, in order to establish whether the deed was executed for good consideration or not. *Ib.*

A, a jointress, having been offered a sum of money by B for her jointure, accepted the offer, and

accordingly articles of agreement for the sale of it at a specified sum were prepared in duplicate, and engrossed, and one part was signed and witnessed in the ordinary way by A, and the other by B. The part signed by A was sent by her to her attorney, whom she had previously instructed to see that all necessary arrangements were made, and the part signed by B was left in the hands of his attorney. A's attorney, having discovered that B had made some misrepresentations as to the amount of his property, and apprehending that he would be unable to pay the purchase money, refused to interchange the parts of the instrument, so as to complete the contract, unless B gave him further security, which the latter refused to do, and for two months after the refusal of the other party to interchange the parts of the instrument, took no further steps towards the completion of the contract. A cause petition was then presented for the purpose of compelling A to a specific performance of the contents of the instrument, and dismissed upon the ground that under the circumstances no complete contract for the sale of her jointure had been entered into by A. *Beamish v. Vignoles*, 7 Ir. Jur. 261, C.

A being in treaty to obtain a lease of certain lands from B, the following memorandum of agreement was made with mutual consent: "31st March, 1852. Term 61 years. Rent, from the 1st of May, £75. Taxes and rates to be paid by (A), and allowed out of the first gale. Covenant to expend £300 in permanent buildings in two years. Covenant to give tenant the refusal in case of (B) selling." A entered into possession in the same year, and paid rent, and obtained receipts, but did not expend the sum of £300 in improvements upon the lands, and in the year 1854 he furnished a draft lease for approval to B, who refused to receive it, alleging that A had not entitled himself to a lease having failed to expend the sum of £300 within the specified time. A cause petition having been filed by A to obtain specific performance of the memorandum of agreement, Held, that relief could not be granted under the circumstances, the petitioner having admittedly violated an essential portion of the agreement. *Williams v. Langley*, 7 Ir. Jur. 264, C.

Where a party, in answer to an advertisement calling for tenders for supplying meal, and requiring that a bond for the due performance of the contract, if approved of, should be perfected by a certain day, sent in a proposal to supply meal, which proposal had been approved of, but no notice of such approval was given to the contractor, who subsequently withdrew his tender, and did not enter into the bond. Held, that no contract was made which bound the party making the tender. *Guardians of Navan Union v. M'Loughlin*, 7 Ir. Jur. 287, C. P.

—◆—
CONVEYANCE, *See* DEED.

—◆—
CONVICTION, *See* CRIMINAL LAW.
—◆—

CORONER.

The finding of a coroner's jury can only be quashed for defects apparent on the face of the inquisition, or for the misconduct of the coroner. An allegation, therefore, of the insufficiency of the evidence returned by the coroner to support the finding is not ground adequate to rest an application to set aside the inquisition. *In re Casey*, 3 Ir. C. L. R. 22; s. c., (*nom. Sixmile Bridge Case*), 6 Ir. Jur. 41, Q. B.

The medical officer or surgeon of an union work-house is not entitled to fee or remuneration for instituting a *post mortem* examination, pursuant to the directions of the coroner, or for attendance at an inquest held on the body of a person dying within the union work-house, it being a public institution within the meaning of the 9 & 10 Vic., c. 37, s. 32. *In re Kaye*, 7 Ir. Jur. 388, Cir. Cas.

CORPORATION, *See* EVIDENCE. RAILWAY COMPANY.COSTS, *See* ADMIRALTY. AMENDMENT. LIEN. PRACTICE. PRIORITY.

Of equity proceedings.—Trustees of real estate, upon trust to sell for the payment of charges, are entitled to the costs of the suit out of the surplus only after payment of the charges. Where the fund was deficient, the court refused their costs. *White v. Villiers*, 3 Ir. Chan. R. 125, C.

A testatrix bequeathed to trustees £20,000, in trust for the building and endowment of a college for clerical students connected with the General Assembly of Irish Presbyterians, the same to be built where the trustees should decide, and to be under such rules, &c., as they should determine, subject to the advice and direction of the assembly. The suit was for the administration of the assets of the testatrix, and to carry into execution the trusts of her will. Held, that the costs incurred by the trustees in the settlement of a scheme for the due application of the £20,000 were to be borne by that bequest, and not by the residuary fund. *Dill v. Brown*, 3 Ir. Chan. R. 127, C.

The General Assembly (who were not parties to the cause) presented a petition for leave to intervene in the office, as if they had been joined, and that their costs of doing so might be allowed to them out of the £20,000; but the order made on the petition merely provided that they should be at liberty to intervene if they thought fit, and reserved, until the final hearing, all questions as to any claim for costs by them. Under this order they proceeded before the Master. Held, (at the final hearing,) that they were not entitled to their costs as against any fund, since they were not parties to the cause so as to be liable to costs; and the order permitting them to intervene did not provide for their costs as prayed by the petition. *Id.*

Costs refused where the bill was drawn at unnecessary length. *Fitzgibbon v. Blake*, 3 Ir. Chan. R. 328, C.

The court will not decide, on the first hearing of a cause petition for an administration, that the ex-

tra costs, caused by setting it down as a general cause petition, should be borne by the petitioner. *Green v. Giles*, 3 Ir. Chan. R. 487, C.

The costs of the appointment of a receiver, or a judgment on a receiver's recognizance, under the 4 & 5 Wm. 4, cap. 55, and 9 & 4 Vic., cap. 105, are chargeable beyond the penalty of the recognizance against the receiver, and, sensibly, against his sureties, these costs not being costs at the petty bag side of the court. *Reg. v. Dillon*, 3 Ir. Chan. R. 564, R.

A receiver having neglected to lodge his balance pursuant to the Master's order, an attachment was issued against him directed to the sheriff, who made a return of *non est inventus*, and it was afterwards renewed and a similar return was made; it was then directed to the coroner who made an improper return. An attachment was then issued against the coroner, which was also renewed from time to time. On taxation the Master refused to allow the plaintiff the costs of those proceedings, which he had taken against the receiver and against the coroner. The court refused, in the first instance, to allow these costs out of the estate, as it did not appear that the receiver or his sureties were insolvent, but directed the recognizance to be put in suit and the motion to stand over. *Erskine v. Baker*, 7 Ir. Jur. 25, R.

The payment of the amount for which the attachment was issued against the receiver, would not discharge the contempt, but he would still be liable to the costs of the proceedings against him; and if he could be identified with the coroner, perhaps also for the costs of the proceedings against the coroner. *Id.*

In a suit for tithe rent-charge several of the defendants were struck out of the bill by side-bar rule on payment of their proportion, and the costs of subpoena and appearance. The bill was set down against the other eight defendants, who then entered into a consent to pay whatever costs were taxed against them, and they paid £26 on account. The general costs of the suit were taxed against them to £36 2s. 0½d. A motion was made to the Rolls in January, 1854, and an order was obtained whereby the Taxing Master was directed to review his taxation, and report what amount of costs would be properly charged against these eight remaining defendants, if the other sixty-three defendants had been charged with the proportion of the costs of the suit to which they would have been liable under the 28th section of the 1 & 2 Vic., c. 109. A report was made, and, in pursuance of it, his Honor directed the plaintiff's solicitor to refund to the eight defendants £17 6s. 8d. out of the £36 paid by them for costs, and that the plaintiff should pay to these eight defendants the costs of the motion of January, 1854, and the proceedings thereunder. Held, on appeal against the payment of costs directed by the order, that this order should be affirmed, and the appeal dismissed with costs. *Chaine v. Dungannon*, 7 Ir. Jur. 89, C.

On hearing of cause petition only two briefs for counsel are allowed, following the analogy of motions. *McDonnell v. Midland Great Western Railway Company*, 7 Ir. Jur. 98, R.

Where a petition prays an injunction, and there

has been a motion for an injunction, the solicitor, in preparing the bill of costs, should include as part of the costs of the injunction motion the brief of the petition and of all affidavits that have been filed up to the time of hearing the injunction motion, and of all documents properly used thereon, as he is entitled to them as part of the costs of this motion, irrespective of the result of the subsequent costs of the cause. *Ib.*

The Taxing Masters having certified their opinion that the respondent in a cause petition is not entitled to make out his briefs for hearing until the petition has been set down for hearing, and that if the petition is dismissed for want of prosecution under the 27th General Order of 1851, the respondent is not entitled to the costs of any briefs for hearing, on the analogy of a cause heard on a bill and answer; the Master of the Rolls declined to adopt this view, or to decide the question, considering that in the present practice in cause petitions there is nothing analogous to the passing of publication under the old system, and that there are objections to fixing the period for respondent to make out his briefs either at the time when the answering affidavits come in, or when the petition is set down for hearing, and no general order on the subject. *Ib.*

Where on a motion made in February to draw out purchase money which had been lodged in court by a public company, an order was made for that purpose, and several deeds referring to the title of the party applying were entered as read. Briefs of these deeds in full were allowed on taxation, and a motion in November to review the taxation, and amend the order by striking out the deeds, was refused. *The Poor Law Commissioners v. Fitzgerald*, 7 Ir. Jur. 110, R.

The counsel who was first retained for the motion having become unwell, a second brief and fee was allowed, as the court does not approve of the practice of counsel handing over their briefs to another to move for them. *Ib.*

The owner of certain lands by a marriage settlement granted them in trust, among others, to pay certain debts which were set out in a schedule attached thereto. The creditors, having instituted a suit, obtained a decree in Chancery, establishing their rights. From this there was an appeal to the House of Lords, which was resisted by the principal creditor only, and their Lordships differing in opinion, the decree below was affirmed, but no order was made as to the costs. It appeared also that if the appeal had succeeded, none of the schedule creditors would have obtained anything on foot of their demands. Held, that each of the creditors in the schedule to the deed should contribute ratably to the costs of resisting the appeal. *Hamilton v. Synges, Simpson v. Synges*, 7 Ir. Jur. 121, R.

The proper course for seeking the costs against the defendant is to set down the cause for hearing before the Chancellor upon the House of Lords' order. *Ib.*

An application may be made for an order to the Taxing Master here to tax House of Lords' costs. *Ib.*

Petitioner, after having set down the cause for

hearing, and when it was in the Chancellor's list of the day, applied for leave to file further affidavits. Leave was given to file them, petitioner to pay £4, costs of the motion, and this to be without prejudice to the respondent applying to the Chancellor for the costs of the day. *Martin v. Cooper*, 7 Ir. Jur. 123, R.

Where the report of the Master in a cause had found that it would be for the benefit of the estate to take proceedings against certain tenants, and the receiver had proceeded by attachment, on which a return of *non est inventus* was made by the sheriff. The receiver is entitled to his costs of such proceedings. *Kelly v. Kelly*, 7 Ir. Jur. 161, R.

Several bills of costs, including costs for business in the Incumbered Estates Court, were furnished to the client at different times, and the attorney having refused to sign an undertaking to pay the costs of taxation in case one-sixth of the costs were taken off, upon the petition for taxation, it was objected that if less than one-sixth was taken off some of the bills, the costs of the petition and taxation should be apportioned. The order for taxation was made in the usual form, directing that if the costs, when taxed, were less by one-sixth than the costs furnished, that petitioner should pay the costs of petition and taxation, and, if not less by one-sixth, then respondent should pay them. *In re Martin*, 7 Ir. Jur. 196, R.

Where a cause petition is set down for hearing by the petitioner, and he afterwards applies for liberty to file further affidavits in support of the petition, he must pay the costs of the motion, especially if he had any considerable time to file the affidavits, during which he neglected it. *Hickey v. The Earl of Meath*, 7 Ir. Jur. 212, R.

Where costs are referred for taxation, the petitioner (the client) may lodge in the office the copy of the costs furnished to him by the solicitor, and may issue a summons to tax, and the summons will be dealt with in the taxation according to the result and directions of the order. *Kelly v. Moore*, 7 Ir. Jur. 303, R.

If the solicitor lodge a copy of the costs for taxation pursuant to order, he is not allowed the costs of such copy, unless he has first served notice on the client to lodge the copy of the costs served on him, and he has refused to do so. *Ib.*

If either the client or the solicitor, after having been served with notice, refuse to attend the taxation, the Master will be directed to proceed with the taxation *ex parte*, but the Taxing Masters feel a difficulty in carrying out this rule in the absence of the necessary documents. *Ib.*

Where, after the usual order of reference to tax was made, neither party lodged the costs nor issued a summons to tax, and a motion was made for an attachment against the solicitor for thus disobeying the order of reference, the court made no rule on the motion, and let each party abide his own costs. *Ib.*

If a second receiver petition be presented under the Judgment Acts for the purpose of appointing a receiver over additional lands not comprised in the former petition, for the payment of the same judgment, the Taxing Master will be directed to tax the

costs of same, as the costs of a simple motion to appoint the receiver over the additional lands. *Minchin v. Dillon*, *Byrne v. Dillon*, 7 Ir. Jur. 329, R.

A general cause petition was filed against several respondents. The chief respondent, when about to file his affidavit, laid the draft affidavit before counsel, and with it a case for his opinion to advise proofs. Several other affidavits were subsequently filed, and the petition was afterwards heard, and dismissed, as against this respondent, with costs. The costs of this case and opinion not having been allowed by the Taxing Master on taxation between party and party, held, in accordance with the opinion of the other two Taxing Masters, but without laying down any general rule, that the respondents was here entitled to the costs of the case and opinion; but that if the petition had been dismissed for want of prosecution, that the respondent would then not be entitled to such costs; that a case for direction of proofs should be allowed for at some stage of the proceedings; that the filing of the answering affidavit by the respondent is in the nature of issue joined, and appears to be the time at which such case should be allowed. *Abbott v. Geraghty*, 7 Ir. Jur. 373, R.

As a general rule, the costs of an attendance on a third party to borrow a necessary document are not allowed; but, if expense is thereby saved, the Taxing Master may exercise his discretion in allowing such costs. *Ib.*

Of proceedings at law.—A plaintiff in a cause having obtained the costs of two interlocutory motions, each under the sum of £10, will not be allowed to consolidate the two sums, and thereby entitle him to issue a *ca. sa.*, as such would be an evasion of 11 & 12 Vic. c. 28. *Waldron v. Jones*, 3 Ir. C. L. R., 34, Q. B.

An issue having been directed by the Incumbered Estates Court, was, by the order, to be tried by a special jury, and the plaintiff having, in pursuance of 8 & 9 Vic. c. 109, obtained a writ of summons, and framed the issue accordingly, obtained in this court an order for a special jury in the usual way. At the trial, the judge not having been asked for that purpose, did not give a certificate that it was a fit case for a special jury; but some time after, on the request of plaintiff's counsel, the judge gave a certificate to that effect, which did not appear on the back of the record. Held that, under the circumstances, the taxing officer was right in allowing the costs of the special jury to the plaintiff. *Bodkin v. Leahy*, 3 Ir. C. L. R. 36, Q. B.

To an action of trespass *de bonis asportatis* the defendant pleaded the general issue and a special plea. The plaintiff replied specially to the latter, and, on demurrer to the replication, obtained judgment. No trial of the issues in fact having taken place, the court refused an application by the plaintiff that the costs of the demurrer should be taxed and set off against the costs on the issues in fact, he undertaking to permit judgment to be entered on the latter for the defendant. *Lenahan v. Fitton*, 3 Ir. C. L. R. 111, C. P.

The court will not review the taxation of its officer in a matter purely for his discretion, and where

he has transgressed against no legal principle *Thomas v. Mannix*, 3 Ir. C. L. R. 128, E.

With regard to the effect of the 14 & 15 Vic. c. 57, s. 40, upon the costs of a suit instituted whilst that provision was in force, although it was repealed before the suit terminated, see *Morgan v. Potter*, 3 Ir. C. L. R. 234; s. c. 6 Ir. Jur. 255, Q. B.

In an action commenced before the 1st of June, 1854, the defendant had obtained an order for a special jury, which was struck accordingly. The plaintiff afterwards entered a rule to discontinue. Held, that the defendant was entitled, as against the plaintiff, to the costs of the special jury. *Roducanachi v. Soderholm*, 3 Ir. C. L. R. 331; s. c. 6 Ir. Jur. 21, C. P.

A bill of costs in an action of trespass had gone before the Assistant Taxing Officer, and he had made and signed a certificate of his taxation. The defendant made an application to the court that the officer should review his taxation, which was refused (but without prejudice) upon the grounds that the matter should have been previously carried by appeal under 16 & 17 Vic. c. 55, s. 3, before the principal Taxing Master. The defendant then served notice upon the other party to appear before the principal officer, which the latter accordingly did, but under protest, on account of the certificate having been filed and execution issued in the meantime. The principal officer nevertheless (the Assistant Master having refused to review his taxation) undertook to tax the costs, and rescind the taxation of the Assistant Master; but ultimately adopted the several items as taxed by the latter. This was an application that the taxation so made should be reviewed. Held, that before an application, such as the present one, could be made for the purpose of reviewing a taxation of costs made by the Assistant Taxing Master, the question should be previously carried by appeal (under 16 & 17 Vic. c. 55, s. 3,) before the principal Taxing Master. *M'Namara v. O'Loughlen*, 7 Ir. Jur. 9, E.

Held also, that the taxation in the present case did not substantially amount to a taxation by the principal officer, so as to enable the defendant to apply to the court for a review of the taxation. *Ib.*

The principal Taxing Master does not possess original jurisdiction to cancel the taxation of the Assistant Taxing Master. *Ib.*

In certain exceptional cases, a party may appeal immediately from the taxation of the Assistant Master to the court. *Ib.*

In an action for the price of two horses, the plaintiff, in the summons and plaint, stated that the contract had been made subject to a condition that the horses in question should be submitted to the opinion of a certain veterinary surgeon, as to their soundness. The defendant pleaded that the plaintiff warranted the horses to be sound; and the following issue (amongst others) was sent down for trial: "Whether there was a general warranty by the plaintiff that the said two horses were sound, and whether they were in fact sound or unsound." The jury found that the plaintiff gave no general warranty as to the soundness of the horses, but that they were in fact unsound; and a general verdict was found for the plaintiff. Application that the

defendant should be allowed to set off the costs incurred by him in sustaining this issue against the general costs in the action, refused. *Foot v. Barker*, 7 Ir. Jur. 47, E.

In an action of ejectment for nonpayment of rent, the defendant paid money into court, under the 9th & 10th Vic. c. 111, s. 2, and afterwards had a verdict and judgment in his favour. Held, upon a motion to review taxation of costs, that the defendant was only entitled to recover against plaintiff his costs of suit from the time of the lodgment of the money in court. *Leane v. Leane*, 7 Ir. Jur. 50, Q. B.

Held also, that the practice in cases similar to the above depends solely upon the construction of section 2 of the foregoing statute, and is wholly independent of that respecting lodgments in court, after action brought in personal actions, under the 16th & 17th Vic. c. 113. *Ib.*

Where the Poor Law Commissioners had, improvidently, directed the master of a union workhouse to alter the registry of the religion of a pauper infant, under the 1 & 2 Vic. c. 56, s. 43, and upon the refusal of the Board of Guardians to allow thereof, had obtained a conditional order for a writ of *mandamus* to the said Board, for the purpose of enforcing the foregoing instructions, and upon subsequently discovering their mistake, admitted the cause shown against the rule to be good. Held, the defendants were, under the circumstances, entitled to costs. *Reg. v. The Guardians of the Uxlingford Union*, 7 Ir. Jur. 147, Q. B.

Where but one defendant takes defence in an ejectment for non-payment of rent, and upon the motion of the plaintiff that defence is set aside, and leave is obtained to mark judgment as for want of a defence, the plaintiff cannot recover the costs of the action against that defendant without bringing an action for mesne rates. *Johnson v. Garde*, 7 Ir. Jur. 239, C. P.

In an action for assault and battery the plea only covered the assault, and upon the issue raised thereby a verdict of one farthing damages was given, and no application was made to the judge for a certificate. No judgment had been marked in respect of the portion of the plaint left uncovered. A motion that the full costs should be taxed, on the ground that the battery was not denied in the plea, refused with costs. *Doyle v. Rainsford*, 7 Ir. Jur. 246, C. P.

Where a defendant lodges money in court, it is to be considered as money recovered in the action, and the plaintiff will get his full costs, if the money so lodged and the verdict together make up £20. *Hughes v. Guinness*, 7 Ir. Jur. 298, C. P.

Where money has been lodged, the judgment should be entered up for the amount of the verdict alone, if any, exclusive of the money lodged. *Ib.*

Where some of the issues carrying a verdict are found for the plaintiff, and some for the defendant, the defendant is entitled only to the extra costs caused by the issues found in his favour, and not to a share of the general costs of the action. *Ib.*

Security for.]—See PRACTICE.

COUNSEL, See COSTS.

COVENANT, See DAMAGES. LANDLORD AND TENANT. LEASE.

A lease for lives renewable for ever was sought to be converted into a fee-farm grant under the provisions of 12 & 13 Vic. c. 105. The original lease contained several covenants in gross, such as doing service at a certain manor court, bringing corn to certain mills, and upholding and preserving the trees upon the premises; but, by endorsement upon the lease and all its renewals, the property in the timber on the estate was vested in the petitioner. An order having been made by the Master of the Rolls declaring the petitioner entitled to a fee-farm grant, and directing a reference to the Master to ascertain the amount of compensation to which the respondent was entitled under the 5th section of the above Act, for the loss he would sustain in the marketable value of the land, arising from the conversion of the lease into a fee farm grant, Held, (reversing the order of the Master of the Rolls so far as it related to the matter of compensation,) that the respondent, under the circumstances, was not entitled to compensation for the loss of the reversion. *Thackwell v. Jenkins*, 7 Ir. Jur. 61, C.

Mines, minerals, and royalties are not divested out of the reversioner by the grant of a fee-farm estate under this Act. *Ib.*

In re Lawless, (7 Ir. Jur. 13,) approved of. *Ib.*

A granted a lease to B with a covenant for quiet enjoyment in the usual form, namely, that B, duly paying the reserved rent and performing the covenants, &c., should and might peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, with the appurtenances, during the aforesaid term, without the let, suit, trouble, hindrance, interruption, or disturbance of A, his executors, &c., or any other person or persons lawfully claiming or deriving, or to lawfully claim or derive by, from, or under him, them, or any of them. The premises were afterwards evicted for non-payment of rent, due by A to his head landlord. B having sued A's representatives in an action for breach of the above covenant, Held, first, that its terms did not extend to such a disturbance as eviction, although occasioned by the default of A; secondly, that whatever covenant might have been otherwise implied from the term "demise" in the granting part of the lease, such an implied covenant could not co-exist with the express covenant contained in the lease. *Murray v. Cummins*, 7 Ir. Jur. 286, Q. B.

Semble, that in any case the plaintiff was precluded from relying on such implied covenant in the present action, as he had declared upon the express one. *Ib.*

A lease contained a covenant by the lessee to pay rent, "with sixpence in the pound receiver's fees." An action was brought upon this covenant, alleging for breach thereof the nonpayment of £32 6s. 2d., on account of the receiver's fees, reserved and made payable by the lessee in question. The declaration contained no averment that the rent had been paid or otherwise satisfied. Judgment having

been given upon the demurrer for the defendant, Held, affirming the judgment of the court below, that the reservation of the rent and receiver's fees was indivisible, and that a separate action was not maintainable for the receiver's fees. *Blount (in error) v. Evans*, 7 Ir. Jur. 314, Ex. Cham.

By indenture of lease made in the year 1799 between F and D, after reciting that F had, by a renewal of a former lease for lives renewable for ever, made under a covenant for perpetual renewal, become entitled to the premises in question; it was witnessed that F demised to D the said premises, to have and to hold the same to him, his executors, administrators, and assigns, from, &c., for the lives therein named, "and for and during such other life or lives as shall hereafter be added to the original lease," reserving a certain yearly rent; containing covenants for quiet enjoyment and further assurance, but not for perpetual renewal, nor reserving a renewal fine. In May, 1852, V, on whom the interest of F had devolved, served notice upon D to renew his lease, informing him that two of the lives named in the lease of 1799 were dead, (not naming them,) and calling upon him to nominate two other lives in their place, and informing him that in case he neglected to do so V would decline to renew the lease; and in July, 1853, D furnished to V a draft fee-farm grant of the premises for his approval, which the latter refused, alleging that D's right to renewal had been lost through laches. The original lease had been renewed in 1828. A petition having been filed by D for a declaration of his right to a renewal of the lease of 1799 for the lives to be named in each renewal of the original lease, Held, that, independently of the question of laches, he was not entitled to a perpetual renewal of the lease of 1799. *Dempsey v. Vincent*, 7 Ir. Jur. 350, C.

Held also, that he was entitled to have the lives named in the renewal of the original lease granted in the year 1828, inserted in the lease of 1799. *Ib.*

A tenant holding under the court, by lease, with the usual covenant to cultivate in a husbandlike manner and not to commit waste, on a motion by the receiver a conditional order had been granted for an injunction to restrain him from sowing a large quantity of flax, and from breaking up grass land. On the motion to show cause, there being contradictory affidavits as to advantage or disadvantage of the mode of tillage, the motion was directed to stand over, with liberty to the receiver to bring an action at law on the covenant, serving notice on the parties interested in the estate, the tenant in the meantime to have liberty to go on with his tillage at his own peril. *Savage v. O'Connor*, 7 Ir. Jur. 161, R.

A covenant to farm in a husbandlike manner means according to good husbandry in that part of the country, and though the court has a right to interfere by injunction, it will not do so in a doubtful case. *Ib.*

CRIMINAL LAW.

With respect to the non-application of the 3 & 4 W. 4, c. 91, to Term Grand Juries in the Queen's

Bench, see *Reg. v. Duffy*, 3 I. C. L. R. 88; s. c. 5 Ir. Jur. 229, Q. B.

As to what constitutes a malicious publication, see *Reg. v. Wallace*, 3 I. C. L. R. 38; s. c., 5 Ir. Jur. 179, Q. B.

With regard to the separation of the jury in a misdemeanour case without assent or order of the court, and during the trial, not amounting to a mistrial, see *Reg. v. Wallace*, 3 I. C. L. R. 38; s. c., 6 Ir. Jur. 179, Q. B.

An indictment charged the prisoners with stealing 40 lbs. weight of mutton, the property of some person unknown; the evidence was that one of the prisoners, in answer to the constable if he had any mutton in his house, replied, "that his house was seldom without mutton, to his grief;" that mutton was found in a box in the room where the prisoner was, and in the adjoining cow-house two others of the prisoners were found lying behind one of the cows; and that, in examining the wall of the cow-house, a cavity was discovered where 30 lbs. of mutton were found. Evidence was given that sheep-stealing was common in the neighbourhood. Held, that this evidence was sufficient to warrant the judge in sending the case to the jury to say whether the mutton so found had been stolen by the prisoners, (Pigot, C.B., *dissentiente*.) *Reg. v. Redmond*, 3 I. C. L. R. 494, Crim. Ap.

Held also, that though there was no evidence of identification of the mutton, yet the indictment describing it as belonging to persons unknown was sufficient, (Pigot, C.B., *dissentiente*.) *Ib.*

As to the jurisdiction of an Assistant Barrister to try an indictment for perjury committed before himself, at the civil side of his court, the form of said indictment, and his right to award the expenses of the prosecution, see *Reg. v. Lawler*, 3 I. C. L. R. 507; s. c., 5 Ir. Jur. 340, Crim. Ap.

A was indicted for uttering certain promissory notes with intent to defraud. The prisoner had been pressed for security by a firm to whom he was indebted, and undertook to obtain for their agent B the notes of his mother-in-law, C W, whose Christian name B did not know. A subsequently gave to B two notes, signed by himself and by his wife by the name of A W. (which had been her maiden name,) intimating to B that the signature "A W" was that of his mother-in-law. It subsequently appeared that neither A nor his wife had been authorized by C W to sign the note on her behalf. A having been convicted of the above offence, Held, that the conviction was right. *Reg. v. Mahony*, 7 Ir. Jur. 33, Crim. Ap.

CROWN.

The Crown is not bound by the Bankers' Acts, (33 Geo. 2, c. 14, [Ir.] and 40 Geo. 3, c. 22, [Ir.]) and there is no distinction in this respect between a Crown debt proper and one upon foot of a receiver's recognizance, which is executed for the benefit of the subject, and is in reality a security between private parties. *Reg. v. Guinness*, 3 Ir. Chan. R. 211, C.

CROWN PRACTICE.

In a prosecution by information before justices at the petty sessions of the borough of L, for the recovery of penalties for an alleged breach of the excise laws, the magistrates dismissed the complaint, and an appeal was taken on the part of the Crown against the adjudication, pursuant to 7 & 8 Geo. 4, c. 52, ss. 82, 83. The Recorder of L, before whom the appeal came on for hearing, refused to entertain it on account of an assumed informality in the service of notice upon the Clerk of the Peace for the meeting of the borough. A writ of *certiorari* having been sued out by the Crown, upon the fiat of the Attorney-General, to return the proceedings with the view to quash the adjudication of the Recorder and to make an order to enter continuances and hear the appeal, it did not, upon the face of the depositions as returned to the court, appear that any proof had been given or offered that notice of the appeal had been given to the defendant six days previous to the day of holding the quarter sessions. Held, that although the appeal had been rejected by the Recorder upon a different ground, the want of proof of service of such a notice, or of an averment that such evidence had been tendered, was a fatal defect in the record before the court, and prevented the propriety of the rejection of the appeal from being called in question. *Reg. v. Thompson*, 7 Ir. Jur. 124, Q. B.

Held also, that it is the practice of the court in such cases as the foregoing, where the adjudication below has been quashed on the return to a *certiorari*, to make an order upon the justices to enter continuances and proceed to hear the complaint, without a writ of *mandamus* being required. *Ib.*

The Crown has a right, in the exercise of its discretion, to change the venue it may have selected without any affidavit. *Reg. v. Kelly*, 7 Ir. Jur. 361, E.

A *certiorari* lies to remove an order made by a Justice of the Peace under the Petty Sessions Act, where the order was made without jurisdiction. *Reg. v. Campbell*, 3 I. C. L. R. 586, Q. B.

All orders made under this Act should be signed by the Justice, and should show on the face of them that he had jurisdiction to make the order. *Ib.*

With respect to the practice as to writs of *certiorari* to return the charge, information, and recognizance on the application of a person arrested and bound over to keep the peace, and the affidavits upon which the same have been grounded, and the entitling of the proceedings, see *Reg. v. O'Brennan*, 3 I. C. L. R. 589; s. c. 6 Ir. Jur. 211, Q. B.

With respect to the right to inquire into the validity of an election of Poor Law Guardians, by *quo warranto*, having been ousted by 6 & 7 Vic. c. 92, s. 23, see *Reg. v. Austin*, 3 I. C. L. R. 441; s. c. 6 Ir. Jur. 2, Q. B.

CUSTODY, See INSOLVENT COURT.

CUSTOM.

To an action of trespass for breaking and entering plaintiff's close, and carrying away the soil

therefrom, the defendants pleaded with regard to breaking and entering, &c., so much of the lands as lay between high and low water mark, that the lands were the soil and freehold of the Queen, and not of the plaintiff; that the defendants were the occupiers of land in the borough of C, in the county of C, and as such occupiers they and all previous occupiers, from time to time, whereof the memory of man was not to the contrary, had of right used to enjoy the power, liberty, privilege, and easement as often as they pleased, for the purpose of taking sand for manure, to enter into so much of said lands as lie between high and low water mark of ordinary tides, being the soil and freehold of the Queen, and to dig for and raise the soil, and carry same away for the purpose of manure, and that the supposed trespass was committed in the exercise of the supposed right. Held, on general demurrer, that the plea was bad, inasmuch as the right contended for was not merely an easement but a profit *a prendre*, and could only be claimed in the lands of another by prescription, and not by custom, according to the principle established in *Gateward's case*, (6 Rep. 53, b.) *M'Namara v. Higgins*, 7 Ir. Jur. 39, Q. B.

Held also, that, even assuming a distinction in this respect between lands vested in the Crown, *pro bono publico*, and those of the subject, a custom for the inhabitants of maritime districts to have an exclusive right to the use of the sea-shore, would be unreasonable. *Ib.*

DAMAGES, See ATTORNEY. CONTRACT. VENDOR AND PURCHASER.

With respect to the measure of damages recoverable under a covenant to pay "the full value of the interest" intended to be vested in B by a certain deed of appointment, in the event of the said deed not taking effect, see *Crommelin v. Donegal*, 3 I. C. L. R. 434; s. c. 5 Ir. Jur. 386, Q. B.

DEBT, See RESPECTIVE TITLES.

DECREE, See CIVIL BILL. PRACTICE.

DEED, See CONTRACT. MARRIAGE SETTLEMENT. PRIORITY.

No form of words is necessary to constitute the delivery of an instrument as an escrow. If the real intention of the parties be, that the instrument shall not operate at all except and until a specified condition is performed, it is an escrow. *Wood v. Knox*, 3 Ir. Chan. R. 109, C.

Thus, where the renewal of a lease was executed by the lessors on the promise and faith of immediate payment of the renewal fines, and there was no attesting witness to the execution, Held, that the renewal was delivered as an escrow. *Ib.*

The dividends of a sum of bank stock, and another sum in $3\frac{1}{4}$ per cent. stock, were, by a deed made between E S and several of his creditors, assigned to a trustee in trust to pay the dividends of the bank stock to E S for his maintenance and support until he should become a bankrupt or in-

solvent, or assign the same, or until any creditor of his should do any act or acts for the purpose of having the same applied in or towards payment of his individual debt and no longer; and as to the residue of the stock, and as to the said dividends, from and after the time when E S should become bankrupt or insolvent, or assign the same, or from and after the time when any creditor of his should proceed to attach the same for payment of his individual debt, upon certain trusts for the benefit of scheduled creditors, the deed contained a proviso that it might be cancelled or the application of the trust funds changed by the consent of the majority of the scheduled creditors and E S. A creditor of E S, who was not a party to the deed, and whose judgment was prior to it, obtained a conditional order to charge the two sums of stock. E S showed cause, relying on the deed. Held, that the showing cause was not a proceeding to attach the dividends, so as to give effect to the limitations over. *Synge v. Synge*, 3 Ir. Chan. R. 262, R.

No creditor claiming under the deed showing cause, the court made the order absolute as to the dividends of the bank stock, but allowed the cause as to the $3\frac{1}{2}$ per cent. stock, the deed being for valuable consideration. *Ib.*

A obtained judgment in 1850 against B, who was the devisee for life of certain annual proceeds and dividends of Bank Stock under a devise made in 1827. In 1853 A obtained a charging order attaching B's interest in that property towards payment of his judgment debt. By deed of 1827 between B, C (a trustee), and other parties creditors of B, (and holding securities prior to that of A,) the interest of B in the above was assigned upon trust for him until he should become bankrupt or insolvent, or should assign, or until some one of his creditors should do any act for the purpose of attaching such interest, and upon the happening of such event, then to divide the property among the creditors named in the schedule, and parties to the deed. Held, that such limitation was void. *Synge v. Synge*, 7 Ir. Jur. 270, C.

By a deed of assignment made in 1833 between A of the first part, his sons, B, C, D, and E, of the second part, and his wife F, (as trustee for D and E) of the third part, after reciting a lease of the lands in question with a covenant for perpetual renewal thereof, as being in the possession of A, and also that A being desirous of making provision for his sons B, C, D, and E, had agreed to convey his interest in the lease to them, it was witnessed, that in consideration of 10s. and other considerations therein mentioned, the said A did grant "unto the said B, C, D, and E the said lands," &c., (setting out one-fourth as the portion of each,) "to have and to hold the said lands, &c., unto the said B, C, D, and E, as follows: that is to say, to the said B his one-fourth of the said premises as herein-before described, from the date hereof, for and during the term of his natural life, and from the day of the death of the said B, if he shall leave lawful issue him surviving, then to such of them as he shall by deed or will limit or appoint, but if he shall die without issue, then said one-fourth of said premises to be divided and descend to the survivors or sur-

vivor of the said three brothers C, D, and E, which shall be then living." Held, that the limitation contained in the *habendum* was not void for remoteness. *Ker v. Ker*, 7 Ir. Jur. 76, C.

Held also, that B having died without issue, C who survived B, D, and E, became absolutely entitled to the divided part of B in the premises assigned by the above deed. *Ib.*

DEFAMATION, *See* PLEADING.

In defence to an action for oral slander the defendant, in pleading that the words complained of were privileged, must state not only that on the occasion they were spoken they were used for a privileged purpose, but also show that at the time the words were spoken and published he believed them to be true, and spoke and published them *bona fide* and honestly, and upon a lawful occasion, and he must likewise expressly negative the existence of malice at the time of speaking the words, and show that it was his interest or duty to make the communication. *Praeger v. Shaw*, 7 Ir. Jur. 115, E.

In an action for oral slander, where the words alleged to have been spoken concerning the plaintiff in his profession of surgeon, amounted to a positive charge of drunken, disorderly conduct at D during a former period of his professional life, the defendant pleaded, in substance, that he was chairman of a board of guardians of which the defendant was medical officer, and took part officially in a certain conversation relative to the plaintiff's fitness for his office, that in the course of such conversation former charges against the plaintiff of intemperance were discussed, and that the defendant then stated that he had been informed that the plaintiff had been previously addicted to or charged with intemperate habits at D, which statement the plaintiff believed it to be his duty, as chairman of the board of guardians, to make, and which he believed to be true in substance and in fact, and was the same as the slander complained of in the summons and plaint. Held, to be a bad plea, because it should have shown the speaking of the words to have been upon a justifiable occasion. *Custis v. Sandford*, 7 Ir. Jur. 154, Q. B.

Semble, that a plea that the words were spoken without malice, and in the exercise of defendant's office of chairman of the board of guardians, and, being so spoken, that was a privileged communication, is bad for not showing the lawfulness of the occasion itself. *Ib.*

Alleged slanderous words must be shown to have been spoken of the plaintiff in his trade. *Sayers v. Buckley*, 7 Ir. Jur. 257, C. P.

To say of a person that "he is a rogue," or that "he is a thief," is not, *per se*, actionable, unless the words be spoken in connection with other slanderous expressions, or connected with some facts or circumstances, and special damage must be averred. *Ib.*

DEFENCE, *See* PLEADING. PRACTICE.

DEMURRER, *See* PLEADING.DEVISE, *See* WILL.DISCONTINUANCE, *See* PRACTICE.DISMISSED SUIT, *See* PRACTICE.DISTRESS, *See* POOR LAW.

Where the amount produced at the sale of goods distrained for rent is but slightly in excess of the rent due, it is not an excessive distress, and no action will lie. *Fitzgerald v. Longfield*, 7 Ir. Jur. 21, C. P.

A demise to B a term for lives still in being at the time of action brought. B subdemised to C for a life still in being one undivided moiety of the lands, reserving a rent which considerably exceeded the head rent. B afterwards by his will, reciting that under the sub-lease he had a profit rent of £77 12s., late currency, devised £17 a-year, like currency, of said profit rent to E, his daughter. E and her husband subsequently distrained C, who had become the assignee of the demised premises, for an arrear of the portion of rent so devised. C having replevied, sued E and F, who pleaded the foregoing facts by way of avowry. Held, on general demurrer, that E and F were entitled to distrain upon the lands in question, inasmuch as E by the devise became seized *pro tanto* of a portion of the reversion expectant on the lease to C, for the rent incident to which they might separately distrain, and that the fact of the tenancy in common created by the demise by B to C of an undivided moiety of the premises did not oust the right of distress. *Brennan v. Flood*, 7 Ir. Jur. 82, Q. B.

The above avowry was pleaded generally, without averring that the requisitions of 9 & 10 Vic. c. 111, s. 10, had been complied with. Held, that such an allegation was unnecessary, and that it lay upon the plaintiff to rely upon any noncompliance with that statute by way of replication. *Ib.*

DIVORCE.

A marriage celebrated in England between a native and domiciled Scotchman and an Irishwoman may be dissolved by a decree for a divorce pronounced by the Court of Session in Scotland. *Maghee v. M'Alister*, 3 Ir. Ch. R. 604, C.

DOCUMENTS (PRODUCTION OF.)

An affidavit, detailing such facts as would sustain a bill of discovery prior to the passing of 14 & 15 Vic. c. 99, will entitle the applicant to inspect the documents referred to in the affidavit. *M'Cay v. Magill*, 3 Ir. C. L. R. 83, Q. B.

The inspection of a document will not be granted to a plaintiff, on the plea that it contains a particular clause in support of his case, where the existence of such clause is directly denied by the defendant. *Frauen v. The Incorporated Society*, 3 Ir. C. L. R. 118, Consol. Cham.

In an action upon a guarantee the defendant applied to the court that he should be furnished with a copy of the document by the plaintiff, stating in his affidavit that he had no copy of the guarantee in his possession, and that he was advised and believed that the production of the instrument might be material to his defence. The court granted the motion, although it appeared that the instrument had been prepared by, and was in the handwriting of the defendant, who was a solicitor. *Luscombe v. Martin*, 7 Ir. Jur. 24, E.

A cause petition was filed, praying the sale of certain lands for payment of a judgment. One of the respondents, in her affidavit filed by way of answer, admitted that part of the lands were conveyed to her by a deed of the 25th of May, 1853, which was in her possession; that by an account stated and settled, dated the 28th of June, 1853, to which respondent refers, it was found that £3609 12s. 6d. was due to her; and that, by a deed of the same date, the other lands were mortgaged to her for the amount, but did not state that the deed was in her possession, nor refer to it. On a motion by the petitioner for the inspection of these documents, it was held, that the respondent had so referred to the account stated, that she was bound to produce it, but that she was not bound to produce the mortgage deed. *Staunton v. Donaghoe*, 7 Ir. Jur. 37, R.

The court will grant an application for the inspection of documents, *e. g.* bills of exchange, but timely notice must be given to the party in custody of them, to enable him to permit the inspection at a convenient time. *Nerwich v. Gregory*, 7 Ir. Jur. 152, E.

The court will compel a plaintiff to furnish the defendant with a copy of a copy of a document, where no other means of procuring either the original or the copy exist. *Lynch v. Creagh*, 7 Ir. Jur. 288, C. P.

The court will order copies of a bond and warrant of attorney for confessing judgment thereon, to be furnished although it appear, from applicant's affidavit, that execution has been had thereon, and that there is no longer a cause in court. It is no ground for refusing such an application that the party applying does not clearly show the previous written notice of demand for the copy sought to have come from himself. *Edgar v. Houston*, 7 Ir. Jur. 362, E.

DRAINAGE ACTS, *See* COMMISSIONERS OF DRAINAGE.EASEMENT, *See* CUSTOM. PRESENTMENT.

A right of way of necessity, to land surrounded by other lands, is created, as well in the case where the grantor grants the reversion expectant on the determination of outstanding leases in the surrounding lands, himself retaining a similar reversion in the land surrounded, as where the grantor, being in actual possession, grants the surrounding lands themselves, retaining the lands surrounded; although at the time of such grant the tenant of the land surrounded has another way of access thereto,

to continue during his lease. *Nugent v. Cooper*, 7 Ir. Jur. 112, C. P.

In an action against a railway company for diverting the water from plaintiff's well sunk in 1835, by reason of boring a tunnel or shaft in adjacent land, it appeared that the tunnel was constructed within the lines of deviation marked on the company's maps and plans—but 60 feet from the *medium filum viæ*; and that no part of the railway or tunnel passed through the plaintiff's premises. Held, without determining how far the tunnel might have been illegally constructed, in case it had been made through the lands of strangers, that it sufficiently appeared that the tunnel was made by the company in the exercise of their rights of ownership over their own soil, and hence that according to the doctrine established by *Acton v. Blundell*, (12 M. & W. 324,) no action could lie for the diversion of an underground water course, as the plaintiff could have no right of property in the same. *Galgrey v. The Gt. Southern and Western Railway Co.*, 7 Ir. Jur. 222, Q. B.

ECCLESIASTICAL LAW, *See* BENEFICE.

The vicars choral of the cathedral church of L are a spiritual corporation consisting of five members, who have been from time immemorial, with one single exception, clerks in holy orders. The corporation provides for the reading of prayers in the cathedral, which is also the parish church of L, and are also charged with the performance of parochial duties in said parish. They have been accustomed, for this purpose, to employ as stipendiary curate either a stranger or a member of their own body, whose stipend as curate is in addition to his share of the revenues which the body receive, they being seized of the vicarial tithes of the parish of L and also burial fees. A, one of the said vicars choral having accepted a benefice with cure of souls, a successor was appointed to him upon the ground that under the Pluralities Act, (13 & 14 Vic. c. 98,) he had vacated the vicar choralship. Held, that although the vicars choral as a body corporate were charged with the cure of souls, the individual members were not the holders of benefices with cure of souls within the meaning of the Act, and that A was accordingly entitled to retain his post of vicar choral. *Shaw v. Woods*, 7 Ir. Jur. 365, Q. B.

EJECTMENT, *See* COSTS. JUDGMENT.

On the title.—As to the presumption of the time of the death of the last *cestui que vie* being a question for the jury, and not matter of discretion, see *Nesbitt v. M'Manus*, 3 I. C. L. R. 600; s. c., 6 Ir. Jur. 163, Q. B.

In an ejectment, where the defence was, that the plaintiff was barred by the Statute of Limitations, the court allowed the parties to depart from the Form of issue given by the Common Law Procedure Act, in order to enable the plaintiff, if successful, to recover mesne rates, from a date anterior to the commencement of the action, and to enable the defendant to raise the question as to whether the plaintiff was barred by the statute at

the commencement of the action. *Blake v. Mannion*, 7 Ir. Jur. 12, Consol. Cham.

For non-payment of rent.—As to the accrual of a new right of entry with each successive gale of rent—see *Spratt v. Sherlock*, 3 Ir. C. L. R. 69; s. c., 5 Ir. Jur. 146, Q. B.

As to the ascertainment by the jury of the amount of rent due—*ib.*

Certain premises had been demised by lease to the defendant for building purposes, and at the time of the execution of the lease there existed a public passage through the lands so demised unknown to the lessee. The latter proceeded to build upon this public passage (having been informed by the landlord's agent that he might do so,) but the county surveyor interposed, and obtained and executed an order made by the Justices of the Peace, to remove the erections made by the defendant, and to preserve the passage open for the use of the public. An action of ejectment for non-payment of rent having been brought by the plaintiff to recover possession of the demised premises, and it being contended, on behalf of the defendant, that the condition of re-entry for non-payment of the rent reserved had been defeated by eviction of a portion of the demised premises by title paramount; Held, that the occupation of this portion of the demised premises by the county surveyor amounted merely to the assertion of a right of easement on behalf of the public, and did not constitute an eviction of any part of the premises by title paramount. *Herbert v. Kennan*, 7 Ir. Jur. 43, Ex.

Where a public road is closed up by presentment, the possession of the soil reverts to the owner of the land, discharged of the easement, and no proceedings at law are necessary for the purpose of re-vesting the right. *Ib.*

A defence that the defendant or any other person does not hold under the plaintiff is a good defence. *Figgis v. Hickey*, 7 Ir. Jur. 160, C. P.

In an action of ejectment for non-payment of rent, brought under the new forms of pleading prescribed by 16 & 17 Vic. c. 113, it appeared at the trial that the lease which bore date the 24th May, 1853, was, as well as the counterpart, executed by the lessee, who thereon went into possession about that time, and by two of the grantees shortly afterwards, but not by the remaining two until the 25th July, 1854. No rent was ever paid under that lease, and the rent alleged to be due was for one year and a half, ending the 29th September, 1854, the gale day next before the bringing of the action. The issues of *Nisi Prius* were, whether the defendant held under the lease stated in the summons and plaint, and whether the alleged rent was due. Held, that under these issues the defendant was not entitled to rely upon the fact, *quantum valeat*, that since the actual completion of the lease, only one half year's rent accrued due. *Crofton v. Sholdice*, 7 Ir. Jur. 273, Q. B.

Quære, whether that would have amounted to a defence to this action, if it were open on the pleadings. *Ib.*

Seemle, per Moore, J., that the counterpart executed by the lessee, although not *per se* a demise,

contained a sufficient minute or article so as to bring the case within the operation of the Ejectment Statutes. *Ib.*

Practice in action of.—See PRACTICE.

ELECTION, See WILL.

By marriage articles the property of the wife was limited to the husband and wife for their lives and the life of the survivor of them, with remainder, subject to a term to secure portions of £1,000 for younger children of the marriage, to the first and other sons of the marriage in tail, and Whiteacre, the property of the husband, was settled upon the husband and wife and the survivor of them, for their lives, with power for the survivor to appoint Whiteacre to any one or more of the children of the marriage; and in default of appointment, equally between them. The wife died first, leaving a son and a daughter. The husband by his will devised and appointed Blackacre to the son, and demised, limited, and appointed Whiteacre to the daughter for her life, with remainder to the son, in case he should survive her, and declared it to be his intention that "the bequest to her should be taken as and for any sum or claim she might have under or by virtue of her marriage settlement, or any other deed executed by him." Held, that the daughter was bound to elect between the £1,000 portion and the benefit given her by the will. *Fearon v. Fearon*, 3 Ir. Chan. R. 19, C.

There is not any authority for the proposition that a case for election can only be raised where the property conferred upon a person in lieu of that to which he would otherwise be entitled must be the absolute property of the giver; an appointment under a power vested in him is sufficient to compel the appointee to elect. *Ib.*

A testator having under his marriage settlement power to appoint £1,500 among his children (which was, in default of appointment, to be divided among them equally), and having only two sons, H and W, appointed to his son H £1, and to his son W £1, and as to the residue, appointed the same to W, adding, "I request him to have the same invested on mortgage, or on the purchase of lands, and settled on himself for life, with remainder to his child or children as he may appoint, with remainder to such child or children of my son H as he may appoint, with remainder to my own right heirs." Held, that W was bound to elect between his rights under the settlement, and those under the will. *Moriarty v. Martin*, 3 Ir. Chan. R. 26, C.

W having during his lifetime done acts which were held to amount to an election to take under the will, and having died without children; Held, that the precatory words contained in the will constituted a valid trust in favour of the children of H, although they were not objects of the power contained in the settlement. *Ib.*

A testator by his will bequeathed annuities to each of his daughters, severally with power of appointment to their children, and in case they should die without leaving issue, then the annuity of the daughter so dying to go to his sons, to be equally

divided between them; but in case of either of his sons dying before such event, then his proportion in such annuity to go to such issue as he should leave; and if any of his sons should die without issue, then to his other sons, except he or they should leave a widow or widows, and, if so, to such widow or widows during her or their lives; and after to his sons or the issue of such sons as may have died. He then devised his freehold and leasehold property to his four sons, A, B, C, and D, in the following proportions: to A one-third, to B one-third, and the remaining one-third to be divided between C and D, after payment of the annuities, providing that in ten years after his death his "income" should be equally divided between his four sons, after payment of the annuities, with the following provision: "Having left to my eldest son, D, one-fourth of my income to take place in ten years after my death, it is my will that then he shall have his choice either to take the one-fourth of the income as mentioned above, or to take instead of one-fourth of the income the house and demesnes of X and Y, subject to the marriage settlement of the said D, and subject also to a sum of £500, and interest at 6 per cent. on said sum of £500;" and after a bequest of his furniture, &c., "I appoint my executors residuary legatees in trust first with the produce of such property to pay each of my daughters (naming them) £5 each, and such further sum as shall be necessary for their maintenance until the first payment of annuity shall be made to them." He then named his sons, D and C, and his son-in-law, executors. In the following year he added a codicil, naming his son, C, as executor in place of D, with the following clause: "And with the view of removing any doubts that may exist as to the continuance of annuities to my daughters (naming them), it is my will, and so intended by me, that the same respectively be only payable during their respective lives, and in the event of their dying, leaving children, the share of such so dying to survive to their children, and subject to appointment as in my will named." Held, that the several annuities did not become extinct upon the death of each daughter respectively. *Stevell v. Stevell*, 7 Ir. Jur. 145, C.

Held also, that the lands of X and Y, (D having elected to take them in lieu of his one-fourth of the testator's income,) were exonerated from the payment of the annuities. *Ib.*

Held also, that the residuary legatees did not take a beneficial estate in the residue. *Ib.*

ELEGIT, See EXECUTION.

ENROLMENT, See PRACTICE.

EQUITABLE MORTGAGE, See CHARGING ORDER. MORTGAGE. PRIORITY.

ERROR, See PRACTICE.

ESTATE, See RESPECTIVE TITLES.

ESTOPPEL, See FINE AND RECOVERY.

A writ of *scire facias* on a recognizance recited the recognizance, which purported to be taken by S, a Master Extraordinary of the court for the County of R. The plea traversed that S was a Master Extraordinary for the County of R. Held, on demurrer, that the plea was bad, as the recital of the recognizance estopped the defendant from denying any of the material facts appearing thereupon, though afterwards substantively alleged. *Reg. v. Irwin*, 2 Ir. Chan. R. 268, C.

EVIDENCE, See COMMISSIONERS OF DRAINAGE. CRIMINAL LAW. DOCUMENTS (PRODUCTION OF). DAMAGES. EJECTMENT. INSURANCE.

An order cannot be made in a cause petition against a minor without proofs. *Holmes v. Holmes*, 3 Ir. Chan. R. 126, C.

An action on the case was brought by a corporation, as proprietors of Government Stock, against the Bank of Ireland for refusing to transfer their stock, and for permitting it to be transferred without their authority. This stock had been transferred under forged process of attorney, purporting to be under the common seal of the corporation, which their agent had fixed thereto without their knowledge or consent, and for which he had been prosecuted by the corporation, and convicted. The judge told the jury that if they believed the evidence, the powers of attorney were forgeries, and that, believing them to be so, they were bound to find a verdict for the plaintiffs, unless they should be of opinion that the use made of the common seal of the corporation, whereby the defendants were imposed on and defrauded, was caused exclusively by the neglect or default of the plaintiffs; and that, in considering whether the use so made of the common seal was the exclusive cause of the imposition and fraud practised on the defendants, they should consider whether there was any neglect or default on the part of the defendants in examining the letters of attorney, or inquiring into their genuineness; and if they were of opinion that there was such neglect or default, and that the same in any degree contributed to such imposition and fraud, they should find for the plaintiffs. The plaintiffs excepted to this charge, and required the judge to tell the jury, that the documents being forgeries, they should find for the plaintiffs, notwithstanding the allegation of default or neglect by the plaintiffs; and also to direct the jury, that if they believed on the evidence that the plaintiffs did not previously authorize, and were not privy to the affixing of the seal to the powers of attorney, and did not, by any subsequent act, adopt them, they should find for the plaintiffs. Held, on error from the court below allowing the exceptions, that the charge of the judge was wrong, and that the exceptions were properly allowed, (Pigot, C. B., *dissentiente*.) *Bank of Ireland (in error) v. The Trustees of Evans' Charities*, 3 I. C. L. R. 280, Ex. Cham.

As to evidence of agency, see *Kinahun v. Malyn*, 3 I. C. L. R. 563; s. c., 6 Ir. Jur. 76, Q. B.

Where a party is sued on a contract made in a foreign country, the court will presume that it is a legal contract according to the law of that country, unless the contrary be proved, and the *onus* of such proof lies upon the party objecting to its legality. *Russell v. Kitchen*, 3 I. C. L. R. 613; s. c., 6 Ir. Jur. 218, Q. B.

The defendant was sued for tithe rent-charge, and the writ of summons and plaint alleged, in the terms of the 1 & 2 Vic., c. 109, that the defendant was seised or possessed of an estate of inheritance or one equivalent thereto in the lands. In order to prove this a former petition, presented in 1839, to recover tithe rent charge in respect of these lands, was given in evidence, with an order made upon consent with respect thereto. The petition contained an allegation similar to the summons and plaint, relative to the defendant's interest. Acts of ownership and payment of head-rent by the defendant were also proved. To rebut the effect of this evidence, it was proved by the defendant that in 1834 he was discharged by the Insolvent Court, and his estate vested in the provisional assignee, who did not, however, interfere. It was contended on the part of the defendant that this latter evidence was conclusive to displace the effect of the evidence adduced on the part of the plaintiffs, even though that should *per se* suffice to establish a *prima facie* case. Held, (Crampton, J., *dissentiente*), that notwithstanding the fact of payment of head-rent, there was *prima facie* evidence of the defendant's having been seised or possessed of a sufficient estate to render him liable in the present action; and, secondly, that the effect of the insolvent proceedings was not conclusive to show that the estate had passed from and continued out of the defendant, inasmuch as it was consistent with the defendant's evidence that the estate might have been re-assigned to the defendant since 1834. *Ecclesiastical Commissioners v. Holmes*, 7 Ir. Jur. 236, Q. B.

In an ejectment on the title, upon a notice to quit, the party who served the notice had been duly served with a subpoena, but did not attend at the trial in obedience thereto; Held, that under the circumstances secondary evidence of the service of the notice by proof of the indorsement in the handwriting of the party was inadmissible. *Pollock v. Hagerty*, 7 Ir. Jur. 268, Q. B.

Semble, that even though actual collusion between the notice server and the defendant were proved, such evidence would not have been admissible, and that the rule of law respecting the dispensation with the *viva voce* testimony of absent living witnesses applies only to the case of attesting witnesses. *Ib.*

EXCEPTIONS, See BILL OF EXCEPTIONS.**EXECUTION.**

Ca. Sa.—See COSTS. MISREPRESENTATION. PRACTICE. SHERIFF.

Semble, the voluntary discharge of a debtor, in custody under a *ca. sa.* issued on foot of a judgment,

does not deprive the creditor of his right to issue another execution under 35 Geo. 3, c. 30, (1r.) *Burnes v. O'Leary*, 3 I. C. L. R. 1; s. c. 5 Ir. Jur. 65, Q. B.

Prior to the Common Law Procedure Amendment Act, a defendant could not have been detained under a *ca. sa.* until the poundage fees and expenses of the execution were paid, if he tendered the sum marked on the writ. *Chadwick, in error*, v. *Atkinson*, 3 I. C. L. R. 425, Ex. Cham.

Charging order.—See PRACTICE.

Elegit.—Neither the suing out of an *elegit*, nor the appointment of a receiver on a judgment not redocketed or revived as required by the 9 Geo. 4, c. 35, will render it valid against a subsequent purchaser for valuable consideration. *In re Judge*, 3 Ir. Chan. R. 152, P. C.

Where a judgment had been recovered prior to the passing of the 3 & 4 Vic. c. 105, and subsequently an *elegit* executed under section 19 of that Act, extending all the lands of the debtor, and where it appeared that prior to the passing of that Act, but subsequent to the rendition of judgment, the judgment debtor had made leases of two portions of the lands that were subject to the judgment debt, it was held that the *elegit* creditor who had brought his ejectment to recover all the lands, was only entitled to recover a moiety set out by metes and bounds of the leased lands, but the whole of the lands in the hands of the tenant from year to year. The sheriff is bound to execute the writ of *elegit* as it comes to him, and the benefit of the proviso in the latter part of the 19th section of 3 & 4 Vic. c. 105, only enures upon any subsequent proceeding by the judgment creditor. *Neiland v. Smith*, 7 Ir. Jur. 157, C. P.

Lessee O'Brien v. Bernard, (6 Ir. L. R. 16,) considered. *Ib.*

Fi. fa.—See SHERIFF.

With respect to the operation of a suspension order, or the withdrawal of an execution, so as to give priority to one subsequently lodged, see *Kirwan, in error*, v. *Jennings*, 3 I. C. L. R. 48; s. c. 5 Ir. Jur. 190, Ex. Cham.

An attachment for £6 17s. 7d., payable under an order of the Court of Chancery was issued in 1837, and was renewed in 1848, but not afterwards, as it could not now be executed in consequence of the 11 & 12 Vic. c. 28. The court gave liberty to issue a *fi. fa.* for the amount. *Fenton v. Fenton*, 7 Ir. Jur. 26, R.

Habere.—See PRACTICE.

Levari facias.—Judgment by default was entered up on a receiver's recognizance; a *levari* issued against the surety, and the sheriff returned goods on hands for want of buyers. An injunction was granted against the *levari*, on payment of the amount of it into court. The surety applied to set aside the judgment by default, and an order was made that the judgment should stand, but that the surety might be at liberty to plead to the *scire facias*. He did plead, and a demurrer to the rejoinder was allowed, and it was ordered that judgment be entered up for the plaintiff, which was accord-

ingly done. Held that the latter judgment was irregular, and the first not being a continuing judgment, and being determined by the death of the receiver, a *levari* could not be sued out on it. *In re Herrick's Minors*, 3 Ir. Chan. R. 183, R.

Sequestration.—Upon an application to obtain an order to extend a sequestration to the matter of a pre-existing judgment, under the 16 & 17 Vic. c. 113, s. 136, order refused, it not appearing clearly to the court that the judgment creditor was in a position to issue execution at law. *Baker v. Armstrong*, 7 Ir. Jur. 291, E.

A sequestration having been issued in 1846 against a beneficed clerk on a judgment, (recovered in 1840,) and marked for the principal sum and interest then due, and interest having since accrued due, and a sequestration having been subsequently issued at the suit of another creditor, the court declined to extend the sequestration pending to the matter of the sum due on foot of the plaintiff's judgment, but held that the judgment should be revived, previous to the extension, it being more than ten years old. *Paton v. Carpendale*, 7 Ir. Jur. 362, E.

EXECUTOR AND ADMINISTRATOR, See BENEFICE. CHARGING ORDER. LANDLORD AND TENANT. SUGGESTION. TRUST.

The general rule is, that though there be a decree for the administration of assets, a creditor of the testator or intestate will not be restrained by injunction from proceeding at law to make the personal representative liable *de bonis propriis*, but where a legatee who has proved in the Master's office under the decree brings an action at law against the executor for the legacy, the court will enjoin him though the judgment in the action should be *de bonis propriis*, for the court by its decree has taken upon itself to decide upon the question of assets, without which the plaintiff at law cannot recover, and will not permit that question to be tried at law. *Molyneux v. Scott*, 3 Ir. Chan. R. 291, R.

To make an executor liable at law for a legacy *de bonis propriis*, there must be an express promise in writing, and assets or some other consideration. *Ib.*

Semble, on a claim for a legacy against the defendant as executor, and not averring that the defendant promised in writing to pay the legacy, the judgment should be *de bonis testatoris*. *Ib.*

An executor lent a sum of £4,100 of his testator's assets on the security of a property worth at the time between £60,000 and £70,000, and incumbered to the amount of £27,000. The solicitor for the borrower was also employed for the executor, the lender. No opinion of counsel was taken on the title, and no searches were made, as had been done on two occasions within seven years on other loans. The security having turned out defective in value, the executor was decreed to bring in the money. *Waring v. Waring*, 3 Ir. Chan. R. 331, C.

Judgment may be entered in the name of one executor against the other, on a warrant authorizing a judgment against both. *Hickey v. Musgrave*, 3 I. C. L. R. 446, Q. B.

EXEMPTION, *See* TITHE RENT CHARGE.

FEE FARM GRANT, *See* RENEWABLE
LEASEHOLD CONVERSION ACT.

FEME COVERT, *See* MARRIED WOMEN.

FIAT, *See* MESNE PROCESS.

FIERI FACIAS, *See* EXECUTION.

FINES, *See* LEASE.

FINE AND RECOVERY.

In Hilary Term, 1806, A being, under a settlement made in 1769, tenant for life of thirteen denominations of land, with remainder to B in tail male, remainder to N in tail male, joined with B in suffering a recovery; and by deed of the 9th of March, 1806, executed by B and R, it was declared that the recovery was to be to the use of B and his heirs, but that he was forthwith to execute to R a mortgage in fee of some of the lands in the recovery, to secure a debt due from A to R; and by a deed of mortgage of the same date A and B conveyed (by lease and release) seven of the thirteen denominations to R in fee, subject to redemption, &c. B died in Jan., 1809, without issue, leaving N (the next remainderman under the settlement of 1769,) his heir-at-law. A died in 1816. N having been in possession from the death of A in 1816, died in 1848, leaving the lessor of the plaintiff, her eldest son, who claimed all the lands as heir in tail under the remainder to N in the settlement of 1769. In 1810 N, by settlement on his marriage, after reciting (as if the recovery of 1806 had been, in fact, duly suffered,) the declaration made by the first deed of the 9th of March, 1806, of the uses of the recovery thereby recited to have been duly suffered, and without any further recital relating to the title, conveyed (by lease and release) all the lands expressed on the deed, declaring the uses of the recovery, including those in the mortgage to R, to the use of himself for life, remainder to his first and other sons in tail male. N never levied a fine nor suffered a recovery. The recovery of 1806 had, down to the passing of the 4 & 5 W. 4, c. 12, been invalid as to some denominations in the mortgage to R, because, though named in the deed making the tenant to the *præcipe*, they were not named in the recovery itself; and as to others of the mortgaged denominations, because the tenant to the *præcipe* was not made by C, in whom the legal freehold was outstanding under a deed of 1799. Held, reversing the judgment of the Court of Queen's Bench (reported 2 L. C. L. R. 163; s. c. 4 Ir. Jur. 114, Q. B.) that at the time of the passing of the Act (August, 1834,) N was in possession of the lands "in respect of an estate which the recovery, if valid, would have barred within the meaning of those words in the ninth section of the Act, and, therefore, the above defects in the recovery were not cured by the 5th and 6th sections,

and that the lessor of the plaintiff was entitled to recover the lands in the mortgage to R. (*Dissentientibus*, Pigot, C. B., Pennefather, B. and Moore, J.) *Davies v. Darcy*, 3 Ir. C. L. R. 617, Ex. Cham.

The court will permit the commissioners for taking the acknowledgment of deeds by married women, under the 4 & 5 W. 4, c. 92, to indorse the memorandum of acknowledgment *nunc pro tunc*, when it appears to have occurred through fatality, and the deed is clearly identified. *In re Mathews and wife*, 7 Ir. Jur. 331, C. P.

FISHERY.

Where a several fishery in a navigable river has been appropriated by the Crown prior to Magna Charta, a grant in letters patent to A and his heirs of all the salmon fishing, pike, eel, and other fishings of and in the river in question, enure to pass the several fishery. *Ashworth v. Brown*, 7 Ir. Jur. 315, Q. B.

FIXTURES, *See* BANKRUPT. LANDLORD AND
TENANT. POOR LAW.

FOREIGN LAW, *See* EVIDENCE. PROMISSORY
NOTE.

FORFEITURE, *See* LEASE.

FRANCHISE, *See* REGISTRY.

FRAUD, *See* AGENT. TRUST. WILL.

FRAUDULENT PREFERENCE, *See*
BANKRUPTCY.

FRAUDS, (STATUTE OF,) *See* CONTRACT.

FUNDS, *See* CHARGING ORDER.

GENERAL ISSUE, *See* PLEADING.

GENERAL ORDERS, *See* PLEADING. PRACTICE

GLEBE, *See* BENEFICE.

GRAND JURY, *See* PRESENTMENT.

GRANT, *See* RENEWABLE LEASEHOLD CON-
VERSION ACT.

GUARDIAN, *See* MINOR. PRACTICE.

HABEAS CORPUS, *See* INSOLVENT.

HOUSE OF LORDS, *See* COSTS. RENEWABLE
LEASEHOLD CONVERSION ACT.

HUSBAND AND WIFE, See MARRIED WOMAN. PRACTICE.

A, by marriage settlement, granted certain lands to trustees, in trust to pay his wife an annuity for her sole and separate use. A and his wife always lived together, and he received the annuity. In 1850 the wife applied to A for her annuity. In the year 1850, and in the early part of the year 1851, there were judgments obtained against A. In April and May, 1851, the wife and her brother applied to the trustee to obtain payment of the annuity; he applied by his solicitor to A for payment of it, but it was not stated particularly at what time this application was made. A petition was presented for recovery of the annuity on the 18th of April, 1853, Held, that the wife was entitled to the arrears of the annuity only from the 18th of April, 1852, being one year from the time of filing the petition, the application not appearing to have been made "*bona fide*." *Corbally v. Grain-ger*, 7 Ir. Jur. 265, R.

Bequest of the dividends of a fund "to J T and S, his wife, and the survivor of them, for the term of their natural lives," and after their decease to pay the fund and all interest due thereon to the children of the said J T and S his wife, share and share alike. J T became insolvent. Held, that J T and S his wife had been, prior to his insolvency, entitled to the dividends by entreties, and that the wife was not entitled to any equity of a settlement, but only to have the fund kept in court to secure her title to the dividends by survivorship. The dividends in the meantime were directed to be paid to the insolvent's assignee. *Irwine v. Baker*, 7 Ir. Jur. 305, R.

The plaintiff sued the defendants jointly for a year's rent accruing out of premises in which the female defendant had, *dum sola*, become possessed for a term of years by mesne assignment; one half year's gale had accrued due before her marriage, the other gale during the coverture. The defendants demurred to the summons and plaint on the ground of misjoinder of causes of action, inasmuch as the husband should have been sued alone for the gale which accrued during coverture. Held, overruling the demurrer, that the husband and wife were jointly liable for the rent which accrued during coverture, and were, therefore, both properly defendants in the action. *Coppinger v. Quirk and wife*, 7 Ir. Jur. 331, C. P.

INCUMBERED ESTATES COURT, See CHARGING ORDER. RECEIVER.

Practice as to claim of purchaser to rents of purchased estate, as distinguished from that of Court of Chancery, see *Walcut v. Condon*, 3 Ir. Chan. R. 431; s. c., 6 Ir. Jur. 381, R.

As to jurisdiction of Commissioners, see *Rutledge v. Hood*, 3 I. C. L. R. 447; s. c., 5 Ir. Jur. 59, E.

As to liability of purchaser for arrears of poor rates, where estate was sold free of incumbrances, see *Lally v. Concannon*, 3 I. C. L. R. 557; s. c., 6 Ir. Jur. 26, Q. B.

INDEMNITY, See CONTRACT.

INDICTMENT, See CRIMINAL LAW.

INJUNCTION, See EXECUTOR AND ADMINISTRATOR. PRACTICE. RAILWAY CO. WRIT OF ERROR.

As to the principles which guide the court to grant or withhold an injunction, after verdict but before the legal right is determined, see *Baxter v. Combe*, 3 Ir. Chan. R. 245, R.

A testator, by his will, devised certain lands, held for life, in trust, that his wife should reside upon the lands, and be maintained out of the proceeds, and that his executors should divide the estate between the respondent and his brothers. After the decease of the testator, the lease having expired, a renewal was granted to the respondent alone, who was not one of the executors, with a proviso for the maintenance of his mother upon the lands, and the family continued to reside upon the premises as under the former lease, but no division of the property had ever been made by the executors. The respondent for some time managed the farm, and having become paralytic, his brother (one of the petitioners) undertook the management of it for him; but subsequently, they having quarrelled, the respondent tried to remove his brother from the lands, and having brought an action of ejectment on the title against him, obtained judgment in that suit, as also for mesne rates. A motion for an injunction to restrain the respondent from executing the *habere*, or enforcing the judgment for mesne rates, until the hearing of a cause petition between the same parties praying that the lease made to the respondent might be declared to be a graft upon the original lease, upon the grounds that there had been an understanding that the former lease was held in trust, was refused, the respondent being owner of the entire legal estate in the lands, and at least of a moiety of the beneficial estate, and the alleged trust not being established. *Kisly v. Kisly*, 7 Ir. Jur. 269, C.

INQUISITION, See CORONER. CRIMINAL LAW.

INSOLVENT.

With regard to the proper custody of prisoners for contempts committed in the County or City of Dublin, see *In re Dickson*, 3 I. C. L. R. 118; s. c., 5 Ir. Jur. 245, Q. B.

By the 57th section of the 3 & 4 Vic. c. 107, a prisoner seeking to be discharged as an insolvent shall, after the vesting order has been made, deliver into the Insolvent Court a schedule containing, among other things, "a full and true description of all debts due or growing due from such prisoner at the time of making such order, and of all and every person and persons to whom such prisoner shall be indebted, or who, to his knowledge or belief, shall claim to be his creditors, together with the nature and amount of such debts and claims respectively,

D

&c. The defendant to an action brought by the executor and executrix of J D, deceased, upon a bill of exchange made by the defendant to the deceased, pleaded a discharge under the Insolvent Act; and in his schedule the following item in reference to the debt in question appeared: "No. 19.—J D, solicitor, Belfast, executor of J D, late of Belfast, cattle-dealer, deceased." It was proved that this person was not the executor, but the learned judge who tried the case admitted evidence to show that the defendant had used the best means in his power to ascertain who the personal representatives of J D, deceased, were; and it appeared that he had only received hearsay evidence that J D, son of the deceased, was his executor; and that although he had employed an attorney to prepare his schedule, and was aware that wills were proved in the Prerogative Court, he had not directed his attorney, or any other person, to search there for the purpose of ascertaining who the personal representative of the testator was. Held, under the circumstances, that the description in the schedule was insufficient. *Dinnen v. Chaine*, (miscalled *James*), 7 Ir. Jur. 28, E.

Semble, it is not sufficient for an insolvent to insert in his schedule merely the description of a creditor, without also adding his name; although, in the case of negotiable instruments, some allowance will be made in cases where it is impracticable for the insolvent to ascertain the name of the present holder, provided the name of the holder, last known to the insolvent as such, be correctly given. *Ib.*

Where the warrant of commitment for the remand of an insolvent debtor, under the 3 & 4 Vic. c. 107, under the hand of the Assistant Barrister for the county where the hearing had taken place, merely specified the period of the remand and the name of the detaining creditor, but omitted to state the grounds of the remand or the offence by which the insolvent had disentitled himself to the immediate benefit of the Act. Held, upon a return to a writ of *habeas corpus*, to be insufficient, and that the prisoner was entitled to be discharged from custody accordingly. *In re Berry*, 7 Ir. Jur. 164, Q. B.

In an action for assault and false imprisonment the defendants, a former execution creditor of the plaintiff and his attorney, pleaded severally—first, a denial of the wrongful acts as alleged; and, secondly, a justification under an order by the Insolvent Court for the committal of the plaintiff to Richmond Bridewell for the contempt of having neglected to file his schedule, pursuant to 3 & 4 Vic., cap. 107. It appeared upon the pleadings that the plaintiff had been discharged from custody by this court upon *habeas corpus*. Held, on demurrer to the latter plea, (Lefroy, C. J., *dissentiente*), that the plea in question was no justification, inasmuch as, according to the construction of the 3 & 4 Vic., c. 107, ss. 54, 57, as settled in *Re Dickson*, (5 Ir. Jur. 245,) the committal of the plaintiff to Richmond Bridewell was an excess of the jurisdiction of the Insolvent Court, and the order, being illegal, afforded no justification to either of the defendants for the acts done thereunder. *Murray v. Byrne*, 7 Ir. Jur. 293, Q. B.

The foregoing special defence did not expressly admit the commission of the trespass alleged in the summons and plaint, but, on the contrary, stated facts from which an inference might arise that the defendants had been only instrumental in putting the court in motion. Held, that, however the latter facts might operate as a defence under the plea of denial first pleaded, it must be intended, for the purposes of the argument of the present demurrer, that the special defence was one pleaded in confession and avoidance, pursuant to the 71st section of the Common Law Procedure Act. *Ib.*

Semble, (per Perrin, J.) that at all events the defence should have alleged the issuing of a warrant, and not merely an order. *Ib.*

The defendant to an action, by writ of revivor, to revive a judgment obtained by plaintiff against the defendant in the penal sum of £182, and upon which the sum of £61 was claimed to be due, pleaded a discharge pursuant to the Insolvent Act; and in his schedule were set down the following items: "No. 4, L. M., [plaintiff,] Kilcarrig, Borris, Gore's-bridge, £18, admitted, 1840; balance of my bond for £90 paid by me to said M. in 1840. No. 20, L. M., [plaintiff,] Bagnalstown, £1, admitted 1840, due for an horse." It was proved that Kilcarrig—where plaintiff resided many years previous to 1840—forms a suburb of, and is close to, Bagnalstown, which is the plaintiff's post-town, (in Co. Carlow,) Borris and Gore's-bridge being also post-towns in the same county, and, by some miles, distant from Kilcarrig. The plaintiff stated that he never received any notice, nor even heard, of the filing of the defendant's petition or of his discharge until two years after it had occurred, and produced in evidence an attested copy of the judgment, in which he is described as of Bagnalstown. It did not appear that plaintiff had instituted any proceedings from 1847 down to 1855, to recover the balance due of the judgment debt. The judge left it to the jury to say, "whether, according to the circumstances, a sufficiently true and full description of the debt, and of the creditor and of his residence, had been given in the schedule." A new trial was now granted by the court; Richards, B., although he was of opinion that the case had been properly left to the jury, and that there had been no misdirection, holding that the trial had been unsatisfactory, and that the case, under the circumstances, required re-investigation. Greene, B., concurred in the reasons which influenced Richards, B., to grant a new trial, but held that the question had not been properly submitted to the jury, and that the description in the schedule was insufficient. *Murphy v. Agar*, 7 Ir. Jur. 379, E.

INSOLVENT COURT, *See* INSOLVENT.

INSPECTION OF DOCUMENTS, *See* DOCUMENTS, (PRODUCTION OF.)

INSURANCE, *See* POLICY OF INSURANCE.

INTEREST, See PORTIONS. RECEIVER. SURETY.

A testator, who, before his death, had adopted his niece at the age of three years, and maintained her as an inmate of his family until his death, made the following bequest: "I give, devise, and bequeath, and hereby charge upon all my aforesaid lands and premises to my niece D B the sum of £3000 sterling, to be payable to her upon her marriage with the consent of my wife A M H; but in case of her marrying without such consent in the lifetime of my said wife, the said charge of £3000 is to merge in the inheritance, and I hereby charge thereon, and give to her the sum of one shilling and no more. It is my wish and will that my said niece D B should live and reside at Queensborough with my said wife." The testator also bequeathed to a brother and sister of D B, an annuity of £100 per annum, directing that it should be payable out of certain lands and at certain times. At the time of the testator's death D B was nineteen years of age and unmarried. A petition having been presented by her for the purpose of enforcing payment of interest upon the sum of £3000 by way of maintenance. Held, that she was not entitled to interest upon that sum. *Burke v. Kane*, 7 Ir. Jur. 169, C.

INTERPLEADER, See SHERIFF.**I O U, See CONTRACT.****IRREGULARITY, See PRACTICE.****ISSUES, See PRACTICE.****JUDGMENT, See AMENDMENT. EJECTMENT. EXECUTION. PLEADING. PRACTICE. PRIORITY.**

An attorney being the assignee of a judgment cannot enter satisfaction on it without a warrant of attorney. *Hodder v. Kist*, 3 I. C. L. R. 22, Q. B.

Where a judgment had been paid by the representative of the conuzor to three out of four trustees in whom it was vested, the fourth being resident out of the country, the court refused to permit satisfaction of the judgment to be entered under the 143rd section of the 16 & 17 Vic. c. 113. *Kelly v. Blake*, 3 I. C. L. R. 110, C. P.

Where a judgment has been revived within six years, and no interest paid on it, a receiver will be extended to pay the amount of such judgment and interest. *Viridet v. Evans*, 7 Ir. Jur. 17, R.

A writ of revivor under the 16 & 17 Vic. c. 113, s. 151, at the suit of the assignee of the conuzee of a judgment is sufficient, if it merely state that the defendant is summoned to show cause "why A B, assignee of C D, shall not have execution." &c., without alleging the particulars of the assignment of such judgment, or the enrolment of the memorial thereof required by statute. *Stapleton v. Bergin*, 7 Ir. Jur. 64, Q. B.

Where a judgment had been given as a collateral security with a mortgage, and the mortgage had

been paid off without the judgment being satisfied, there being now no legal personal representative of the conuzee of the judgment, the court ordered a memorandum of satisfaction of the judgment on the record to be entered up by the Master. *Redmond v. Crawford*, 7 Ir. Jur. 120, Consol. Cham.

In an action of ejectment upon the title brought to recover possession of certain mines, and commenced in July, 1858, the parties agreed to a special verdict, and the verdict below (which was for the plaintiff) was reversed by the Court of Common Pleas, and judgment given for the defendant in the usual form, "that the said defendants do go thereof without day," &c. The present action was brought in the month of June, 1854, between the same parties, to recover possession of the mines in question, and a verdict was given for the plaintiff, although no accrual of title to the latter since the former judgment had been marked was given in evidence at the trial. Held, (Greene, B., *hesitant*), that the action of ejectment under the provisions of the Procedure Act being assimilated to other actions, a judgment in ejectment is equally conclusive between the parties as a judgment in another form of action. *O'Donnell v. Ryan*, 7 Ir. Jur. 127, E.

Held also, that the judgment in the former action of ejectment was conclusive, although not pleaded as an estoppel, the provisions of the Procedure Act limiting the defendant to a particular mode of defence. *Ib.*

Wilkinson v. Kirby, (2 E. C. L. R. 1395,) approved of. *Ib.*

An action may be maintained in the Superior Courts on a judgment, although the amount of the judgment may be less than £10, exclusive of costs, notwithstanding the provisions of 11 & 12 Vic. c. 28, which prevent a plaintiff from arresting a defendant for a sum not exceeding £10, exclusive of costs, unless by the order of an Assistant Barrister, obtained on a civil bill calling on the defendant to show cause why process of arrest should not issue against him. *Brophy v. Boland*, 7 Ir. Jur. 279, C. P.

The affidavit to register, as a mortgage, a judgment obtained in an adverse suit, did not specify the title, trade, or profession of the plaintiff, and did not specify the amount of costs recovered by the judgment. Held, that the omission of the costs was not a valid objection, inasmuch as no costs were specially given by the judgment, and that besides the word "costs" in the 8th requirement of the 6th section, properly referred to costs as such, ordered to be paid by any "decree, order, or rule." *In re Ferrall*, 7 Ir. Jur. 307, Bkpt. Ct.

Held also, that the affidavit not stating, pursuant to the 6th requirement of that section, either the title, trade, or profession of the plaintiff was inoperative to create a mortgage. *Ib.*

A judgment having been obtained on a bond and warrant of attorney of the defendant, to secure the sum of £4000 and interest, the fortune of the Lady A W B, and it being declared by the settlement executed on the marriage that said judgment was to be vested in the Earl of E and Sir T S, upon certain trusts, with power, when said judgment should be paid off, to lend the moneys arising

therefrom on other securities, it appeared that the bond and warrant of attorney was executed by mistake to the Earl of C and R F, also trustees, for other purposes, in the said settlement, but having no interest in the judgment, instead of the Earl of E and Sir T S, and that the judgment had been fully paid off and satisfied to the said Earl of E and Sir T S. The court granted an order that the master should enter satisfaction on the roll of said judgment, unless cause should be shown to the contrary, within six days after personal service of the rule upon the said Earl of E, Sir T S, the Earl of C, and R F, and conceded the space of one month to applicant for the effecting of such service. *Clancarty v. Ormonde*, 7 Ir. Jur. 398, E.

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JURISDICTION, *See* RESPECTIVE TITLES.

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JURY, *See* COSTS. CRIMINAL LAW. EJECTMENT. PRACTICE.

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JUSTICE OF THE PEACE, *See* ARREST. CROWN PRACTICE.

In an action against a justice of the peace for false imprisonment of the plaintiff, an infant of tender years, pleas justifying the trespass on the ground that the defendant, by command of the Queen, apprehended and detained the plaintiff with his own free will, in order that he might not be tampered with in respect to a prosecution against his father for felony, in which he was a material witness, was set aside by the court on a motion under 16 & 17 Vic. c. 113, s. 83, without putting the plaintiff to demur. *Dixon v. Franks*, 7 Ir. Jur. 64, Q B.

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JUSTIFICATION, *See* DEFAMATION. JUSTICE OF THE PEACE. PLEADING. TRESPASS.

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LANDLORD AND TENANT, *See* COVENANT. DISTRESS. EJECTMENT. LEASE. PLEADING. RENEWABLE LEASEHOLD CONVERSION ACT. SHERIFF.

A tenant, while in possession under his lease, set up for agricultural purposes a threshing machine and steam boiler. The threshing machine was fastened to four bolts fixed in the ground, but was capable of being detached from them by unscrewing four nuts at the end of the bolts, and removing the shaft of the machine, which passed through the wall of the house, both of which could be done without injury to the freehold. The steam boiler was set in brick work, which rested on the floor, in the corner of the outhouse, and touched both walls, but was capable of being removed by detaching the upper tier of the brick work, without injury to itself or the outhouse. Held, that the threshing machine and steam boiler were not fixtures as between landlord and tenant, and that the tenant was entitled to them as removable chattels. *Shinner v. Harman*, 3 I. C. L. R. 243, Cir. Cas.

With respect to the right of a landlord to a year's rent as against an execution creditor and the assign-

nees of a bankrupt, see *Gill v. Wilson*, 3 I. C. L. R. 544; s. c. 6 Ir. Jur. 132, Q. B.

Where lands are to be let under the court, the owner in occupation of the mansion house and lands attached is not entitled as of right to be declared the tenant at an occupation rent, but this is an indulgence given by the court, and if the owner has it in his power to make a fair settlement for the creditors and does not do so, the indulgence will not be granted. *Averall v. Wade*, 7 Ir. Jur. 219, R.

Where the owner had only a life estate, and was himself old, and his eldest son who had the first charge on the estate, refused to have the owner's life insured for the benefit of another creditor, the court refused a motion to have the owner declared tenant at an occupation rent, and with costs. *Id.*

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LEASE, *See* CANAL COMPANY. MINOR. WILL.

The interest in a lease for lives renewable for ever was settled on A for life, remainder, subject to a jointure, to A's wife, to the use of his children, who were minors. In 1839, one of the lives being dead, a negotiation for a renewal took place between A and B, one of six parties entitled to the reversion acting on behalf of all. In 1847 a renewal was executed as an escrow by the reversioners, on the promise (which was not fulfilled) of immediate payment of the fine. In July, 1849, a demand in writing of the renewal fines was made by B on behalf of himself and the other parties interested in A. In March, 1851, another *cestui que vie* having died in the meantime, A tendered the amount of the renewal fines. Held, that the right to a renewal had been forfeited, and a petition for that purpose was accordingly dismissed with costs. *Wood v. Knox*, 3 Ir. Chan. R. 109, C.

A lease for lives renewable for ever was vested as to two-thirds in A and one-third in B, subject to an underlease for years at a profit rent. From 1799 to 1822 the headrent was paid by the subtenant who was in possession, and two-thirds of the profit rent to A, but it was not proved that anything was paid to B. In 1822 the interest in the underlease was conveyed to the defendant, subject to the entire rent reserved by it. He continued to pay the headrent and two-thirds of the profit rent to A, and in 1822 he purchased the reversion in fee. Held, on a bill filed by the representatives of B to have the benefit of a decree for a renewal in respect of A's interest, first, that no presumption of the extinguishment of B's third of the profit rent or a conveyance of his third of the reversion arose. Secondly, that the retention of the profit rent gave the defendant no title under the Statute of Limitations, as the third of the headrent must be presumed to have been paid or retained by him as agent of those representing B's interest. *Hayes v. Woodley*, 3 Ir. Chan. R. 142, C.

A testator devised the lands of Q in trust, after his decease to sell and dispose thereof, and that the sale monies thereof, together with the rents and profits until the sale, should be considered as part of, and applied in the same manner as his personal estate. He gave the latter to certain trustees upon trust to pay his personal expenses, debts, and cer-

tain legacies, and in trust to apply in payment of debts and legacies, until the same should be satisfied, the yearly produce of the personal estate thereby directed to be laid out in land, and the rents and profits of the lands to be purchased therewith. As to the residue of his personal estate, he gave same in trust for the purchase of fee simple lands to be conveyed to his grandson A T and his heirs, subject to a charge for renewing certain chattel leases, and for that purpose he directed a term of years to be created out of such purchased lands, and also in trust until purchase, that the money should be laid out at interest, and should be applied towards discharging the purchase; and he directed the trustees to renew the chattel leases which he had bequeathed to A T for his life. The testator died in 1771, and from that to 1837 A T continued in possession of the lands of Q, and the chattel leases. From 1820 to 1837 he paid large sums for renewal fines. Held, that the accumulation of the rents of the lands of Q was to cease at the end of a year from the testator's death, and that the rents from that period to 1820, when the trust to raise the renewal fines arose, belonged to A T, but that subsequently to 1820 the rents were to be set off against the renewal fines. *Smith v. Lord Dungannon*, 3 Ir. Chan. R. 316, C.

As to the tenancy at will of a lessee for lives renewable for ever after the expiration of the *cestui que vie*, and pending renewal, see *Church v. Dalton*, 3 Ir. C. L. R. 4; s. c., 5 Ir. Jur. 76, Q. B.

Where a landlord is seised in fee simple of the reversion, expectant on a lease for lives renewable for ever, and is not likely to suffer any special loss by the conversion of his tenant's interest into a perpetuity, the renewal fine being nominal, he is not entitled to compensation under the 5th section of the Renewable Leasehold Conversion Act. *In re Lawless' estate*, 7 Ir. Jur. 13, P. C.

Ex parte Knox, (3 Ir. Ch. Rep. 57,) overruled. *Ib.*

The owner of a lease of lives renewable for ever upon the payment of a fine within six months after the fall of each life, where a receiver had been appointed over the lessor's interest, and all the *cestui que vie* were dead, tendered to the receiver the amount of renewal fines and septennial fines, which he declined to accept. A reference was directed to the Master to ascertain the amount due for fines, and to approve of a proper renewal to be executed. *Simpson v. Mullins*, 7 Ir. Jur. 16, R.

A lease made by the plaintiff to the defendants for 21 years, contained the following proviso:— "Provided also, that if the said commissioners, their successors or assigns, shall be desirous to give up or surrender the said houses, messuages, lands and tenements hereby demised, at any time within the said period of twenty-one years hereby granted, and of such their or his desire shall give twelve months' previous notice thereof in writing to the said (plaintiff,) or on paying twelve months' rent of said premises in advance unto the said (plaintiff,) and in such case all arrears of rent being duly paid, the covenants and agreements on the part of the commissioners, their successors or assigns, observed and performed, the lease and every clause, matter,

and thing therein contained, shall at the expiration of the said twelve months in such notice expressed, determine, and be utterly void," &c. The lease also contained a recital that the premises were taken for the accommodation of paupers, and a clause to keep them in repair. The defendants having taken possession, made several alterations in the premises for that purpose, such as removing kilns and trees; but all these things were done with the knowledge of the plaintiff. Previous to the 1st November, 1852, the defendants gave twelve months' notice to the plaintiff of their intention to give up the premises; upon that day the clerk of the union waited on him, offering him the rent, and saying that he came to give up the premises. The plaintiff having refused to take up the possession, upon the ground that the defendants had committed dilapidations, the clerk refused to give the money, and the plaintiff brought an action to recover the rent due up to the 1st of November, 1853. Held, that the alterations in the premises being necessary for the purposes for which the premises were taken, the defendants had complied with the terms of the lease. *Power v. The Poor Law Commissioners*, 7 Ir. Jur. 106, E.

Held also, that under the circumstances, the tender of the rent was a good tender. *Ib.*

By a lease for lives renewable for ever, and made in the year 1775, A, being seised in fee-simple, demised to B certain lands at a certain rent, and at a pepper-corn renewal fine; and in the year 1776, by another lease of the latter date, reciting that there had been an informality in the lease of 1775, which the parties were desirous to correct, A, for the considerations, and upon the terms mentioned in the lease of 1775, demised to B the said lands, "and all manner of mines and minerals of coals, lead, iron, tin, and other mines upon said lands, and bog timber, forest trees, and young saplings of oak, ash, yew, and elm, and all timber and other trees, the benefit of fishing, fowling, hunting, and hawking on the premises always excepted and reserved out of the said demise." This lease also contained a covenant that B should be at liberty to cut all such trees as he himself should plant. The estate of A in the lands subject to this lease having devolved to the respondent, and the interest in the lease to Y, the former in the year 1832, by indenture of lease reciting that it was made in pursuance of the covenant for perpetual renewal contained in the lease of 1776, demised to the latter "all the said lands, (all manner of mines and minerals of coal, lead, iron, tin, and other mines whatsoever upon said lands, and bog timber, forest trees, and young saplings of oak, ash, yew, and elm, and all timber and other trees, the benefit of fishing, fowling, hunting, and hawking on the said premises always excepted and reserved,) omitting the word "and," which appeared at the commencement of the exception in the lease of 1776. Held, that under the lease of 1776 the only rights reserved to the lessor were the benefit of fishing, fowling, &c., and that the mines and minerals passed under the demise. *Marquis of Sligo v. O'Donoh*, 7 Ir. Jur. 178, C.

Held also, that the lease of 1832, purporting to

be a renewal of the lease of 1776, and being made in pursuance of the covenant for renewal contained therein, but containing a clause at variance with the corresponding clause in that lease, this court would order the lease of 1832 to be made conformable to the lease of 1776. *Ib.*

Where there is a covenant to renew during forty years, upon nominating a new life within six months after the fall of each life, this does not come within the Tenantry Act, and unless the landlord is shown to have been in default, there is no equitable right to renew; but if the value of the premises be small, and it would appear for the benefit of the minor to grant a renewal, the court may, notwithstanding, direct the Master to execute a renewal on behalf of the minor under the 11 Geo. 4, and 1 Wm. 4, c. 65, nominating for each life that had dropped a life that was in being within six months after. The principle of calculation for renewal fines was: "One fine due at the end of six months after the fall of each life, and a septennial fine due at the end of every seven years, with interest on each from the time when it became due at 5 per cent." The guardian of the minors was declared entitled to the costs of appearing. *In re Coates, minors, ex parte Boyd*, 7 Ir. Jur. 235, R.

In an action for use and occupation, the defendant pleaded that before his occupation of the premises commenced, the plaintiff agreed in writing to demise the premises to him for 999 years, at a certain rent, which was to commence from the gale day next ensuing the date and execution of the lease; that, after making said agreement, he was let into possession, but that the lease had never been executed, although he requested the plaintiff to do so; that he had laid out considerable sums of money on the premises, but had never beneficially occupied or received any profits whatever from the same. Held, on demurrer, that this defence was no answer to the action. *Flood v. O'Gorman*, 7 Ir. Jur. 243, Q. B.

Where lands are let in Chancery for seven years pending the cause, and the lands are sold in the Incumbered Estates Court, the tenancy does not determine till the receiver has been discharged by the aide bar order. *Wybrants v. Wybrants*, 7 Ir. Jur. 327, R.

Where the gale days in the lease from the court were the 1st of February and the 1st of August, and the sale was on the 6th of July, and the conveyance to the purchaser was made on the 26th of July, an agreement was then made between him and the tenant to commence a new tenancy from the 6th of July. The receiver was discharged on the 28th of July, but having previously received from the tenant the portion of the gale up to the 6th of July, he was directed to pay this amount over to the purchaser. *Ib.*

LEGACY, See ANNUITY. EXECUTOR AND ADMINISTRATOR.

A testator by his will, made in 1840, in case of his wife having a child after his death, left to that child eight shares he had in the N. Bank, and ten shares in the B. Bank; Held, that three children

born after the will, and before the testator's death, were entitled to the shares. *In re Lindsey*, 3 Ir. Chan. R. 239, C.

A sum of £1,000 was left by a will to M V. By a codicil, if M V should be married, and not have child or children alive, the £1,000 left by the will was to become the property of E S and F S; but if M V should ever marry, and have a child alive, or children, in that case she can leave the said £1,000 as she thinks proper to one or amongst any children she may have. By a further codicil the £1,000 was left to M V; but if she died without children, it was to become the property of E S and F S. M V married, and died, leaving no child, but leaving a grandchild, the son of a deceased daughter, to whom she had appointed the £1,000 on her marriage. Held, that the bequest was an absolute one to M V, with an executory bequest over to E S and F S if she should die without leaving issue living at her death, whether children or remoter issue, which in the events which had happened had failed. *In re Synges's Trusts*, 3 Ir. Chan. R. 379, R.

A testator by his will, dated in 1798, gave to his wife the sum of £1,500, which he was possessed of by the death of his mother, and which he became entitled to under the marriage settlement of his father. By a codicil, in 1800, after stating that his brother E had married and had children, he willed that after the death of his wife the children of his two brothers, E and F, (should F marry and have issue,) should have the sum of £1,687, which was the same sum as that left by the will, was lent on a judgment against A. It was paid off in 1803, and invested by testator in 3½ stock. Held, that the legacy given by the codicil to the children of the testator's brothers was a general or demonstrative legacy (not a specific one), and was not redeemed by payment of the judgment and investment of the moneys in the funds. *Thomas v. Thomas*, 3 Ir. Chan. R. 399, R.

A testator made the following bequest in his will: "I give and bequeath unto each and every of my servants, male and female, who shall respectively have been living in my service for the space of six calendar months immediately previous to my decease, the amount of one year's standing wages over and above any yearly salary or wages I may owe them respectively at my decease." Held, not to include a person who had lived in the testator's service as gardener, at the weekly wages of 12s. 6d. (although his service had been exclusively given to the testator, in a cottage belonging to whom he resided, and by whom he was allowed yearly a certain quantity of coals,) upon the ground that the hiring was not a yearly one. *Breslin v. Waldron*, 7 Ir. Jur. 153, C.

A testatrix devised her estates of M and C to A upon trust to sell, and out of the produce to pay a certain legacy, and pay the residue to B. She also specifically devised other real estates, and "appointed C her residuary legatee and devisee." The bill contained this clause: "And in case such residue should prove insufficient for the purpose aforesaid, then in such case it is ordered and directed that the said deficiency should be paid out of the

said lands of M and C." The testatrix by her will specifically devised other lands with legacies charged thereon, some exclusively, others generally. By a codicil the testatrix bequeathed to D a legacy of £2000 charged as well on her real as personal estate. Held, that the real estate specifically devised was not subject to the latter; and that the sale monies of the M and C estates were only bound to make good any deficiency of the residue to answer the debts and legacies bequeathed by the will itself, but were not charged with the legacy of £2000 created by the codicil. *Dyer v. Bessonet*, 7 Ir. Jur. 162, M. O.

A testator by his will gave his personal, and a portion of his real estate to trustees, directing that they should convert them into money; and out of the fund so to be realized he bequeathed two legacies (among others) to persons named in his will, and after other bequests he directed that the residue of this fund, after payment of his debts and the legacies bequeathed, should be divided into twelve equal portions, and paid to certain persons named, among whom were the above mentioned legatees and the testator's heirs-at-law. The proceeds of the sale of the testator's personal estate, and of the portion of his real estate so directed to be sold, left a surplus fund after payment of the debts and legacies created in the will, with the exception of the two above mentioned legacies, the persons who would have been entitled to the latter having died in the lifetime of the testator, and their legacies having thereby lapsed, and questions arose as to the proper mode of disposition of these lapsed legacies, as also of the portions of the residuary fund to which those legatees would have been entitled in case they had survived the testator. A reference to the Master having been directed, he found by his report that the two legacies that so lapsed formed a part of the residuary fund that remained after payment of the bequests created by the will, composed of the real and personal estate directed to be sold in the proportion of the proceeds of the personalty to that of the real estate; that the lapsed shares in the residuary estate, to which the above mentioned two legatees would have been entitled in case they had survived the testator, were to be divided between the heir-at-law of the testator and his other next of kin, in the proportion that the residue of the personal estate bore to that of the real estate; that the two lapsed legacies formed part of the general residue of the fund composed of the real and personal estate, and were divisible among the surviving residuary legatees in the will named. Exceptions by the heir-at-law—that the Master should have found that the lapsed legacies formed portion of the testator's real estate as to which he died intestate, and as such should go to the heirs-at-law in equal proportions, and that the same rule should be applied to the lapsed shares of the residuary estate—overruled. *O'Kelly v. Chamberlaine*, 7 Ir. Jur. 310, C. *Roberts v. Walker*, (1 Rus. & Myl. 753,) approved *of*. 1b.

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LEVARI FACIAS, *See* EXECUTION.
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LIBEL, *See* CRIMINAL LAW. DEFAMATION.

—◆—
LIEN.

A bill for an injunction was filed by W and S to restrain S from suing at law on certain bills of exchange; notice of a motion to give security for costs was served, pending which W obtained a decree *pro confesso*, whereby it was referred to the Master to take an account of the money *bona fide* advanced by S to W, who undertook to pay any balance, which should be found due by him on the account. An order was afterwards made on consent that the decree and injunction should be set aside, S undertaking to file his answer within a month; and that he should have a lien on the funds reported or decreed, in the cause of *W v. M'K*, and if the answer was not filed within a month, that the decree and injunction should remain in force. Afterwards E obtained an order, in the cause of *W v. M'K*, that the same funds should be charged with a sum in favour of E, and that, when the funds should be allocated, he should be at liberty to file a charge and he reported the said sum. Held, that S had acquired a lien on the funds for any demand for costs or otherwise, which he should establish his right to in the cause of *W v. S*; and that he had priority over E, neither party having lodged his order with the Accountant General. *Waller v. Wildridge*, 3 Ir. Chan. R. 155, R.

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LIMITATION, *See* DEED. MARRIAGE SETTLEMENT.
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LIMITATIONS (STATUTE OF), *See* LEASE.

An acknowledgment of a judgment debt in the will of the debtor is sufficient to take it out of the operation of the Statute of Limitations (3 & 4 W. 4, cap. 27, s. 40.) *Millington v. Thompson*, 3 Ir. Chan. R. 237, C.

A claim against an executor founded on a breach of trust, created without a specialty executed by him, is a simple contract debt and as such barred by the Statute of Limitations. Held, (affirming the order of the Master of the Rolls, reported 2 Ir. Chan. R. 648, R.) *Brereton v. Hutchinson*, 3 Ir. Chan. R. 361, C.

A nonsuit in an action of ejectment for nonpayment of rent on the ground that no rent had been proved to have been paid under the lease within 20 years next before the commencement of the suit, held to be wrong because that a new right of entry accrued with each successive gale of rent. *Spratt v. Sherlock*, 3 Ir. C. L. R. 69; s. c., 6 Ir. Jur. 146, Q. B.

To an action brought by the plaintiffs for the loss of goods shipped on board the defendants' vessel and lost through their negligence, the defendants pleaded, that by a certain Act of Parliament (6 & 7 W. 4, cap. C., s. 4,) it was enacted that no action should be brought against the defendants for any act done by them in their trade, unless such action be brought within twelve calendar months after the act complained of happened, and that the

act complained of occurred more than twelve months before the commencement of the action. Demurrer, upon the grounds that the 6 & 7 W. 4, cap. C., s. 8, had been repealed as to the time of limitation by 5 & 6 Vic. cap. 97, sec. 5, which enacts that the time for bringing any action for anything done "under the authority or in pursuance" of the 6 & 7 W. 4, c. C. (amongst others) should be extended to two years, overruled. *Browne v. City of Dublin Steam Packet Co.*, 7 Ir. Jur. 53, E.

The 3 & 4 Wm. 4, cap. 27, applies to the rent-charge, and therefore only six years' arrears of that species of property can be recovered by the tithe-owner. *Ecclesiastical Commissioners v. Marquis of Sligo*, 7 Ir. Jur. 261, C.

LODGMET OF MONEY, See PRACTICE.

LUNATIC.

A lunatic may be permitted to travel in England on proper security being given; but the court will not give leave to the committee to take the lunatic out of the United Kingdom on a medical certificate that it would be to the advantage of the lunatic to travel in a continental climate. *In re Hackett*, 3 Ir. Chan. R. 375; s. c., 6 Ir. Jur. 249, C.

Where money was lodged in court by a defendant in an action brought by a plaintiff alleged to be a lunatic, leave was given to invest the money in the name of the Master of the court in the public funds. *In re Barrett*, 7 Ir. Jur. 22, C. P.

The court refused to make any order as to the dividends until they had accrued. *Ib.*

The Masters have jurisdiction, in cause petitions under the 15th section of the Chancery Regulation Act, to appoint a guardian *ad litem* for a lunatic respondent. *Ashton v. Pollock*, 7 Ir. Jur. 50, M. O.

Notice of filing a cause petition was directed to be served upon a respondent, who was of unsound mind and out of the jurisdiction, by serving the keeper of the lunatic asylum and the friend of the lunatic in London, and liberty was given to petitioner to appoint a guardian *ad litem*, in case respondent's friends should neglect to do so. *Ib.*

A cause petition having been filed for the recovery of rent under a lease, and for the administration of the estate of the assignee of the lessee, the petitioner claimed as assignee of the reversion under a deed of the year 1822, and stated payment of rent for 24 years to such assignee. The respondent in her discharge did not deny the payment of rent, and as to the execution of the deed of 1822, said she knew nothing, but that the grantor was a lunatic at the time. The Master directed that each party should examine on interrogatories, and refused to direct an issue. Held, that an issue should not be directed as to the question of lunacy, and that the onus of proving the lunacy lay on the respondent. *Long v. Long*, 7 Ir. Jur. 81, R.

MAGISTRATE, See JUSTICE OF THE PEACE.

MALICE, See CRIMINAL LAW.

MANDAMUS, See POOR LAW.

MARRIAGE.

A marriage celebrated in England between a native and domiciled Scotchman and an Irishwoman may be dissolved by a decree for a divorce pronounced by the Court of Session in Scotland. *Magher v. M'Alister*, 3 Ir. Chan. R. 604, C.

MARRIAGE SETTLEMENT.

A settlement recited an agreement to settle the property of the wife for her sole use, free from her husband's debts, control, &c., and to be paid on her receipt, or of such appointee as she should by writing under seal, in each half-year, for that purpose appoint, no such appointment to extend beyond half a year, but to be capable of being renewed half-yearly; and no act or authority whatever to be capable of empowering the husband or any one deriving through him to take the property; but the wife to have power and authority in every respect to dispose of the same and the accumulations thereof by deed or will, at all times, &c., as she should think fit, as fully as if she had remained sole and unmarried; and in case of her dying intestate, the property and all accumulations thereof to pass to her heirs and next of kin. The settlement, after vesting the property (a portion of which consisted of two annuities or rent-charges) in the trustees thereof, proceeded to declare that they should receive the same annuities from time to time, half yearly as same should be paid, and after receipt thereof pay over the net produce to the wife on her own receipt free from her husband's control, &c. It was also declared that the trustees should carry into effect the true intent, &c., so as to maintain and apply to the sole use, &c., of the wife, and subject to her sole control, &c., (notwithstanding coverture,) all and every her property according as she should think fit, and so as to be payable into her own hands; and her own sole receipts, all in her own handwriting and signed by her, to be the sole and only acquittances for the same. After the marriage and during the husband's lifetime, the wife joined in executing a promissory note to the petitioner, to secure a debt of her own, and the suit was to raise the amount out of the securities. Held, that she was restrained during her husband's life from anticipating the annuities in that way; and accordingly the petition for a receiver over same was dismissed. *Doolan v. Blake*, 3 Ir. Chan. R. 340, C.

A limitation in a marriage settlement, giving a fund, the property of the settlor, to the settlor for life, with remainders over in the event of the bankruptcy or insolvency of the settlor, is void on grounds of public policy, and the settlor having conveyed this fund to assignees, in trust for creditors, they are, upon his insolvency, entitled to retain the fund during the life of settlor, in preference to the objects of the limitation, so Held, on appeal, (reversing the judgment of the Master of the Rolls,) *In re Casey*, 7 Ir. Jur. 133, C.

For a report of the same case, as heard at the Rolls, 3 Ir. Chan. R. 419.

F S, being the owner of certain fee-simple, freehold, and leasehold estates, executed two several bonds for the respective sums of £500 and £1,700, dated respectively in the years 1799 and 1817, to which J E S was now entitled. On the 17th of April, 1818, F S, upon the marriage of his eldest son, J, executed a settlement, whereby he conveyed his estates upon trust for himself for life, then to his said son for life, and next to secure a jointure for the intended wife of the son, with other provisions for the younger children of F S. The said F S then conveyed other lands to trustees, in trust out of the rents and profits "to pay off, discharge, and keep down all interest now due or hereafter to grow due upon all debts and incumbrances now affecting all or any part of the estates by the said presently granted or assigned, or upon such other debts now due by the said F S, as far forth as the same by law bear interest, and which other debts and incumbrances are specified in a schedule hereto annexed;" then, after some other trusts, in trust for F S for life, and then for the said son, J, his heirs and assigns; provided, that these last mentioned estates were to be liable to and "chargeable with the payment of all and singular the debts and incumbrances of F S now due by him, as the same are specified in said schedule, and that such debts and incumbrances shall remain and be liens and charges thereon exclusively, and in exoneration of" other tenements and premises. This indenture also contained a provision that, notwithstanding any of the trusts, these lands so charged with the debts might, in the lifetime of F S, be sold by the trustees for the payment of all or any of the debts charged upon any of the premises, provided it be with consent of F S and his son, J, or the survivor of them. To this indenture was annexed a schedule of the debts, including large items which could not be at all chargeable upon the estates, unless made so by this deed, and, among others, two bonds due the Rev. J S for £600 and £1,600 respectively. None of the schedule creditors were parties to the deed, nor had they notice of it, but it was executed by F S and his said son, J. The marriage took place, and the interest was paid upon the bonds and other schedule debts till 1846, first by F S, and then by his son, J. In 1824 F S conveyed his life estate in the land to other trustees to keep down the interest upon these debts, and also upon other debts, all of which were contained in a schedule to this second deed, and then upon similar trusts as before. J S died in 1831, having by his will left everything real and personal to his son, J, the younger, whom he made executor, and who proved the will. In 1832 the son, J, married a second time, and made a settlement, reciting the indenture of April, 1818, and that the said J had executed a bond to indemnify the trust estates therein from the debts mentioned in said indenture of 1818, and he subsequently incumbered his estates by several mortgages and bonds, and died in 1845, having by his will bequeathed all his real and personal estates to trustees to pay his mortgage and bond debts, and then bequeathed all to his eldest son, F, subject thereto. A suit having been instituted by J E S, the owner of the first bonds,

it was resisted by those mortgage and judgment creditors of the son J. Held, (Lord St. Leonards dissentiente,) that the two bonds for £500 and £1,700 were identical with those mentioned in the schedule to the settlement of 1818 as bonds for £600 and £1,600 respectively, and that the son, J, took the trust lands in said settlement, subject to the payment of interest then due, and to grow due, on said bonds, and that the trusts of the will of the son, J, should be carried out, and that these two bonds formed part of those directed by the will to be paid, and were within the trusts created thereby for payment of bond debts. *Synnott and others, appellants; Simpson and others, respondents*, 7 Ir. Jur. 197, H. L.

Per Lord Chancellor.—The schedule creditors were objects of the settlor's bounty, as much as the eldest son, and though the trusts were revocable during the life of F S, yet, when at his death they became irrevocable, the eldest son, J, could only take the estates as they were given him, viz., subject to the debts. Some of the debts in the schedule being evidently intended by the settlor as a gift, makes it conclusive that he intended the trust, as to all the schedule debts, to operate as a bounty. Even if such intention did not appear, it is doubtful whether the doctrine of *Garrard v. Lord Lauderdale* applies to a case when the trust is to come into operation only on the death of its author, and when subject to trusts for the payment of debts, the lands charged are conveyed by way of bounty to a third person. The trust for the sale of the lands, with the consent of F S and his son J, is not inconsistent with the trust for the payment of debts, because the sale contemplated was a sale in the lifetime of F S, before the other trust had arisen. *Ib.*

Per Lord St. Leonards.—The schedule creditors could not have filed a bill for the interest on their claims as soon as the deed of 1818 was executed, as no contract was entered into with them. The fact of the trust being rendered irrevocable by the death of F S did not give them any additional right. The payment of interest on the debts did not entitle them to sue the trustees, nor was there any notice to the creditors or dealing with them, sufficient to give them any rights under the settlement of 1818. The trusts of this deed began immediately, and if the schedule debts and the interest thereon were held to be a charge upon the estates, the creditors could have filed a bill for the recovery thereof, immediately after the execution of the deed of 1818, which would be contrary to the authorities. The deed of 1824, placing other debts *puri passu* with those in the deed of 1818, show that it was not the intention of the settlors that the debts of 1818 were intended as a bounty. The rest of the deed was a contract upon the marriage, and though this was bounty to the schedule creditors, they could not enforce it. *Ib.*

Garrard v. Lord Lauderdale, Gibbs v. Glamis, and Gibbs v. Gibson, observed upon. *Ib.*

MARRIED WOMAN, See HUSBAND AND WIFE.

Semble, where one of the defendants is a *feme covert*, and the suit is respecting her inheritance,

the consent of her counsel in the direction of an issue relating thereto would not be binding on her. *Rossborough v. Boyse*, 3 Ir. Chan. R. 540, R.

The interest due at the time of a fund settled to the use of a married woman, with a clause against anticipation, is liable to be charged with the amount of a promissory note due by her. *Fitzgibbon v. Blake*, 3 Ir. Chan. R. 663, C.

Seemle, that interest which accrued due after the date of the promissory note could not be charged therewith. *Ib.*

A married woman sued together with her husband cannot demur by attorney, but must, if at all, do so in person when the husband lets judgment go by default. *Bergin v. Burke*, 7 Ir. Jur. 27, C. P.

A married woman may not appear by attorney, although sued as *feme sole*. *Kennedy v. Grace*, 7 Ir. Jur. 28, C. P.

In a defence to an action of ejectment, the defendant pleaded as follows: "A P, defendant, in person, appears and takes defence, &c., and therefore she defends this action."—(Signed) J C M, attorney for the said A P, No. 46, Hardwicke-st., Dublin. Application to set aside the defence for irregularity, granted. *Seymour v. Patterson*, 7 Ir. Jur. 46, E.

MESNE PROCESS.

It is the duty of the plaintiff applying for a judge's fiat to set forth in his affidavit to hold to bail all the facts of the case in the first instance; and he is not justified in withholding facts from the knowledge of the judge, on the supposition that they are not material to the case. *Rodocanachi v. Soderholm*, 3 I. C. L. R. 591; s. c., 6 Ir. Jur. 21, C. P.

In an action of trespass for an illegal arrest and false imprisonment, A, the defendant, (plaintiff in error,) justified under a Judge's fiat to hold B, the present plaintiff, (defendant in error,) to bail in an action in which A had been the plaintiff, the suing out of a writ of *capias ad respondendum* pursuant to the provisions of 3 & 4 Vic, cap. 105, and the arrest and detention thereunder of B. B replied that the special order in question had been obtained on affidavits filed by A, alleging that B was about to quit the country; that the said order was subsequently, by the order of another judge acting in Chamber, set aside, and that the special order was so set aside upon the grounds that the former judge had been induced to make the same upon a misrepresentation of facts touching the alleged intention of B to quit Ireland, and that he had been induced to and did make said order improvidently, wherefore the said order was so set aside. The defendant having demurred to said replication, judgment was given by the Court of Exchequer in favour of B (the plaintiff below). A having brought his writ of error to reverse said judgment, Held, by a majority of the court, five judges to four, (Monahan, C. J., Ball, J., Pennefather and Greene, B.B., *dis-sentientibus*), reversing the judgment of the court below, that, it not appearing by the replication that the original fiat had been set aside by reason

of any fraudulent or wilful misrepresentation on the part of A, the order, although since set aside, was a sufficient protection for acts done under its authority whilst it remained in force. *Dowdall (in error) v. Kelly*, 7 Ir. Jur. 183, Ex. Cham.

MINOR, See PRACTICE. RECEIVER.

An order cannot be made in a cause petition against a minor without proofs. *Holmes v. Holmes*, 3 Ir. Chan. R. 126, C.

A testator bequeathed the lands of B, (held under a bishop's lease, renewable every seven years,) and all his other property (being personal) to trustees upon trust to pay the rents and other outgoings of K, as therein, and to preserve the interest in said lands by keeping up the renewals; and after giving certain legacies, he bequeathed the residue of the lands of K and the other property to his daughter, her executors, &c.; but in case of her death, under age and unmarried, then over. On his death the daughter was a minor, and was made a ward of court, the other personal estate not being sufficient for the payment of his debts; the greater part of same were paid out of the rents of K by the receiver in the minor matter, and renewals were also obtained, and the fines paid in like manner. The daughter died under age and unmarried, and a remainderman took, Held, that the personal representative of the minor was entitled to be repaid the principal money of such of the testator's debts as were paid out of the rents of K during the minority, and which the other personal estate was insufficient to discharge, with interest thereon from the minor's death. *Lanauze v. Malone*, 3 Ir. Chan. R. 354, C.

Held also, that the minor and remainderman were bound to contribute to the renewal fines, in proportion to the actual advantage they respectively obtained from the renewals. *Ib.*

A being seised of large estates, all in Ireland, but being resident in England, died there, and by his will made B testamentary guardian to his daughter, a minor. B immediately applied to, and made the minor a ward of, the Court of Chancery in England, and got herself appointed guardian of the person and fortune. The minor's mother, being resident in Ireland, presented a petition to make the minor a ward of the Court of Chancery in Ireland, and to appoint a receiver over the estates. The court granted a reference to the Master to inquire whether B had been duly appointed guardian of the person and fortune, and if not, then to appoint a proper person as such with the directions usual in minor matters, B to have notice of all such proceedings; and also that the Master should have regard to the proceedings in England, and should report whether it was for the benefit of the minor that she should be made a ward of the Court of Chancery in Ireland, or that the petition should have been only for the appointment of a receiver, and reserved the question of costs. *Re Morgan*, 7 Ir. Jur. 217, R.

Quære, can a minor who has been made a ward of the Court of Chancery in England be also made a ward of the Court of Chancery in Ireland? *Ib.*

MISJOINDER, *See* PRACTICE.MORTGAGE, *See* CHARGE. JUDGMENT.
PRIORITY.

The court will not appoint a receiver in a foreclosure suit, or a suit to raise a charge affecting lands, unless a year's interest is due, or the property is in danger of being evicted, (*e. g.* for nonpayment of headrent,) or there is reason to apprehend that it will be insufficient to pay the charges on it. An absolute order for a sale in the Incumbered Estates Court will not of itself induce the court to vary the rule. *Herbert v. Greene*, 3 Ir. Chan. R. 270, R.

Where a judgment creditor, who had registered an affidavit of ownership under the 13 & 14 Vic. c. 29, on the same day filed a cause petition, which was referred to the Master under the 15th section; and the Master made a decretal order appointing a receiver for the payment of the sum due on foot of the judgment; the court, on appeal, it appearing by affidavit that the lands would be insufficient to pay the judgment, extended the receiver, who had been appointed in another matter, but reserved the question of costs, until the produce of a sale, which was pending in the Incumbered Estates Court, should be ascertained. *Ib.*

It is a well settled general rule of the court not to pay any part of the principal of a mortgage out of the rents and profits, or to appoint a receiver for that purpose. The provision in the Sheriff's Act to the contrary is an exception. to the general rule, the appointment of a receiver under that Act being in the nature of an equitable execution and in lieu of the *degit.* *Ib.*

The affidavit to register a mortgage, a judgment obtained in an adverse suit, did not specify the title, trade, or profession of the plaintiff, and did not specify the amount of costs recovered by the judgment. Held, that the omission of the costs was not a valid objection, inasmuch as no costs were specially given by the judgment, and that besides the word "costs" in the 8th requirement of the 6th section, properly referred to costs as such, ordered to be paid by any "decree, order, or rule." *In re Ferrall*, 7 Ir. Jur. 307, Bkpt. Ct.

Held also, that the affidavit not stating, pursuant to the 6th requirement of that section, either the title, trade, or profession of the plaintiff, was inoperative to create a mortgage. *Ib.*

MOTION, *See* PRACTICE.

NE EXEAT REGNO.

A respondent is not entitled to his discharge from custody under a *ne exeat regno*, upon the ground that he was made amenable to that writ by means of an arrest, under a warrant issued on informations, sworn by the petitioner, in respect of the same matters, which were in question in the suit; even though the prosecution instituted in pursuance of those informations be eventually abandoned, if the petitioner appear to have a *bona fide* intention of prosecuting the criminal proceedings at the time

of procuring the arrest on the warrant. *Kelly v. Birch*, 3 Ir. Chan. R. 466, C.

NEGLIGENCE, *See* EVIDENCE.NEW TRIAL, *See* PRACTICE.NONSUIT, *See* PRACTICE.NOTICE, *See* RESPECTIVE TITLES.NOTICE TO QUIT, *See* PRACTICE.NOTICE TO TREAT, *See* RAILWAY CO.NOTICE OF TRIAL, *See* PRACTICE.

OFFICE.

The 52 Geo. 3, cap. 184, s. 2, does not create or regulate two distinct and independent offices of weighmaster and taster of butter, but the latter is merely a function of the former office. *Kelly v. Molony*, 7 Ir. Jur. 225, Q. B.

Quære, whether the office of weighmaster of butter under the last mentioned Act, is distinct from that of public weighmaster created by the 4th Anne, cap. 14, Ir. *Ib.*

OCCUPIER, *See* REGISTRY.ORDER, *See* CHARGING ORDER. PRACTICE.PARTICULARS, *See* PRACTICE.PARTIES, *See* PRACTICE.

PATENT.

On a motion for an injunction to restrain the infringement of a patent an order was made that the motion should stand until the plaintiff brought an action at law. There was a verdict for the plaintiff, and the defendant tendered a bill of exceptions, pending which the motion was renewed. The court granted an injunction, the plaintiff undertaking to abide any order which the court might make, by directing an issue, or otherwise to ascertain the damage, if any, which the defendants should sustain by obeying the order, in case the defendant should obtain judgment in the action at law. *Baxter v. Combe*, 3 Ir. Chan. R. 245, R.; s. c., affirmed on appeal, 3 Ir. Chan. R. 256, C.

Where a several fishery in a navigable river has been appropriated by the Crown prior to Magna Charta, a grant in letters patent to A and his heirs of all the salmon fishing, pike, eel, and other fishings of and in the river in question, enure to pass the several fishery. *Ashworth v. Brown*, 7 Ir. Jur. 315, Q. B.

PETITION, *See* PRACTICE.

PLEA, *See* PLEADING.

PLEADING, *See* **COURT. ESTOPPEL. MARRIED WOMAN. PRACTICE. SUGGESTION OF BREACHES.**

Under former system.—A writ of *scire facias* on a recognizance recited the recognizance, which purported to be taken by S, a Master Extraordinary of the court for the County of R. The plea traversed that S was a Master Extraordinary for the County of R. Held, on demurrer, that the plea was bad, as the recital of the recognizance estopped the defendant from denying any of the material facts appearing thereupon, though afterwards substantively alleged. *Reg. v. Irwin*, 3 Ir. Chan. R. 268, C.

To a *scire facias*, on a judgment praying execution generally, the defendant pleaded that a *ca. sa.* had been issued by the plaintiff on foot of the judgment in the *sci. fa.* mentioned, under which the defendant had been arrested, and then averred that the defendant was released and discharged from this arrest by consent of the plaintiff and from the execution upon said judgment. Held, that such a plea was bad upon general demurrer. *Burns v. O'Leary*, 3 Ir. C. L. R. 1; s. c. 5 Ir. Jur. 65, Q. B.

Held also, that admitting the facts stated in the plea to be true the *sci. fa.* need not pray a special execution excluding personal arrest. *Ib.*

A *sci. fa.* issued by the assignee of a judgment directed the sheriff to make known as well "to the heirs of the conuzor of the said judgment, as also to the several tenants to the lands and tenements which were of the said conuzor, &c., to show if they have or know anything to say for themselves, wherefore the debt and damages aforesaid ought not to be made, &c., according to the said recovery." The sheriff returned that he had made known to the within named A, B and C, heiresses-at-law of the said conuzor, and also to D and E, tenants to the lands and premises within mentioned. Held, that though the words "the lands" in the *sci. fa.* meant "all the lands" they had not that signification necessarily in the return, and that it was therefore bad on special demurrer for ambiguity. *Fotrell v. Griffith*, 3 Ir. C. L. R. 131, E.

Held also, that it is sufficient in a *sci. fa.*, at the suit of an assignee of a judgment, to pray judgment "according to the said recovery" without the addition of assignment. *Ib.*

As to it not being essential, in an action against a corporation on foot of an award, to aver that the submission was by deed, see *McClintock v. London-derry and Coleraine Railway Company*, 3 Ir. C. L. R. 609; s. c. 6 Ir. Jur. 229, Q. B.

Under Common Law Procedure Act.—The court will not set aside a writ of summons and plaint, if signed by counsel, on the ground that it contains several counts varying the cause of action, when the plaintiff does not appear to have unnecessarily restated his complaint with a view to embarrass or

oppress the defendant. *Harrison v. Lynch*, 3 Ir. C. L. R. 527, C. P.

A defence will be set aside when amounting to the general issue. *Dowling v. Wallace*, 3 Ir. C. L. R. 83, Q. B.

To a summons and plaint for use and occupation the defendant pleaded that he is not indebted in the sum in the summons and plaint mentioned for the use and occupation of the premises, as he has heretofore discharged the same. Held, that such defence was bad, either as amounting to the general issue, or to a defence of payment; and, if the latter, that the time and manner of the payment should have been endorsed or specified in the defence. *Russell v. Nelson*, 3 Ir. C. L. R. 229; s. c. 6 Ir. Jur. 265, Q. B.

A defence to an action for goods sold and delivered, as to part that defendant was not indebted, &c., and as to the residue, accord and satisfaction, was held to be irregular and embarrassing, the plea of "not indebted" being too general. *Allard v. Ranagan*, 3 Ir. C. L. R. 283; s. c. 6 Ir. Jur. 254, Q. B.

A defence to a writ of summons and plaint, complaining of a breach of covenant for non-payment of rent, and stating that defendant had agreed to accept for a certain consideration, and had accepted, an abated rent, and that the sum demanded was a violation of the agreement; and further, that the only sum due was £60, which the defendant brought into court, was held bad, because it did not allege whether or not the agreement was under seal. *Neville v. Hyland*, 3 Ir. C. L. R. 238, Q. B.

To a writ of summons and plaint, for goods sold and delivered, goods bargained and sold and an account stated, the defendant pleaded that he "is not and never was indebted to the plaintiff in respect of the several causes of action or any of them in the summons and plaint mentioned." Held, that such defence was no traverse of any one fact in the summons and plaint mentioned, and was too wide. *Cock v. Mahony*, 3 Ir. C. L. R. 240; s. c. 6 Ir. Jur. 301, Q. B.

In an action against a railway company for injuries done to the plaintiff's house, the defendants pleaded that the alleged injuries were committed under the provisions of a certain Act of Parliament, and that the plaintiff should have pursued the remedy given by that Act. The plaintiff having applied under the Common Law Procedure Act to have the plea set aside as embarrassing, the court refused the application, on the ground that the plaintiff's course was to demur to the plea. *Connolly v. Dublin and Drogheda Railway Company*, 3 Ir. C. L. R. 255; s. c. 6 Ir. Jur. 302, C. P.

Where to a plaint in an action for malicious prosecution, averring that the defendant, maliciously, and without probable cause, caused the plaintiff to be indicted for, &c. "and that the defendant did prosecute and caused the said indictment to be prosecuted," &c., the defendant, dividing the plaint into two parts, traversed the statement "that he maliciously caused the indictment to be preferred, and demurred to that part which averred that he prosecuted the indictment, &c., for the omission of an allegation that he had done so maliciously," &c.

The court holding that the plaint disclosed but a single cause of action, and that the mode of defence was calculated to embarrass the plaintiff; set aside the demurrer with costs, giving the defendant leave to plead to the whole plaint. *Bayle v. Hammond*, 3 Ir. C. L. R. 579; s. c. 6 Ir. Jur. 270, C. P.

To a plaint, containing a count for money paid for the support of defendant's illegitimate child, at his request, and the common money counts, the defendant, along with pleas, traversing the various allegations in the plaint, and a plea of the Statute of Limitations, pleaded "that he was not indebted, &c. in the sum of £34, or in any other sum; &c. on account of the several or any, &c. of the alleged causes of action mentioned in said plaint." This plea was struck out on motion. *Daniel v. Walker*, 3 Ir. C. L. R. 581; s. c. 6 Ir. Jur. 271, E.

With respect to a plea of fraud and covin, and of misrepresentation to a plaint on a banker's cheque, see *Reddick v. Cavanagh*, 3 Ir. C. L. R. 582; s. c. 6 Ir. Jur. 382, E.

Practice as to leave to file several inconsistent pleas under section 57. — *v. McDonough*, 3 Ir. C. L. R. 584; E.

A plea amounting to the general issue will be set aside, and leave to mark judgment granted in the absence of an affidavit of merits by the defendant. *Smith v. Grant*, 3 Ir. C. L. R. 585, E.

The court, in granting liberty to rejoin, will not confine the rejoinder to any particular matter, but will make the order that defendant be at liberty to rejoin generally. *Hutton v. Wallace*, 3 Ir. C. L. R. 225; s. c. 6 Ir. Jur. 232, Q. B.

Plea to a plaint in ejectment for nonpayment of rent, that defendants did not or do not hold the premises as in the plaint mentioned as tenants to the plaintiff under a lease *modo et forma*. Held, per Crampton, J. bad; and that it ought to be set aside on motion. *Murphy v. Fookay*, 3 Ir. C. L. R. 236; s. c. (nom. *Murphy v. Fouhey*) 6 Ir. Jur. 238, Q. B.

A replication to a plea of set-off, in the following terms, "that the plaintiff was not now is he indebted to the defendant in manner and form as above therein pleaded" is bad, as amounting to the general issue. *Bergin v. Whisler*, 7 Ir. Jur. 42, C. P.

The court will set aside a plea to an action for assault, wherein the defendant relies upon the payment of money into court, and will give liberty to the plaintiff to mark judgment, as if no defence were filed, inasmuch as such a plea is irregular, under the 5th section of the Common Law Procedure Act. *Brown v. Brown*, 7 Ir. Jur. 119, E.

A literal adherence to the forms given in this Act is not necessary, and a defence to an ejectment varying from the form, but embodying a good defence, held sufficient. *Norton v. Johnson*, 7 Ir. Jur. 126, C. P.

A plea that the defendant never was indebted to the plaintiff in the sum demanded by the summons and plaint is a plea of the general issue, and comes within 16 & 17 Vic. c. 113, s. 79. *Meade v. Morrow*, 7 Ir. Jur. 126, C. P.

Martin v. McHugh, (6 Ir. Jur. 279,) distinguished. *Ib.*

Where to an ejectment for non-payment of rent the defendant pleaded in the form given to an eject-

ment on the title, held, that such plea was a nullity. *Phillips v. McEvoy*, 7 Ir. Jur. 126, C. P.

A defence to a plaint for assault and false imprisonment, which professed to deny and justify, but which left it uncertain whether the justification extended to the act of the defendant, or of the magistrate and constable by whom the plaintiff was arrested, was set aside for uncertainty. *Dunne v. Cooper*, 7 Ir. Jur. 167, C. P.

The court will give a defendant liberty to plead several matters under 57th section of the Common Law Procedure Amendment Act, when it appears that it is not the facts, but the legal consequences of them, that is in controversy between the parties. *Brown v. O'Brien*, 7 Ir. Jur. 182, Consol. Cham.

In an action for oral slander, a defence stating that the words in the summons and plaint mentioned were spoken of the plaintiff by the defendant in good faith and without malice, will be set aside as being framed in a way calculated to prejudice, embarrass, and delay the fair trial of the action. *Dixon v. Franks*, 7 Ir. Jur. 239, E.

Seem, where a defendant obtains liberty to plead several matters, the defence pleaded in pursuance thereof must strictly follow the terms of the order. *Ib.*

In actions for goods sold and delivered, &c. &c., it is sufficient to declare in the summons and plaint that the defendant is indebted to the plaintiff in £., being the price and value of the goods sold and delivered, without the insertion of the words "for money payable by the defendant to the plaintiff," preceding the statement of the particular cause of action, as directed by Schedule C of the 16 & 17 Vic. c. 113. *Gason v. O'Bryan*, 7 Ir. Jur. 272, Q. B.

The forms of pleadings in that Act are not obligatory. *Ib.*

In an action for defamation the court granted liberty for defendant, who applied without affidavit, to plead the Statute of Limitations, to traverse the words alleged to have been spoken, and also a denial of the defamatory sense imputed by plaintiff to the words. *Currin v. Currin*, 7 Ir. Jur. 362, E.

Seem, it is not a good defence against an action for the recovery of money payable for general average to allege that the defendant, the owner of the ship, had, previous to the commencement of the voyage, let and hired the use of the ship to S B, a third party, for the conveyance of a certain cargo from port to port, of which hiring the plaintiff, the shipper of other goods, had notice, and that the plaintiff had put his goods on board the ship by permission of the said S B, but without the knowledge or consent of the defendant; because the defence admits the defendant to be owner and proprietor of the ship at the time of the jettison of the plaintiff's goods, and also that he was interested in the freight of plaintiff's cargo. *Gilmore v. Farrell*, 7 Ir. Jur. 358, E.

In an action for slander, a plea of privileged communication will be allowed to be filed along with pleas denying the speaking of the words, and the meaning imputed by the innuendoes. *Dixon v. Franks*, 7 Ir. Jur. 384, E.

To a summons and plaint averring the plaintiff

to be possessed of a store, &c., adjoining premises of J M, and part of which store was and of right ought to be supported and enclosed by a wall between it and the defendant's premises, and that the defendant J M took down the said wall, whereby he caused the part of the store to fall, and it and the plaintiff's buildings were injured, and he was deprived of the support of the wall and his store rendered useless, the defendant pleaded that he caused the said wall to be taken down with all reasonable and proper care and diligence to prevent injury to the plaintiff's store. This defence was held, on demurrer, to be insufficient. *Toole v. Macken*, 7 Ir. Jur. 385, E.

In an action by indorsee against the makers of a joint and separate promissory note, the defendants pleaded that one J J H was, at the time of the making of the note, negotiating on the part of the defendants with one M C for sale of certain property of defendants, and that it had been agreed that the amount of the note should be paid to J J H by M C, out of the purchase-money on the completion of the sale, and that, in pursuance of the agreement, J J H obtained, at the time of the making of the note, a written order authorising him to retain the amount of the note out of the purchase-money on the completion of the sale, which defendants further pleaded was as yet incomplete, and also averred the want of value or consideration for the endorsement by J J H of the note to the plaintiff, who took it when endorsed, with notice of the premises, and after the said note had arrived at maturity. Held, that this defence was insufficient. *Huckwaite v. Dunne*, 7 Ir. Jur. 386, E.

In an action to recover damages for injuries sustained by a railway collision, the plaintiff averred, *inter alia*, in his summons and plaint, that in consequence of the wounds, &c., inflicted, he had been obliged, at great cost, &c., to send one of his clerks to travel on his business, to solicit orders and collect accounts from his customers in the country, and at great expense to contract with and employ a person to travel on his business, and was, by means of his wounds, prevented from collecting, in person, several large sums of money due to him by his customers, and sustained great loss by the non-payment of divers moneys, and was obliged to borrow large sums to meet his liabilities. Held, that this portion of the summons and plaint being calculated to embarrass and prejudice a fair trial, be struck out, unless the plaintiff furnished the names of the persons sent to travel on his behalf, and the names of the customers by the non-payment of whose debts he sustained the special damage complained of. *Smith v. Dublin and Drogheda Railway Company*, 7 Ir. Jur. 395, E.

In an action to recover money payable for rent-charge, in lieu of tithe-composition, the plaintiffs averred in their summons and plaint that an annual sum was duly apportioned on certain lands in which the defendant was and still is, and, previous to the passing of the "Act to abolish tithe composition in Ireland and to substitute rent-charges in lieu thereof," was, owner of the first interest, equivalent to a perpetual interest within the meaning of the said Act, under which, or derived wherefrom, there was

not, at the time of the passing of the said Act, or since, any such estate or interest, no landlord having undertaken the payment of said composition under the provisions of the Act of the 2nd and 3rd years of the reign of King William the Fourth, relating to tithe-composition, whereby the defendant became liable to pay the annual sum, being three-fourths of the said composition. The defendant having demurred, on the ground that the plaintiffs did not, in their pleading, show "that the defendant had such an estate of inheritance, or such an estate at all, as would render him liable to pay tithe rent-charge, in the parcels of land, within the meaning of the 1st and 2nd Victoria; that the nature of the perpetual estate or interest of the defendant is not otherwise mentioned than in vague and general terms," it was held that the summons and plaint sufficiently set forth the estate of the defendant in the parcels of land. *Trench v. Cassidy*, 7 Ir. Jur. 399, E.

POLICY OF INSURANCE.

Lands were, by a marriage settlement of 1801, conveyed to trustees in trust for C, the intended wife, for life, remainder to B, the intended husband, for life, remainder in trust for the younger children of the marriage, with a power to the trustees to sell the lands, and lay out the produce in the purchase of other lands in fee, or in Government securities. There was one younger child of the marriage, K. The trustees sold the lands, and lent a portion of the purchase money to B, on the security of his bond and warrant, and a policy of insurance on his life, which was effected by the trustees. By a deed of 1832, to which neither K nor her trustees were parties, B and her eldest son, R, conveyed other estates, of which B was tenant for life, with remainder to R in tail, to the use of a trustee for 500 years, to raise by mortgage a sum of £10,000 to pay off incumbrances; and after reciting that bonuses had accrued on the policy of insurance to the amount of £2,500, and that B had agreed, in order to indemnify R's estate, to assign to the trustee of the term all his interest in the policy of insurance, and all bonuses therein, B assigned all his interest, &c., in trust to apply the produce thereof in payment or part payment of the sum of £16,000 intended to be borrowed. The £16,000 was, in 1834, raised by mortgage of the term without referring to the policy or indemnity clause in the deed of 1834. By deeds of 1839 and 1843 the surviving trustee of the deed of 1801 assigned the judgment and the policy of insurance to R, as a new trustee on the trusts of the deed of 1801, and C and K accepted the judgment and policy as a proper investment of the trust fund. Further bonuses afterwards accrued on the policy; Held, that the mortgagees were not entitled to the bonuses under the indemnity clause of the deed of 1832. *O'Grady v. Brady*, 3 Ir. Chan. R. 439, R.

Held also, that the deed of 1832, though not binding on K, might be read as evidence of the title of the mortgagees. *Ib.*

F proposed his life for insurance, and signed a

form of proposal which contained his answers to twenty-seven questions, the twenty-first and twenty-second of which were as follows: "21.—Did any of the party's near relations die of consumption or any other pulmonary complaint? Answer—No." "22.—Has the party's life been accepted or refused at any office? Answer—No." The proposal also contained the following agreement: "I hereby agree that the particulars mentioned in the above proposal shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance shall become forfeited, and the policy shall be void." The policy contained a warranty on the part of F as to most of the facts replied to in the proposal, but not as to Questions 21 and 22. It then provided that the policy should be null and void, and all moneys paid by F forfeited, upon F alleging in certain enumerated modes; "or if anything so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly declared and communicated to the said company, or if any fraud shall have been practised upon the said company, or any false statement made to them on or about the obtaining or effecting of this insurance." In an action on the policy brought against the company, it appeared that the answers to Questions 21 and 22 were not true. Held, reversing the decision of the Courts of Exchequer and Exchequer Chamber in Ireland, that the judge was wrong in directing the jury that if they found the statements both *false and material*, they should find a verdict for the defendants; and that the questions which he ought to have left to the jury were—first, whether the statements were false? and secondly, whether they were made in obtaining or effecting the policy? *Anderson v. Fitzgerald*, 3 I. C. L. R. 475, H. L. Cas.

A cause petition may be presented under the 15th section of the Court of Chancery Regulation Act for sale of a policy of insurance. *Brahan v. Lawder*, 7 Ir. Jur. 283, C.

In an action upon a policy of insurance the plaintiff in his summons and plaint alleged that by the said policy it was provided that in case any "palpably fraudulent or untrue" allegation was contained in the declaration, or any of the testimonials or documents addressed to the society in relation to the assurance, or in case any material information was omitted, the policy should be void; averring that no "palpably fraudulent or untrue" allegation was contained in any of these documents, and that no material information had been omitted, &c. The defendants pleaded several defences, alleging in each that the plaintiff had stated some particular matter of fact "which was untrue," inasmuch as the contrary was the fact, and setting forth the particular fact constituting the alleged untruth. Demurrer, upon the grounds that the

defendants did not allege the facts stated as matter of defence to be *palpably* untrue, but simply untrue, allowed. *Guinane v. The Hope Mutual Life Assurance and Honesty Guarantee Society*, 7 Ir. Jur. 52, E.

POOR LAW, See PRACTICE. REGISTRY.

With respect to errors in rate book not tending to invalidate a distress for the rate, the rate itself being valid, see *Rush v. Guardians of Roscommon Union*, 3 I. C. L. R. 14; s. c., 5 Ir. Jur. 24, Q. B.

On a return to a *mandamus* to the Commissioners to appoint the curate of the parish (the rector having waived his right) to the office of Protestant chaplain of the union, Held, that the Commissioners are the sole judges of the fitness for such an office, and that a return setting out that in their discretion and judgment they had appointed a duly qualified person would not be questioned. *Reg. v. Poor Law Commissioners*, 3 I. C. L. R. 147; s. c. 6 Ir. Jur. 372, Q. B.

Held also, that the words of the 1 & 2 Vic. cap. 56, s. 48—"preference shall be given to some clergymen of the Established Church officiating within the parish"—do not amount to an exclusion of all other clergymen, and that the other words, "if duly qualified," refer to something of which the Commissioners are to judge; "officiating" meaning doing the duty of an office. *Ib.*

Held also, that *mandamus* was the proper remedy, because the title of the prosecutor is asserted upon the supposition that the title of the party is colourable or void; *quo warranto* does not lie for an office held during pleasure. *Ib.*

With respect to the form of proxy voting papers, see *Reg. v. Austin*, 3 Ir. C. L. R. 441; s. c. 6 Ir. Jur. 2, Q. B.

The 6 & 7 Vic. c. 92, s. 23, having provided a special tribunal for the decision of such questions, this court will not grant a *quo warranto*. *Ib.*

As to liability of purchasers under the Incumbered Estates Court for arrears of poor rates, where estate was sold free of incumbrances, see *Lally v. Concannon*, 3 I. C. L. R. 557; s. c., 6 Ir. Jur. 26, Q. B.

Certain premises had been rated to the relief of the poor under the description of a "spinning mill, thread manufactory, stores, and offices," upon the estimated net annual value of £1,600. Upon appeal it was ascertained that upon the premises there were steam-engines, and a large water-wheel, which were fixtures; and that, in addition thereto, there were twisting machines, flax cutting and hackling machines, and warping machines, which were not fixed to the building, but were set in motion by means of the steam-engines and water-wheel, when in gear therewith. It was ascertained that the annual value of the premises, independently of the detached machines, was £600 only; Held, that, having regard to the provisions of the 15 & 16 Vic. c. 63, the latter class of machinery did not form a basis for an increased valuation, and that the premises ought to be rated at the reduced amount. *Reg. v. Guardians of Banbridge Union*, 7 Ir. Jur. 332, Q. B.

Samble, per *Lefroy*, C. J., that, under the 1 & 2 Vic. cap. 56, irrespective of the latter statute, the same conclusion would follow. *Ib.*

It is the duty of the Poor Law Commissioners, in cases relating to the internal management of the affairs of the union house, to communicate in the first instance with the guardians of the union, and not to interfere directly with or convey their instructions to the officers of the establishment. *Reg. v. Guardians of Uxlingford Union*, 7 Ir. Jur. 149, Q. B.

A was the immediate lessor of premises set at an annual rent of £82, and rated at a valuation of £62. A held under a lease from B, at a rent of £27 10s. A having, pursuant to the 12 & 13 Vic. cap. 104, s. 11, allowed the occupying tenant a proportion of poor-rate, amounting to one-half the amount of the current rate, claimed, in the settlement of his own rent with B, credit for half the poundage of the rate upon the entire of the headrent. Held, that since the alteration of the law, by the 12 & 13 Vic. c. 104, s. 11, he was not entitled to deduct so much, and that the amount of the deduction to which he was entitled should be strictly regulated by the rule of proportion contained in the 75th section of the 1 & 2 Vic. c. 56—namely, as the rent which he received was to the rent which he paid, so should the amount of the deduction allowed by him to the occupying tenant be to the deduction to be allowed him by the head landlord. *Carr, appellant, Tottenham, respondent*, 7 Ir. Jur. 363, Cir. Cas.

PORTIONS.

A sum of £8,000 was charged on lands of K by a marriage settlement as portions for children, to be shared and divided between them in such parts and proportions, and to vest and be paid to such children respectively as and upon such age, days, or times, and to be subject to such charges, provisions, and limitations, such charges and limitations being for the benefit of some one or more of them, and in such manner as W M, the younger, by any deed or deeds, instrument or instruments in writing, or by his last will, should direct or appoint, and in default of appointment, to be equally divided between or among such children, share and share alike—the share of sons to be paid at twenty-one, and the share of daughters to be paid at twenty-one, or marriage. W M by his will bequeathed a legacy of £2,000 to his wife, and the interest of the remainder of the money of which he might die possessed for her own use, and for the maintenance and education of his two daughters, and he charged her estate of K, as he was entitled to do by his marriage settlement, with £8,000, which, together with the residue of his fortune, he wished to be divided in equal shares between his two daughters, and he left the residue of his fortune and money, after paying the £2,000 to his wife, together with the sum of £8,000 charged upon the estate of K, to be equally divided between them, the entire to belong to either of his daughters, should the other not arrive at the age of 18 years. Held, that the will operated as an execution of the power under the settlement, and that the portions of the daugh-

ters vested at the testator's death, and bore interest from that date. *Murphy v. Murphy*, 3 Ir. Chan. R. 95, C.

POSTEA, See AMENDMENT.

POWER, See WILL.

A power to appoint to and amongst children, in such shares and proportions, or to appoint, a sum "to be divided to and amongst children in such shares," &c., as the donee of the power shall appoint does not authorize the exclusion of any of the children. *Minchin v. Minchin*, 3 Ir. Chan. R. 167, R.

A marriage settlement recited an intention to secure a jointure for the wife; and the property (which was the husband's) was vested in trustees to secure same, and subject thereto upon such uses and for such persons as the husband should appoint by deed or will, and in default thereof for the children of the marriage, share and share alike. Held, that the power was a general one and not restricted to children of the marriage by the subsequent limitation in their favour. *Lanauze v. Malone*, 3 Ir. Chan. R. 354, C.

The settlor, by his will referred to the settlement, and confirmed the jointure and bequeathed the lands *nominatim*, and all his other property, to trustees for the benefit (in the events that happened) of his only daughter (who afterwards died under age, &c.) with remainders over, but he did not refer to the power. Held, that the power was well executed by the will in favour of the first remainderman. *Ib.*

The rule, that where a general power of appointment is exercised in favour of a volunteer, he is a trustee for the creditors of the appointee, holds where the power is to be exercised by will only. *Edie v. Babington*, 3 Ir. Chan. R. 568, R.

A power is general, though there be a restriction against exercising it in favour of one person. *Ib.*

A testator by his will reciting that he was seized of a freehold estate in certain premises devised as follows: "I leave, devise and bequeath to my said daughter M H all my freehold interest in North King-street, in the City of Dublin, upon trust to receive the rents and profits thereof for and during the term of her natural life, for her own sole use, &c., notwithstanding her coverture, without the control of her present or any future husband, &c., with power to my said daughter by any deed or will to dispose of, devise or bequeath the said freehold estate to and among her children, in such shares and proportions as she shall think fit and proper." After some bequests, a residuary clause followed in these words: "I do hereby give, leave and bequeath to my said daughter M H all the rent, residue and remainder of my worldly substance, of what nature or kind soever, for her sole use and benefit, without the control," &c. Held, that M H took the absolute interest in the freehold estate; that the power was a naked one not coupled with a trust, and that no estate was given to the children by implication from the words of the power. *Healy v. Donaghy*, 3 Ir. C. L. R. 213; s. c., 5 Ir. Jur. 305, E.

PRACTICE.

IN EQUITY.

Abatement and revivor.—A fund was ordered to be paid to the surviving plaintiff in an injunction suit, abated and dismissed by the 1st General Order of 1843. *Thomas v. Thomas*, 3 Ir. Chan. R. 399, R.

The court has not power to order service out of the jurisdiction, of the notice of a suggestion to revive. *Rosborough v. Boyse*, 3 Ir. Chan. R. 489, C.

A cause petition having abated by the death of a sole petitioner, after an order had been made for substitution of service thereof, an order was made giving the executor of the deceased petitioner liberty to file a petition of revivor, and to substitute service of notice thereof in the same manner as had been directed by the previous order for the substitution of service of the original petition. *Synge v. Synge*, 7 Ir. Jur. 101, R.

A cause petition having been filed by a minor by her next friend, and the minor having married, and made a marriage settlement, an order was made giving liberty to file a petition of revivor and supplement, bringing before the court the husband of the minor and the trustee of the settlement. *Bowes v. Watson*, 3 Ir. Jur. 138, R.

Administration suit.—A testatrix bequeathed to trustees £20,000, in trust for the building and endowment of a college for clerical students connected with the General Assembly of Irish Presbyterians; the same to be built where the trustees should decide, and to be under such rules, &c., as they should determine, subject to the advice and direction of the assembly. The suit was for the administration of the assets of the testatrix, and to carry into execution the trusts of her will. Held that the costs incurred by the trustees in the settlement of a scheme for the due application of the £20,000 were to be borne by that bequest, and not by the residuary fund. *Dill v. Brown*, 3 Ir. Chan. R. 127, C.

The General Assembly (who were not parties to the cause) presented a petition for leave to intervene in the office, as if they had been joined, and that their costs of doing so might be allowed to them out of the £20,000; but the order made on the petition merely provided that they should be at liberty to intervene if they thought fit, and reserved, until the final hearing, all questions as to any claim for costs by them. Under this order they proceeded before the Master. Held, (at the final hearing,) that they were not entitled to their costs as against any fund, since they were not parties to the cause so as to be liable to costs; and the order permitting them to intervene did not provide for their costs as prayed by the petition. *Ib.*

The court will not decide, on the first hearing of a cause petition for an administration, that the extra costs, caused by setting it down as a general cause petition, should be borne by the petitioner. *Green v. Giles*, 3 Ir. Chan. R. 487, C.

The general rule is, that though there be a decree for the administration of assets, a creditor of the testator or intestate will not be restrained by injunction from proceeding at law to make the per-

sonal representative liable *de bonis propriis*, but where a legatee who has proved in the Master's office under the decree brings an action at law against the executor for the legacy, the court will enjoin him, though the judgment in the action should be *de bonis propriis*, for the court by its decree has taken upon itself to decide upon the question of assets, without which the plaintiff at law cannot recover, and will not permit that question to be tried at law. *Molyneux v. Scott*, 3 Ir. Chan. R. 291, R.

Quære, whether a cause petition, praying for the administration of personal assets, for the purpose of obtaining the possession of a specific chattel, comes within the 15th section of the Chancery Regulation Act. *O'Flaherty v. O'Flaherty*, 7 Ir. Jur. 283, C.

Affidavit.—A motion to vary a Master's report was directed to stand over for further affidavits. Held, that a party who had filed an affidavit could not, on appeal from the order made on further affidavits, object to the admission of them as irregular and contrary to the practice of the court. *Stewart v. Marquis of Conyngham*, 3 Ir. Chan. R. 104, C.

With respect to the inadmissibility of the use, on appeal, of affidavits which were not before the Master, see *Herbert v. Greene*, 3 Ir. Chan. R. 277, R.

The affidavits, on which an application for a writ of prohibition is founded ought to be entitled simply in the court to which the application is made. *Rich. v. Anderson*, 3 Ir. Chan. R. 463, C.

Amendment.—See AMENDMENT.

Answering affidavit.—See AFFIDAVIT.

Appeal.—The Court of Chancery will not exchange from an order of the Rolls recitals which reflect on the character of a party, unless there has been some miscarriage in the proceedings, or some injustice done. An appeal motion for this purpose dismissed with costs. *Chaine v. Dungannon*, 7 Ir. Jur. 89, C.

The Master of the Rolls has no jurisdiction to stay the proceedings under a decree of the Lord Chancellor, pending an appeal to the House of Lords. Petitioner having moved for an attachment against a respondent for not executing a deed pursuant to a decree, pending an appeal to the House of Lords from the decree, the motion was directed to stand over, with liberty to the respondent to apply within a week to the Lord Chancellor for an order to stay the proceedings pending the appeal. *Osborne v. Smith*, 7 Ir. Jur. 220, R.

Attachment.—See ATTACHMENT.

Cause Petition.—An order cannot be made in a cause petition against a minor without proofs. *Holmes v. Holmes*, 3 Ir. Chan. R. 126, C.

Serious questions of fact cannot be satisfactorily determined by the court in a proceeding by cause petition without directing an issue. *Kelly v. Birch*, 3 Ir. Chan. R. 478, C.

The summary order in petitions presented as within the 15th section of the Chancery Regulation Act merely decides that the subject matter of the suit is within that section. *Graham v. McDermott*, 3 Ir. Chan. R. 488, C.

The Master in a cause petition under the 15th section, appointed a receiver over certain lands for the payment of a judgment debt. A third person claimed to be entitled to the rents under a lease made subsequent to the judgment. The court gave leave to file a supplemental petition to set aside the lease, but offered no opinion as to whether it was the proper course. *Woodhouse v. Molony*, 7 Ir. Jur. 38, R.

Application for a reference under the 15th section of the Chancery Regulation Act, where the petition was verified not by the petitioner, but by his solicitor, whose affidavit stated that he was aware of the circumstances of the case, and had prepared the mortgage deed (the petition being to foreclose,) and that he was also a releassee to uses thereunder, granted. *Byrne v. Coleman*, 7 Ir. Jur. 63, C.

A cause petition filed in 1854 was allowed to be amended by stating the death of A, a respondent, in 1850 intestate, and that B as his heir-at-law was heir-at-law of the mortgagee, and as such claimed to be entitled to part of the fund in court, and by naming him as a respondent. The time being about to expire within which the cause could be set down, the notice of motion asked that it should be retained for a longer time. This was refused with costs. *Irvine v. De Ryther*, 7 Ir. Jur. 225, R.

Semhle, a cause petition cannot be filed under the 15th section of the Chancery Regulation Act against a trustee for an account. *Pounden v. Harvey*, 7 Ir. Jur. 284, C.

An order for liberty to file interrogatories does not imply an extension of the time for setting down the cause, and, unless such order for the extension of the time is obtained, the petition will stand dismissed pursuant to the 27th General Order—as if there had been no such order. *Montgomery v. Mayne*, 7 Ir. Jur. 284, R.

The court may, in such case, allow the petition to be reinstated. *Id.*

Charging order.—See CHARGING ORDER.

Conditional order.—The conditional order to confirm a sale must be served on the inheritor, even if he have not appeared in the cause. *Copeland v. Conway*, 3 Ir. Chan. R. 286, C.

Although, as a general rule, the time for showing cause against a conditional order does not run while the Rolls Court is sitting, the Lord Chancellor will, under particular circumstances, direct the officer to issue the side bar rule to lodge the remaining three fourths of purchase money, though the conditional order to confirm the sale had not been served until after the Rolls Court had risen for the vacation. *Id.*

Consent.—Semhle, where one of the defendants is a *feme covert* and the suit is respecting her inheritance, the consent of her counsel to the direction of such an issue would not be binding on her.—*Rosborough v. Boyse*, 3 Ir. Chan. R. 540, R.

Costs.—See COSTS.

Decree.—A decree declared a will null and void and directed an account of bygone rents, and that the defendants, A, and B his wife, should, within a

month after the date of the Master's report, pay to the plaintiffs the sum, which the Master should report due on such account. A died and the suit was revived against his executor; but after A's death and before the revivor B filed a further discharge in the Master's office. Held, that the decree did not impose a several liability on B; and the court refused an order that she should pay the sum found due by the report. *Rosborough v. Boyse*, 3 Ir. Chan. R. 540, R.

A decree directing a husband and wife to pay a sum of money imposes a joint liability on them, which may be enforced during the husband's life, but it does not impose a several liability on the wife, nor can it be enforced against her after her husband's death. *Id.*

If a decree directs a sum of money to be paid, ascertained by a report made or to be made, the report is, by reference, to be considered incorporated in the decree; and the report and decree may be enrolled under the 41st Geo. 3, c. 90, s. 36. *Id.*

As regards the non-liability of the wife surviving, reversed by the Lord Chancellor on appeal—*id.* 3 Ir. Chan. R. 629, C.

Injunction.—See INJUNCTION.

Interrogatories.—Where an application is made for liberty to file interrogatories it must be on notice to the opposite party. *Nolan v. Drinan*, 7 Ir. Jur. 267, R.

Issue.—In cases relating to the devise of real estates, the court intervenes only by reason of the existence of some impediment to proceeding at law, in order to have the right of the parties submitted by means of that intervention to a legal issue before a jury otherwise than by granting a new trial. *Rosborough v. Boyse*, 3 Ir. Chan. R. 489, C.

According to the earliest authorities the court would not bind the inheritance by one trial; but there is now no absolute rule requiring the court, as of course, to grant a second trial of an issue *devisavit vel non*, unless it is satisfied that a second trial may afford more satisfactory grounds for the final adjudication between the parties. *Id.*

Where the judge, who tried the case, expressed himself not dissatisfied with a verdict in an issue, *devisavit vel non*, finding against the will, and the court concurred in the verdict, and no new evidence had been discovered, although some existed, which the party had not availed himself of, the court refused to grant a new trial. *Id.*

A cause petition having been filed for the recovery of rent under a lease, and for the administration of the estate of the assignee of the lessee, the petitioner claimed as assignee of the reversion, under a deed of the year 1822, and stated payment of rent for 24 years to such assignee. The respondent in her discharge did not deny the payment of rent, and, as to the execution of the deed of 1822, said that she knew nothing, but that the grantor was a lunatic at the time. The Master directed that each party should examine on interrogatories and refused to direct an issue. Held, that an issue should not be directed as to the question of lunacy, and that the onus of proving the lunacy lay on the respondent. *Long v. Long*, 7 Ir. Jur. 81, R.

Motion by respondent to vary the Master's rulings by having such issue directed, and for an order that petitioner proceed at law, (the respondent waiving all temporary bars) refused with costs. *Ib.*

Misjoinder.—The uses to which the estate was to be conveyed, by the deed of 1827, were to D P, remainder to the first and every other son of the first marriage successively and the heirs male of every such son lawfully issuing; remainder to the right heirs of D P, who in the settlement executed on his second marriage conveyed his supposed reversion to the use of the children of the second marriage. D P, and his children of both marriages, were plaintiffs in the original and supplemental suits. —The House of Lords having declared that the children of the second marriage were entitled to the benefit of the deed of 1827. Held, that there was no misjoinder of the plaintiffs in the supplemental suit. *Persse v. Persse*, 3 Ir. Chan. R. 196, C.

Ne exeat regno.—See NE EXEAT REGNO.

Parties.—A person who was properly an answering party in a cause, and is made a notice party, is not bound by the proceedings. Therefore, when a consent was signed by a solicitor, as solicitor for and on behalf of the plaintiff, and such solicitor happened to be the general solicitor of a person so circumstanced. Held, that she was not bound by the consent, which did not purport to be signed on her behalf. *O'Grady v. Brady*, 3 Ir. Chan. Rep. 439, R.

A person had been named in the prayer of a cause petition as respondent, but had not been served with notice of the petition, and did not appear at the hearing, although aware of the proceedings. His name did not appear in the docket for setting down the petition for hearing, and a decree having been made in the cause by consent, his name did not appear in the decree. Upon an application by him for a rehearing of the cause, held, that he was not entitled to have the cause reheard, not being a party to the proceedings. *Handcock v. Delacour*, 7 Ir. Jur. 252, C.

Prohibition.—The affidavits on which an application for a writ of prohibition is grounded ought to be entitled simply in the court to which application is made. *Rich v. Anderson*, 3 Ir. Chan. Rep. 468, C.

The writ of prohibition may be issued to stay proceedings before magistrates even after conviction. The application to the Court of Chancery for a writ of prohibition is to the common law side of that court, and the conditional order, though issued from the registrar's office, should not resemble an injunction order. *Ib.*

Recognition.—See COSTS. CROWN. EXECUTION.

Sale.—The conditional order to confirm a sale must be served on the inheritor, even if he have not appeared in the cause. *Copeland v. Conolly*, 3 Ir. Chan. R. 486, C.

After lands had been sold under a decree, the court may direct a sole plaintiff to be substituted as

purchaser for another party who had bid at the sale, and had been declared the purchaser, he consenting thereto. *Moorhead v. Moorhead*, 7 Ir. Jur. 16, R.

Security for costs.—A, who resided out of the jurisdiction, filed a bill to recover certain judgments; B, who was only a notice party, entered an appearance in the common form. On a motion by B further proceedings were stayed until security for costs were given by A. *Knight v. Nagle*, 7 Ir. Jur. 15, R.

In a cross bill, or bill for an injunction by a plaintiff out of the jurisdiction it is not usual to order such security to be given. *Ib.*

An officer in the navy of the East India Company service will be required to give security for costs. *King v. Field*, 7 Ir. Jur. 328, R.

Service.—The court has not power to order service out of the jurisdiction of the notice of a suggestion to revive a suit. *Rosborough v. Boyse*, 3 Ir. Chan. R. 489, C.

Where notice of a cause petition was sent to a solicitor, supposed to be the general solicitor of respondents, on the 18th of March, and he on the 22nd acknowledged its receipt, and undertook to appear on receiving a copy of the petition, and same having been sent as required on the 23rd, the solicitor entered an appearance for the defendants on the 25th of March, and the registrar refused to set down the petition in Michaelmas Term, on the ground that two whole Terms had elapsed under the 27th General Order, from the time when it might have been set down for hearing, and that therefore the petition stood dismissed. Held, the registrar was right in so deciding, as the service was to be deemed as effected on the 18th, but the court directed the petition to be reinstated under the special circumstances of the case. *Saunders v. Saunders*, 7 Ir. Jur. 68, R.

Practice relative to substitution of service in proceeding under Trustee Act, 1850. *McNally v. Murphy*, 7 Ir. Jur. 181, R.

Stop order.—See PRIORITY.

Transfer of funds.—On motion to transfer funds from the Court of Chancery to the Incumbered Estates Court it is necessary to produce on the motion at the Rolls Court a certificate of the Commissioners of the Incumbered Estates Court, showing that there is a fund in that court to be distributed to which the funds in Chancery can be transferred; otherwise such motion will be refused. *Bagge v. Barron*, 7 Ir. Jur. 243, R.

AT LAW.

Affidavit.—When affidavits are filed as cause against a conditional order, a motion to show cause is irregular. *O'Donnell v. O'Donnell*, 3 Ir. C. L. R. 29; s. c. 5 Ir. Jur. 107, Q. B.

An affidavit detailing such facts as would have sustained a bill of discovery prior to the passing of 14 & 15 Vic. c. 99, will entitle the applicant to inspect the documents referred to on the affidavit. —*McKay v. McGill*, 3 Ir. C. L. R. 83, Q. B.

An affidavit made in another cause in which the plaintiff in the present cause was also plaintiff, was

held inadmissible to ground a motion in the second cause. *Douling v. Saddler*, 3 Ir. C. L. R. 603, Q. B.

Amendment.]—See AMENDMENT.

Appeal.]—The full court will review the decision of a judge in chamber in all cases, except where an exclusive jurisdiction is given to the judge in chamber. *Grady v. Hunt*, 3 Ir. C. L. R. 522, C. P.

Bill of exceptions.]—Upon a bill of exceptions taken by the plaintiffs to the charge of the judge, the court below awarded a *venire de novo*, upon which a verdict was had for the plaintiffs, the defendant not appearing, and judgment was entered thereon. The defendants brought a writ of error on this judgment. The transcript of the record returned into this court by the court below omitted the proceedings on the first trial, the bill of exceptions and judgment thereon by the court below merely entering continuances, of *vice comes non misit breve*, from the award of the first *venire* to the entry of the verdict on the second trial. The plaintiffs in error alleged diminution, and the Court of Exchequer Chamber held that they were entitled to have those matters retained as part of the record. *Bank of Ireland v. Evans's Charities*, 3 Ir. C. L. R., 280, Ex. Cham.

Held also, that the 28 Geo. 3, c. 31, having incorporated the exceptions into the *postea*, thereby made them part of the record, and that the court was bound to consider them. (*Dissentientibus*—Crampton and Perrin, J. J.) *Ib.*

Kennedy v. Gregg, (10 Ir. C. L. R. 559,) commented on and doubted. *Ib.*

A bill of exceptions should state what directions the judge gave on the particular issue raised, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions. *Anderson v. Fitzgerald*, 3 Ir. C. L. R. 475, H. L.

A bill of exceptions must be served, in pursuance of the 84th and 85th General Rules, ten days before the next Term after the one in which the trial has been had; and, in computing the ten days, care must be taken not to include the days fixed as holidays under the provisions of the 232nd section of the Common Law Procedure Act. *Hassard v. Caulfield*, 7 Ir. Jur. 141, E.

Charging order.]—See CHARGING ORDER.

The practice under the 16 & 17 Vic. c. 113, as to charging funds standing in the name of the Accountant General of the Incumbered Estates Court, at the suit of a judgment creditor of a party interested therein. *Browne v. Ellis*, 3 Ir. C. L. R. 106, C. P.

Common Law Procedure Act]—Where an action had been commenced prior to the passing of the Common Law Procedure Act, it may be continued under the law then in force. *McCoy v. McC. Gill*, 3 Ir. C. L. R. 83, Q. B.

Consent for judgment.]—See JUDGMENT.

Costs.]—See COSTS.

Ejectment.]—See EJECTMENT.

The 31st section of the Common Law Procedure

Act applies to actions of ejectment, and the provisions of it are mandatory, and service of the plaint will not be held good, when the indorsement in the writ is not made within the time limited by that section. *Vandelaar v. Smith*, 3 Ir. C. L. R. 86, Q. B.

In an action of ejectment on the title, brought by direction of the Court of Chancery to try the validity of a deed, the court refused liberty to the plaintiff to file an affidavit of service, omitting the words, "who is in possession of the lands sought to be recovered or any part thereof," although his affidavit stated it was not intended to disturb the occupying tenants. *Largan v. Largan*, 3 Ir. C. L. R. 117; s. c. 6 Ir. Jur. 142, C. P.

A defence to an action of ejectment for nonpayment of rent, stating that the defendant had paid all the rent due to the plaintiff, but having no indorsement of the sums alleged to have been paid or the times of payment, will be set aside for irregularity. *Smith v. Gilroy*, 7 Ir. Jur. 47, E.

Error.]—A plaintiff in error must enter into a recognizance in a sum sufficient to cover double the amount of the taxed costs of the opposite party, as well as double the amount of his damages; and if the recognizance fall short of that sum, the party who has obtained judgment below will be allowed to issue execution on foot of it. *Scott v. The Midland Railway Company*, 3 Ir. C. L. R. 467, C. P.

Inspection of documents.]—See DOCUMENTS, (PRODUCTION OF.)

Inspection of premises.]—In pursuance of the provisions of 16 & 17 Vic. c. 113, s. 47, where it shall appear to the court or judge that it would be necessary, for the ascertainment of the truth in any matter in dispute, that an inspection or examination of any premises or chattels in the possession or power of either party should be had by the opposite party, or witnesses, jury, &c., the court or judge may order the party, in whose possession same may be, to permit such inspection by the jury, &c., or by such person or persons on behalf of the party applying, and at such times, and under such regulations, as to the court or judge shall seem fit. *Boylan v. Dublin and Belfast Junction Railway Company*, 7 Ir. Jur. 382, E.

Interpleader.]—See SHERIFF.

Irregularity.]—An error in the description of a party in a writ of summons and copy served, which is not calculated to mislead, is a mere technical one, and as such can be amended under the 3rd section of the Process and Practice Act. Being only an irregularity and not rendering the writ a nullity, it will be waived by the delay of the defendant and by suffering the plaintiff to take a step in the cause. *Stephens v. O'Beirne*, 3 Ir. C. L. R. 66; s. c. 5 Ir. Jur. 223, E.

Issues.]—Practice as to settlement of issues.—*Cantwell v. Cannock*, 3 Ir. C. L. R. 78; s. c. 6 Ir. Jur. 151, Q. B.

Where a summons had been served to settle issues before a judge on circuit, and the defendant did not attend on the settlement of the same, and the plaintiff proceeded to trial (the defendant not

appearing,) and obtained a verdict; held, on motion by way of appeal to set aside the issues and the proceedings founded thereon, on the ground of irregularity, that the summons was regular and the trial properly had. *Murphy v. Toohy*, 3 Ir. C. L. R. 226; s. c. nom. *Murphy v. Pouhy*, 6 Ir. Jur. 288, Q. B.

To a plaint stating that the defendants held certain premises under a lease as tenants to the plaintiff, at a yearly rent, to which the defendants pleaded that they did not or do not hold the premises, as in the plaint mentioned, as tenants to the plaintiff, under a lease *modo et forma*; the issues tendered by the plaintiff were first, whether the plaintiff was entitled to the possession of the premises on the day stated; and secondly, what was the amount of the rent due by the plaintiff? Held, that these were the proper issues. *Ib.*

A judge has jurisdiction under the Common Law Procedure Act to settle issues on circuit. *Ib.*

Judgment.]—See JUDGMENT.

A consent to enter up judgment on an award of an arbitrator should not only provide that the award should be entered as the verdict of the jury, but must also provide specifically that final judgment should be entered up. *Riddick v. Kavanagh*, 7 Ir. Jur. 160, B.

Motion.]—Where affidavits are filed as cause against a conditional order, a motion to show cause is irregular. *O'Donnell v. O'Donnell*, 3 Ir. C. L. R. 29; s. c., 5 Ir. Jur. 107, Q. B.

A motion to amend a *postea* must be made to the judge by whom the cause has been tried; to amend the judgment in accordance therewith, to the court of which it is a judgment, and to amend the transcript where it is before a Court of Error to the Court of Error. *Anonymous*, 3 Ir. C. L. R. 119, Consol. Cham.

A motion that leave be given to the officer of the court to insert the name of the next friend of a lunatic plaintiff in the summons and plaint after it has been filed, must be on notice. *Phillips v. M'Evoy*, 7 Ir. Jur. 117, C. P.

Every notice of motion to set aside proceedings for irregularity must—in conformity with the 179th of the General Orders, 11th January, 1854—point out specifically the irregularity complained of.—*Edgar v. Houston*, 7 Ir. Jur. 362, E.

New trial.]—A verdict had been found against a defendant in ejectment, who died subsequent to the trial, but before judgment was entered up on the *postea*. Leave had been reserved at the trial to enter up a verdict for the defendant, in case the court should rule the points saved in his favour. The action was defended on behalf of creditors of the defendant by a receiver in a cause under an order of the Court of Chancery. A conditional order having been obtained to enter a verdict for the defendant, cause was shown, partly on the ground that the court had no jurisdiction to disturb the verdict, on account of the death, inasmuch as no personal representative to the defendant had been raised up. Held, that the court would entertain

the application to set aside the verdict, upon the receiver's undertaking to be answerable for the costs of the motion. *Rutledge v. Rutledge*, 7 Ir. Jur. 66, Q. B.

Nonsuit.]—After the plaintiff's case had been stated to the jury and a fatality arises owing to the absence of a witness, the judge has no jurisdiction to allow the plaintiff to withdraw the record; the plaintiff must submit to be nonsuited. (*Crampton, J. dubitante.*) *Swift v. Swift*, 3 Ir. C. L. R. 218; s. c., 6 Ir. Jur. 41, Q. B.

Notice of trial.]—Sundays are not to be reckoned in notices of trial or notices of inquiry. The ten days' notice of trial must therefore be counted exclusive of Sunday. *Kennan v. Garde*, 3 Ir. C. L. R. 20, Q. B.

An action being brought against A, B, C and D to recover certain gales of rent reserved by lease; the plaintiff discontinued as to A and B. The other defendants, C and D, were tenants in common of an undivided moiety. C allowed judgment to go by default, but D took defence. The plaintiff marked judgment against C, but without the affidavit required by the 92nd General Order. Issue being joined on the defence pleaded by D the case came before a jury without any notice of the trial being given to C. The jury assessed the amount due by D, but did not assess any sum against C. Held, that the judgment against C was interlocutory, and not under section 97 of the Common Law Procedure Act, and that the proceedings before the jury were irregular as C had no notice of them. *Thompson v. Shanley*, 7 Ir. Jur. 68, C. P.

Particulars.]—The court refused to set aside, as irregular, a plea of payment, the particulars indorsed whereon merely stated generally the amounts of certain judgments "and executions thereon," without alleging that any levy had taken place or when. *Bates v. Foreman*, 7 Ir. Jur. 22, C. P.

The plaintiff must furnish an explicit, full, and unembarrassing, and non-illusory bill of particulars, in order to afford the defendant an opportunity of knowing the specific demand made in the summons and plaint, and of preparing his defence, if any, thereto. *Mahony v. Falvey*, 7 Ir. Jur. 131, E.

Pleading double matter.]—Leave will not be given under section 57 of the Common Law Procedure Act to file several inconsistent pleas. — *v. M'Donough*, 3 Ir. C. L. R. 584, E.

To an action for unliquidated damages for a breach of contract, the defendants pleaded that the contract, being a qualified one and not absolute, as stated in the plaint, was not broken, and that they had tendered a return of the consideration, which they had also lodged in court, in full discharge of the action. Judgment was marked by the plaintiff under the 45th General Order, as no rule to plead several matters had been taken out. Upon a motion to set aside this judgment, it was Held, that the plea was double, and that the judgment should not be set aside except on terms. *Byrne v. Magnetic Telegraph Company*, 7 Ir. Jur. 111, C. P.

The court will grant an application, in an action for oral slander, to plead—first, that defendant did

not compose and publish the words; secondly, that he did not compose and publish them maliciously, or in a defamatory sense; thirdly, that he was privileged in communicating them to his client, believing in their truth; and fourthly, that from plaintiff's acts he was led to believe in the truth of the statement. *Davis v. Reeves*, 7 Ir. Jur. 118, E.

To an action for slander the defendant applied for leave to plead, first, a traverse of the uttering and publication of the alleged words; second, that the words then used were not used in a defamatory sense; third, privileged communication. Held, that a verifying affidavit was requisite in support of the application. *Wilson v. Armstrong*, 7 Ir. Jur. 46, E.

Semble, an affidavit verifying a plea in confession and avoidance, need not in all cases admit the truth of the allegation in the plea to which the plea is a defence. *Id.*

As to form of affidavit to plead double. *Hickie v. Reynolds*, 7 Ir. Jur. 189, E.

Where a defendant moved for liberty to plead several matters without an affidavit of the truth of them, and the court thought an affidavit necessary, the time for pleading was extended to enable the defendant to prepare an affidavit. *Curran v. Curran*, 7 Ir. Jur. 287, C. P.

Postea.—A motion to amend the *postea* must be made to the judge by whom the case has been tried. *Anon.* 3 Ir. C. L. R. 119, Consol. Cham.

Rejoinder.—The court in granting liberty to rejoin will not confine the rejoinder to any particular matter, but will make the order that the defendant be at liberty to rejoin generally. *Huston v. Wallace*, 3 Ir. C. L. R. 225; s. c. 6 Ir. Jur. 232, Q. B.

Replication.—Practice as to granting leave to file, see *Daly v. Nolan*, 7 Ir. Jur. 28, C. P.

Where an issue can be framed, on the summons and plea and defence as they stand, raising the question between the parties, the courts discourage the filing of further pleadings. *Hughes v. Shaw*, 7 Ir. Jur. 292, E.

Revivor.—New trustees of a marriage settlement having been appointed by virtue of the Trustee Act were by order of the court made conusees of a judgment, part of the settled property, and as such were allowed to issue a writ of revivor to revive said judgment. *Stopford v. Evans*, 3 Ir. C. L. R. 75, Q. B.

A conditional order will be granted to revive a judgment, when the time for payment has not arrived, the time being dependant on a life still in being. *Fishbourne v. Freeman*, 3 Ir. C. L. R. 226, Q. B.

Satisfaction of judgment.—See JUDGMENT.

Scire facias.—See PLEADING.

Service of a *scire facias* substituted on a person who had acted as attorney for the conuzor, and also on one who had acted as his agent, notice of the order being given to the creditors of the conuzor, who were in possession of his property. *Cartwright v. Ball*, 3 Ir. C. L. R.; s. c. 5 Ir. Jur. 122, Q. B.

It is sufficient in a *sci. fa.* at the suit of an assignee

of a judgment to pray judgment "according to the said recovery," without the addition of the words "and assignment." *Fottrell v. Griffith*, 2 I. C. L. R. 131, E.

Security for costs.—A plaintiff, resident out of the jurisdiction, filed his summons and plea, and the defendant thereupon served a preliminary notice, calling on the plaintiff to give security for costs, which notice not being complied with, notice of a motion to the court for that purpose was served upon the plaintiff, grounded upon an affidavit that the plaintiff had a just and legal defence upon the merits; and pending this notice, defendant filed his defence, notifying to the plaintiff that he did not intend thereby to waive his right to security for costs. Held, that the filing of this defence was no waiver of the defendant's right to give security for costs, and that the affidavit of the defendant was sufficient for that purpose. *Taylor v. Lowe*, 3 Ir. C. L. R. 223; s. c., 6 Ir. Jur. 240, Q. B.

An affidavit of merits, on belief that the defendant had a good and legal defence on the merits, Held, sufficient to justify an order for security for costs; but an affidavit of merits stating that the defendant had a just and valid defence at law upon the merits held insufficient. *Spencer v. Campion*, 3 Ir. C. L. R. 231; s. c., 6 Ir. Jur. 240, Q. B.

Practice as to security for costs—*Shaw v. Craig*, 3 Ir. C. L. R. 223, n., Q. B.

On an application to compel the plaintiff to give security for costs, under the 52nd section of the Common Law Procedure Act, it is sufficient if the defendant's affidavit states that he has a good defence upon the merits. The affidavit need not state the nature of the defence. *Eyre v. Sparks*, 3 Ir. C. L. R. 542, C. P.

The action had been brought by the plaintiff, who resided out of the jurisdiction, upon a contract entered into between him and the defendant, according to which the former agreed to raise as much as was practicable of a quantity of ship-wrecked property lying under water. The defendant applied that the other party should give security for costs, as residing out of the jurisdiction, and having no property in this country; and his affidavit stated that the defendant is advised and believes that he has a good defence upon the merits, "inasmuch as the plaintiff did not, as deponent firmly believes, raise as much of the property as he might have raised," &c. Held, that, under the circumstances of the case, the affidavit of merits was sufficient. *Bell v. Shannon*, 7 Ir. Jur. 23, E.

In an application for security for costs on the part of one of several defendants, the statement in his affidavit that he had a good and valid defence on the merits, without referring to his co-defendants, was held to be sufficient to enable him to succeed upon the motion. *Lookwood v. Lindsay*, 7 Ir. Jur. 39, Q. B.

An affidavit which was made by the attorney stated, that the defendant had left home without telling deponent where he might be found, "that the defendant had a just and valid defence, on the merits, to the plaintiff's action, inasmuch as the defendant was not indebted to the plaintiff, but the

plaintiff was indebted to defendant in a very large sum of money, which defendant is ready to prove, as deponent is informed and believes." Held insufficient. *Higgins v. Bourke*, 7 Ir. Jur. 86, Q. B.

Where a motion was made by the attorney for defendant for security for costs within the usual time, but was refused by reason of the insufficiency of the affidavit, which was made by the attorney in the absence of his client, who not being aware of the necessity for it, had not properly instructed the attorney. A motion made after defence filed, grounded on affidavit of the defendant stating the reasons of his absence, and swearing positively as to merits, was granted under the 44th Rule, the court holding that the affidavit disclosed sufficient special circumstances to warrant the order, but costs of motion to be paid by defendant. *Higgins v. Bourke*, 7 Ir. Jur. 67, Q. B.

In a motion by defendant to stay proceedings until plaintiff—residing out of the jurisdiction—give security for costs, after plea pleaded, the affidavit must state explicitly and circumstantially that he has a good defence on the merits. *O'Loughlin v. Eyre*, 7 Ir. Jur. 118, E.

An order had been granted that A, the plaintiff in an action, who was then absent in America, should give security for costs, and in the meantime that the proceedings should be stayed. A subsequently returned, and no security having in the meantime been given, applied to the court to rescind the order in question, inasmuch as his absence had been only temporary; that he was now residing here with his family, which had never quitted Ireland; that he did not return to get rid of the order, and that he had no intention of leaving Ireland. His affidavit was silent upon the question of merits, and the affidavit of the defendant in reply sought to establish that the cause of action was not a just one. The court, without entering into the latter question, granted the application upon payment by the plaintiff of the costs of the motion for security for costs, and of the present one. *Eyre v. Baldwin*, 7 Ir. Jur. 123, Q. B.

It is not an answer to an application for security for costs, that the defendant's affidavit of merits upon which the motion was grounded, admits that the amount claimed in an action is due, but alleges that it was tendered before action brought, inasmuch as such tender, if proved under a plea thereof, will be a valid and meritorious defence. *Anon.* 7 Ir. Jur. 164, Q. B.

The summons and plaint contained two counts, one for the recovery of the amount of certain sales, the other for an alleged breach of care and diligence as a commission agent. The affidavit, on which was grounded the application to stay proceedings until plaintiffs gave security for costs, stated that the defendant had a good defence on the merits, inasmuch as he had paid over to the plaintiffs the amount realized by the sale of the goods, less by commission, &c., which he was entitled to set off against the plaintiff's demand, but did not notice the other counts in the summons and plaint. The affidavit was held to be sufficient. *Fox v. Atkinson*, 7 Ir. Jur. 259, E.

In support of an application, made under the pro-

visions of 16 & 17 Vic. c. 113, s. 52, that the plaintiff be restrained from further proceedings until he shall have given security for costs, as he resided out of the jurisdiction, the defendant's affidavit stated that he had not as yet filed his defence, as the time within which he was bound to appear had not expired; that the plaintiff lived in Liverpool, and had no residence or property in Ireland; "that the defendant had a good, substantial, and sufficient defence on the merits, and that this application was not made for the purposes of delay." This affidavit was held to be insufficient, inasmuch as it did not disclose facts sufficient to satisfy the mind of the court that the defendant had a defence upon the merits. *Limonius v. Michelli*, 7 Ir. Jur. 397, E.

Service of process.—Service of a *scire facias* was substituted on a person, who had acted as attorney for the conusor, and also on one who had acted as his agent, notice of the order being given to the creditors of the conusor, who were in possession of his property. *Cartwright v. Ball*, 3 Ir. C. L. R., 31; s. c. 5 Ir. Jur. 122, Q. B.

The 31st section of the Common Law Procedure Act applies to actions of ejectment, and the provisions of it are mandatory; and service of the writ will not be held good, when the indorsement in the writ is not made within the time limited by that section. *Vandeleur v. Smith*, 3 Ir. C. L. R. 86, Q. B.

Practice as to proper mode of service of writ of summons and plaint upon the guardians of a poor law union under 16 & 17 Vic. cap. 113. *White v. Adair*, 3 Ir. C. L. R. 109, C. P.

The temporary absence of a defendant out of the jurisdiction, if, for example, attending Parliament, is not ground to justify a substitution of service. *McDonough v. Macartney*, 3 Ir. C. L. R. 239, Q. B.

The court has no power to substitute service on a defendant residing out of the jurisdiction of the court, in a case in which the cause of action has arisen out of its jurisdiction. *Collins v. De Montmorency*, 3 Ir. C. L. R. 473; s. c. 6 Ir. Jur. 234, E.

An application for an order that the service of the writ of summons already had should be deemed sufficient, ought not to be made until the period allowed by the statute for appearance has expired. *Carter v. Dunne*, 7 Ir. Jur. 45, E.

The court will allow the summons and plaint to be taken off the file, in order to indorse upon it the substitution of service directed by the court. *Darcy v. Wynne*, 7 Ir. Jur. 160, C. P.

The court will not permit the original summons and plaint, when once filed, to be taken off the file of the court, after amendment by side-bar order, for the purpose of being re-served on the defendant, but will order the service of an attested copy of the writ, as amended, to be served on the parties named, and, in future, every side-bar order for amendment shall provide that the service of an attested copy shall be deemed good. *Conolly v. Evans*, 7 Ir. Jur. 182, E.

Setting aside proceedings.—A plaint omitting the indorsement required by the 7th General Order is irregular, and such irregularity may be taken advantage of after the filing of the plaint—the filing

of the plaintiff not amounting to a step taken after knowledge of the irregularity under the 179th General Order. *Powell v. Price*, 3 I. C. L. R. 232; s. c. 6 Ir. Jur. 277, Q. B.

Where a summons and plaintiff was served on the 9th of May, and the defendant on the 23rd of the same month served a notice of motion to set it aside for irregularity, as not containing a sufficient description of the plaintiff's residence; Held, that the application was late. *Roche v. Wilson*, 3 I. C. L. R. 252; s. c. 6 Ir. Jur. 290, C. P.

A summons and plaintiff not indorsed as required by the 7th General Order is liable to be set aside for irregularity, and the filing of the summons and plaintiff is not a fresh step after knowledge of the irregularity under the 179th General Order. *Fitzgerald v. Browne*, 3 I. C. L. R. 253; s. c. 6 Ir. Jur. 291, C. P.

The court will not set aside a writ of summons and plaintiff, if signed by counsel, on the ground that it contains several counts varying the cause of action, when the plaintiff does not appear to have unnecessarily re-stated the complaint, with a view to embarrass or oppress his defendant. *Harrison v. Lynch*, 3 I. C. L. R. 527, C. P.

Special case—The court will refuse to entertain a merely speculative question referred to them by way of special case. *Kelly v. Molony*, 7 Ir. Jur. 225, Q. B.

Special jury.—See COSTS. CRIMINAL LAW.

The court will grant an absolute order in the first instance for a special jury under the old practice, provided sufficient ground is laid for the application. *Fleming v. T aylor*, 3 I. C. L. R. 75, Q. B.

In an action on a policy of insurance commenced before the Common Law Procedure Act, the venue being laid in a county of a city, the court permitted a special jury to be struck, according to the former practice, on an affidavit showing that the plaintiff was possessed of considerable influence in the place where the venue was laid, and that several of his relatives would be on the panel. *Barron v. The West of England Insurance Company*, 3 I. C. L. R. 112; s. c. 6 Ir. Jur. 115, C. P.

The order for a special jury under the old system may be made *ex parte*. *Dixon v. Denroche*, 3 I. C. L. R. 241; s. c. 6 Ir. Jur. 213, Q. B.

In an action commenced before the 1st of January, 1854, the defendant had obtained an order for a special jury, which was struck accordingly. The plaintiff afterwards entered a rule to discontinue; Held, that the defendant was entitled as against the plaintiff to the costs of the special jury. *Johnson v. Midland Great Western Railway Company*, 3 I. C. L. R. 251, C. P.

Where, in an action commenced after the 1st of January, 1854, the plaintiff applied for liberty to strike a special jury under the former practice, on the ground that it was desirable to have jurors of experience in a particular trade, and also that the plaintiffs, being Englishmen, were unknown to any of the jurors usually returned on the special jury panel of the County of the City of Dublin, the de-

fendant being a citizen of Dublin; the court refused the application, with costs. *Harrison v. Lynch*, 3 I. C. L. R. 256; s. c. 6 Ir. Jur. 302, C. P.

An application was made, in an action for assault, for liberty to try the cause with a special jury panel, under the former practice, pursuant to 16 & 17 Vic. c. 113, s. 112, upon the grounds that the plaintiff was a Protestant and defendant a Roman Catholic clergyman, and that in consequence of the different religions of the litigating parties the case had been made the subject of party feeling; that a trial had already been had in the cause, wherein the jury did not agree; and that under the new system it was impossible to exclude from the jury persons entertaining a strong party or theological bias. Held, that the above grounds were insufficient to justify the court in granting the application. *Smyly v. Hughes*, 7 Ir. Jur. 189, Q. B.

Stamping instrument.—Stamp duty upon an order made by the court should be paid at the time when the order is taken out; and the court will not allow the stamp duty to be subsequently received by the officer, where the omission to pay it has been caused by the mere inadvertence of the party; but the court may, in some cases, grant such permission when the non-payment has been the result of a casualty or fatality. *Bailey v. McCleary*, 7 Ir. Jur. 33, E.

Staying proceedings.—In an affidavit on which a defendant grounds an application that proceedings should be stayed until the plaintiff gives security for costs, he must state facts sufficient to satisfy the court that there is a good defence on the merits. *Unwin v. Downing*, 7 Ir. Jur. 168, Ex.

Suggestion.—Where the consor of a judgment dies, notice of motion to enter a suggestion for the purpose of issuing execution against the personal representative must be given. *Neils v. Smith*, 3 I. C. L. R. 76; s. c. 6 Ir. Jur. 109.

On an application for liberty to enter a suggestion upon the record of a judgment, a conditional order only will be granted in the first instance. *Edie v. Phillips*, 3 I. C. L. R. 77, Q. B.

Where two of three of the assignees of a judgment had disclaimed, the court granted a conditional order for liberty to the surviving assignee to enter a suggestion on the record to enable the plaintiff to issue execution on this judgment. *Disney v. Hamilton*, 3 Ir. C. L. R. 77, Q. B.

The court will not, at the instance of the executor of the consor of a judgment, permit a suggestion to be entered for the purpose of reviving it pursuant to the Common Law Procedure Act, except in a plain case. Therefore, where the affidavit of a party seeking the order disclosed a number of special circumstances, from which the existence of the judgment was sought to be deduced, the court refused to permit a suggestion to be entered, the proper course being to sue out a writ of revivor. *Colhoun v. Sample*, 3 Ir. C. L. R. 114, C. P.

Where it becomes necessary to move to revive a judgment within six years, by reason of a change of parties, &c., an absolute order may be granted

in the first instance; *scilicet*, when after six years *O'Brien v. Dowell*, 3 Ir. C. L. R. 119, Consol. Cham.

Subpoena.—Before the court will grant a subpoena *ad testificandum*, to compel the attendance of a witness resident out of the jurisdiction, under 17 & 18 Vic. c. 34, s. 2, it must be satisfied by affidavit that the evidence is material, and cannot be proved otherwise. *Lander v. Lander*, 7 Ir. Jur. 28, Q. B.

An attachment will not be granted against a witness for non attendance, at a trial pursuant to a subpoena, unless he be called in court by the crier, and a note taken of his non attendance by the judge's registrar. *O'Donnell v. O'Donnell*, 3 Ir. C. L. R. 29, Q. B.

An affidavit supporting an application for leave to subpoena a witness residing abroad, under the provisions of 17 & 18 Vic. c. 34, should state not merely that the defendant is advised and believes that the witness can give material evidence at the trial, but that the person sought to be subpoenaed is a necessary witness, and that the party's case cannot be proved without his testimony. *Wade v. Fox*, 7 Ir. Jur. 48, E.

It is a matter within the discretion of the court, and not as of course, for the courts of law to issue process under the provisions of the 17 & 18 Vic. c. 34, to compel the attendance of witnesses out of their jurisdiction, and the party making the application for the subpoena *ad testificandum* must show in the affidavit facts sufficiently indicating a necessity for the attendance of the witnesses required. *Nerwich v. Gregory*, 7 Ir. Jur. 144, E.

A party who seeks to enforce the attendance of witnesses from England, must, in his affidavit, satisfy the court and show facts, indicating that the attendance of the witnesses required is necessary, and that the testimony they are expected to afford cannot be obtained from other quarters. *Davis v. Reeves*, 7 Ir. Jur. 291, E.

Summons and plaint.—The name of the next friend of an infant need not be stated in the writ of summons and plaint before service. It is sufficient if it be inserted before the filing of the writ. *Grady v. Hunt*, 3 Ir. C. L. R. 522; s. c., 6 Ir. Jur. 233, C. P.

The court will not set aside a summons and plaint on the ground that each cause of action was not commenced in a new paragraph, as directed by the 34th General Rule, where it does not appear that the defendant has been embarrassed. *Redmond v. Butler*, 7 Ir. Jur. 391, C. P.

Semble, the 34th General Rule as to engrossing pleadings with proper margins and paragraphs, is directory to the officer of the court; but does not affect the rules of pleading. *Ib.*

Trial at bar.—A trial at bar is very seldom granted, and only under special circumstances, inasmuch as it interferes with the general business of the court. The Attorney General has the right, *ex officio*, to obtain a trial at bar, but the court rely on his exercising a sound discretion before applying. *Butler v. Mountgarrett*, 7 Ir. Jur. 149, E.

Where the points saved at the trial had been unanimously ruled in favour of the party who now sought for a trial at bar, Held to be a sufficient reason for the refusal of the court to grant that order, which always lies in their discretion, *Ib.*

Venue.—When a plaintiff seeks to change his own venue on special grounds, the defendant is entitled to the costs of the motion. *Hewitt v. Hewitt*, 3 Ir. C. L. R. 229; s. c., 6 Ir. Jur. 161, Q. B.

An affidavit made in another cause in which the plaintiff in the present cause was also plaintiff, Held inadmissible to ground a motion to change the venue in the second cause. *Douling v. Sadlier*, 3 Ir. C. L. R. 603, Q. B.

The existence of political feeling or prejudice is no reason for a change of venue. *Ib.*

In an affidavit to change the venue, it is not sufficient in support of the application for the deponent to aver that "all his witnesses reside" in the locality to which it is sought to change the venue, but he should have stated that he has witnesses to examine, and who they are. *Busteed v. Raymond*, 7 Ir. Jur. 22, E.

Where a motion on behalf of the defendant to change the venue was refused, the costs were made costs in the cause if the plaintiff succeeded, but in no event was the defendant to get costs. *Shaw v. Harris*, 7 Ir. Jur. 111, C. P.

Where the summons and plaint, as filed and served, omitted the venue in the margin, as required by 16 & 17 Vic. cap. 113, s. 10, and the plaintiff, upon being served with notice to set same aside, offered to pay the costs incurred up to the service, upon the terms of being permitted to amend by the insertion of the venue and the re-service of same, the court refused defendant his costs of the motion. *Tuomey v. Formey*, 7 Ir. Jur. 188, Q. B.

Liberty was granted to enter a suggestion to change the venue from the county where the plaintiff resided to the sheriff of which county the *scire facias* had been directed, pursuant to the 171st General Order, (under 13th Vic. c. 18), on an affidavit that the venue in the original action was laid in Dublin, that the plaintiff resided there and that the evidence could be more easily obtained there. *O'Loughlin v. Eyre*, 7 Ir. Jur. 140, E.

Warrant of attorney.—See JUDGMENT.

PRESENTMENT.

A declaration made by the Board of Works under 5 & 6 Vic. c. 89, s. 60, as to the amount to be levied on the county or barony is not conclusive on the county or barony; but the sum properly payable by the county or barony is to be determined on a traverse to the presentment. *Ex parte Drainage Commissioners*, 3 Ir. C. L. R. 140, Reserved Case.

Where a public road is closed up by presentment the possession of the soil reverts to the owner of the land discharged of the easement, and no proceedings at law are necessary for the purpose of reverting the right. *Herbert v. Kennan*, 7 Ir. Jur. 43, C. P.

PRINCIPAL AND AGENT, *See* AGENT.

PRINCIPAL AND SURETY, *See* SURETY.

PRIORITY.

An equitable mortgagee, by deposit of railway shares; is entitled to priority over a prior judgment creditor of the mortgagor who has obtained an order charging the shares, under the 3 & 4 Vic. cap. 105, s. 23, subsequently to the mortgage. *Dunster v. Glengall*, 3 Ir. Chan. R. 47, R.

With respect to the right of an annuitant, the purchase money of whose annuity has been applied in discharge of a mortgage, to stand in the place of the paid off mortgagee in priority to the mortgagee of the equity of redemption claiming under a deed executed prior to the grant of the annuity, see *Walcot v. Condon*, 3 Ir. Chan. R. 1; s. c. 6 Ir. Jur. 15, C.

Judgments entered within twenty years before the passing of the Redocketting Act, 9 Geo. 4, c. 35, and not redocketted within twenty years from their entry, or within five years from the passing of the Act, are void as against a submortgage (made in 1841) of a mortgage of 1825, made before the passing of the Act. *Ib.*

A stop order gives no priority to the party who has obtained it, unless it is lodged with the Accountant General, the lodgment being equivalent to notice to the trustee of the fund or the debtor. *Waller v. Wildridge*, 3 Ir. Chan. R. 155; s. c., 6 Ir. Jur. 228, R.

A judgment obtained against a bankrupt and registered as a mortgage under the 6th and 7th sections of the 13 & 14 Vic. c. 29, before the issuing of the commission, is a charge on the bankrupt's lands, in priority to his simple contract debt. *In re Ryan*, 3 Ir. Chan. R. 33, Bkpt. C.

Certain premises were, by a post-nuptial and voluntary deed, dated 28th February, 1826, charged with a rent-charge of £40 per annum. A judgment was obtained by a creditor in Easter Term, 1836, for the penal sum of £900, and duly registered, charging the premises, and on the 21st day of November, 1846, the premises were mortgaged for £700. A bill having been filed for the foreclosure of the said mortgage, and the fund proving deficient, the rent-charge was declared to be void as against the mortgage, but good as against the judgment; that the mortgagee, though subsequent in point of time to the judgment creditor, should have the first claim on the fund, to the extent of the value of the rent-charge as calculated by a notary; that the judgment creditor should stand second for his whole demand; the mortgagee third in respect of the balance of his demand, and the residue, if any, to go to the owners of the rent-charge. — *v. McCowan*, 7 Ir. Jur. 389, M. O.

PROHIBITION, *See* PRACTICE.

PROMISSORY NOTE, *See* MARRIED WOMAN.

Russell v. Kitchen, 3 I. C. L. R. 613; s. c., 6 Ir. Jur. 218, Q. B.

PURCHASE MONEY, *See* PRACTICE.
VENDOR AND PURCHASER.

QUARTER SESSIONS, *See* CRIMINAL LAW.

QUO WARRANTO.

The 6 & 7 Vic. c. 92, s. 23, having provided a special tribunal for the decision of questions relating to the election of Poor Law Guardians, a *quo warranto* will not be granted in such cases. *Reg. v. Austin*, 3 Ir. C. L. R. 441; s. c., 6 Ir. Jur. 2, Q. B.

RAILWAY COMPANY, *See* EASEMENT.

A railway company served a notice to treat for the purchase of land; and persons in their employment, who either were, or acted as if they were authorized to arrange on the price, obtained the vendor's signature to a printed form of agreement fixing the sum. Held, that the company were bound to specifically perform this agreement, though not signed by them under their corporate seal. — *Smith v. Dublin and Bray Railway Company*, 8 Ir. Chan. R. 225, R.

Semble, an award made after the date of said agreement, and under the vendor's protest, by the arbitrator appointed pursuant to 14 & 15 Vic. cap. 70, was a nullity. *Ib.*

Semble, had the price to be paid for the land been ascertained by parol only, after service of the notice to treat, the contract would still have been binding. *Ib.*

Principles which govern Courts of Equity in preventing the diversion of the funds of a railway or canal company from the purpose for which they were contributed, and in preventing the exercise of the powers of the company to effect an object which is not within the Act of Parliament, which created it. *McDonnell v. Grand Canal Company*, 3 Ir. Chan. R. 578; s. c., 5 Ir. Jur. 197, C.

The court will not consider the *quantum* of interest of shareholders in a company, who seek for an injunction, nor whether their interest would entitle them to vote at a meeting of the company; but where the petitioners had purchased two shares for a nominal consideration, after the agreement which they had complained of had been entered into, and with full notice of it, and for the purpose of preventing its completion, the court refused an injunction. *Ib.*

Rights of assignee of a bankrupt shareholder as against a railway company, in respect of shares upon which calls had been made prior to and subsequent to the bankruptcy, see *Turner v. The Dublin and Belfast Junction Railway Company*, 3 Ir. Chan. R. 526; s. c., 6 Ir. Jur. 225, C.

Semble, the proof under the bankruptcy was not equivalent to payment of the calls, so as to satisfy the provisions of the statute, which makes the payment of calls a condition precedent to the right to transfer the shares. *Ib.*

The petitioner, who was a shareholder in a railway company, had been in default as to the pay-

ment of calls made upon his shares, and the directors proceeded to declare them forfeited. He subsequently paid up to the directors the amount due upon these calls, and resumed his original shares. By section 7 of their Act of incorporation (8 & 9 Vic., cap. cxix., local and personal,) the company were enabled, before the completion of the line, to pay interest at four per cent. upon calls paid up, (provided that no such interest should be paid to any shareholder who should be in arrear as to any calls;) and under this section the directors had proceeded to pay interest out of the profits of the railway to such shareholders as had paid up the calls made, but not to the petitioner, as having made default in payment, and he having presented a petition complaining that he had been deprived of a proportionate share of the profits of the railway, because the directors had applied the profits of the railway in payment of the interest upon the money paid up, to which he by his default had become disentitled, and praying that he might be declared entitled to the shares of the profits that had accrued, Held, that he was not entitled to relief under the circumstances. *McKenna v. The Midland Great Western Railway Company*, 7 Ir. Jur. 301, C.

A railway company entered upon certain lands, without giving previous notice to the occupier holding under a lease, and without his consent, but having agreed with the owner of the lands, and they deepened a drain thereon, which had been in connection with the railway, but was not marked on their plans, but which was necessary for the maintenance of the railway, and was executed with as little injury as possible. The occupier presented a petition, praying an injunction to restrain the company from committing waste, and from keeping the drain open, or keeping possession of the premises, Held, that the court ought never to interfere to restrain a company by injunction from doing a thing which has been already done; that if a company enter upon lands without giving the requisite notice, where notice is required, the proper course is to proceed at law for the trespass, as this court cannot in such a case properly estimate the amount of damages. *Newcombe v. The Dublin and Wicklow Railway Company*, 7 Ir. Jur. 323, R.

The motion was directed to stand over, to enable the petitioner to bring an action of trespass—first, to establish that the entry of the company on the lands without notice was not warranted by any statute; and secondly, to ascertain the amount of damages. *Ib.*

Quere, whether a company intending to execute any of the works mentioned in the 16th section of the Railways Clauses Consolidation Act, when such works are not set out in the plans, can, for this purpose, enter upon lands not on the plans, without giving previous notice to the occupier of the lands. *Ib.*

RATES AND RATING, *See* POOR LAW.
REGISTRY.

RECEIVER, *See* COSTS.

After a judgment debtor has become bankrupt, a receiver cannot be appointed on petition of the judgment creditor, though cause is shown only by a *puise* mortgagee in possession. *Ryan v. Leffroy*, 3 Ir. Chan. R. 351, C.

An order was made in a minor matter that a receiver, who was also executor to the minors' father, should be at liberty, until March, 1847, to manage certain lands and the stock thereon in the same manner as the minors' father was in the habit of managing the same—the receiver undertaking to keep regular accounts of his receipts, and to furnish the same to the Master every three months; and after March, 1847, the receiver was ordered to take proper steps for procuring tenants to the property. The receiver continued to manage the lands after March, 1847, without a further order. *In re Herricks, minors*, 3 Ir. Chan. R. 183, R.

Semble, the receiver's surety was liable for the management by the receiver, as such; but not for so much of the quarterly balances as was due by him as executor up to March, 1847. *Ib.*

It is discretionary to charge a receiver's surety with interest on his balances; and the surety having paid the entire of the balances in this case, the court refused to do so. *Ib.*

The court will not appoint a receiver in a foreclosure suit, or a suit to raise a charge affecting lands, unless a year's interest is due, or the property is in danger of being evicted, (e.g., for non-payment of headrent,) or there is reason to apprehend that it will be insufficient to pay the charges on it. An absolute order for a sale in the Incumbered Estates Court will not of itself induce the court to vary the rule. *Herbert v. Greene*, 3 Ir. Chan. R. 270, R.

Where a judgment creditor, who had registered an affidavit of ownership under the 13 & 14 Vic., c. 29, on the same day filed a cause petition, which was referred to the Master under the 15th section; and the Master made a decretal order appointing a receiver for the payment of the sum due on foot of the judgment; the court, on appeal, it appearing by affidavit that the lands would be insufficient to pay the judgment, extended the receiver, who had been appointed in another matter, but reserved the question of costs, until the produce of a sale, which was pending in the Incumbered Estates Court, should be ascertained. *Ib.*

It is a well settled general rule of the court not to pay any part of the principal of a mortgage out of the rents and profits, or to appoint a receiver for that purpose. The provision in the Sheriff's Act to the contrary is an exception to the general rule, the appointment of a receiver under that Act being in the nature of an equitable execution and in lieu of the *elegit*. *Ib.*

A sum was received by a respondent from the tenants subsequently to the appointment of a receiver by a *puise* creditor. The receiver, in his account, was charged with the sum as if received by him, and a conditional order for an attachment was obtained against the respondent, before the extension of the receiver by a prior creditor, Held,

that as the tenants paid the sum prior to the extending, it was to be considered as a sum paid by the tenants for the receiver; and that the petitioner in the first matter was entitled to it: *O'Callaghan v. O'Callaghan*, 3 Ir. Chan. R. 376, R.

After a receiver has been discharged, and the purchaser has gone into possession, the court will not make an order that the tenants shall pay to the purchaser the rent which fell due prior to the discharge of the receiver; the receiver is to receive the arrear due prior to his being discharged, although the purchaser may be entitled to a portion of such arrear. The Court of Chancery does not order the tenant to pay such arrears to the purchaser. *Walcott v. Condon*, 3 I. Chan. R. 431; s. c., 6 Ir. Jur. 381, R.

The side bar rule discharging a receiver, on the certificate of a sale in the Incumbered Estates Court, does not operate as an absolute discharge; although he cannot proceed against the lands for arrears of rent, he may proceed against the tenant by attachment or sequestration on the Master's certificate, or by action in the name of the Master, where the tenant holds by lease under the court, for the arrears due when the receiver was discharged. *Id.*

The appointment, in a suit in the Court of Chancery in England, of a receiver over lands in Ireland, operates only as against the parties in that suit, but does not affect the jurisdiction of the Court of Chancery in Ireland to appoint a receiver over the same lands, and to punish by attachment any interference with him in the exercise of his duties. An attachment was accordingly awarded against the bailiff of a receiver appointed by the Court of Chancery in England over lands in the County Cork, for interfering with the collection of rent by a receiver subsequently appointed by the Court of Chancery in Ireland. *Ferguson v. Coote*, 7 Ir. Jur. 175, M. O.

Petitioner was appointed guardian of the persons and fortunes of a testator's children—and, though a barrister, was appointed receiver over the property, in consequence of a direction in a testator's will, and the collection of the property was accompanied with some expense. Under these circumstances the receiver was allowed poundage fees for collection at 5 per cent., but without deciding the general question that the 2nd General Order of 1844 did not apply to such cases. There having been two separate orders—one directing the receiver to account for certain dividends of stock before the Master in the matter, and another directing him to account before the Receiver Master for the rents, an order was made directing both accounts for the future to be taken before the Receiver Master. *In re Dadey's minors*, 7 Ir. Jur. 335, R.

Where a receiver has been appointed under the Judgment Acts to pay the amount of a judgment out of certain lands, he may be extended to other lands to pay the same judgment, on motion upon notice. *Minchin v. Dillon, Byrne v. Dillon*, 7 Ir. Jur. 328, R.

RECEIVER OF DROITS, *See* SALVAGE.

RECOGNIZANCE, *See* COSTS. CROWN.
EXECUTION. PRACTICE.

RECORD, *See* PRACTICE.

RECOVERY, *See* FINE AND RECOVERY.

REJOINDER, *See* PLEADING. PRACTICE.

REGISTRY.

Municipal.—As to the sufficiency of payment of municipal rates by instalments, as provided for by 12 & 13 Vic. c. 91, (Dublin Collection of Rates Act,) so as to entitle the ratepayer to be enrolled as a burgess. *In re Brennan*, 3 I. C. L. R. 162; s. c., 5 Ir. Jur. 357, Q. B.

Parliamentary.—A notice of claim to be rated in respect of premises, qualifying as a voter under 13 & 14 Vic. c. 69, s. 110, is sufficient, if signed with the name of the claimant, in the handwriting of another person, by the authority of the claimant. *McNiff, appellant; McTiernan, respondent*, 3 I. C. L. R. 186, Reg. C.

A yearly tenant of rated premises let the shop and adjoining parlour to a stranger at a rent. A door opened from the shop into the street, through which the occupier had ingress and egress, and had exclusive control over it; a hall-door opened into the same street, and a passage led from it through the house to back premises; a door opened adjoining the shop into this passage; the yearly tenant occupied the upper stories of the house, and his mode of ingress was through the hall-door. Held, that the occupation of the upper stories was not an ownership or occupation of the entire of the rated premises within the meaning of 13 & 14 Vic. c. 69, s. 5. *Brady, appellant, Ryan, respondent*, 3 I. C. L. R. 187; s. c., (nom. *Ryan, appellant, Bates respondent*), 6 Ir. Jur. 72, Reg. C.

As to want of jurisdiction in Revising Barrister to require claimant to give evidence of his right to have his name inserted on list of voters, where no objection has been served, and no official objection made—*Boon, appellant, Moffett, respondent*, 3 Ir. C. L. R. 190; s. c., 6 Ir. Jur. 58, Reg. C.

Item, as respects the case of parties whose names appear on the original official lists—*Collins, appellant, Moffett, respondent*, 3 Ir. C. L. R. 194; s. c., 6 Ir. Jur. 116, Reg. C.

A claim to be registered for a city or borough need not be signed by the claimant personally.—*Boon, appellant, Moffett, respondent*, 3 Ir. C. L. R. 190; s. c., 6 Ir. Jur. 58, Reg. C.

As to the fact of the non payment of the instalment of a poor rate, published by the Collector General of the rates of Dublin, as payable on the 31st December, 1862, but the entry of which in the rate book was not signed by him, till the 1st of January following, not operating to disqualify a claimant. *Ryan, appellant, Bates, respondent*, 3 Ir. C. L. R. 191; s. c., 6 Ir. Jur. 57, Reg. C.

As to the form of notices of objection, *see Murphy, appellant, Connor, respondent*, 3 Ir. C. L. R. 203; s. c., 6 Ir. Jur. 66, Reg. C.

The headings of forms in the schedules of the Act are no part of the Act. *Ib.*

A was the rated occupier of several tenements, the valuation of each whereof was under £8, but which in the aggregate exceeded that amount. A was returned by the clerk of the union to the officer acting as town clerk of the borough of B, and was by him inserted in the list of persons entitled to vote as rated occupiers for the said borough. The name of A having been objected to, was retained as duly qualified. Held, on appeal, that A was duly qualified within the 13 & 14 Vic. c. 69, s. 5. *Nolan's case*, 7 Ir. Jur. 56, Reg. C.

Where the name of A appeared on the Parliamentary Register of the borough of J as a registered voter in respect of an £8 tenement, a notice of objection had been served to the rectification of his name upon the town clerk's list for the ensuing year, and at the Revision Court a copy of the above register was produced, and evidence was given by the clerk of the union's return that A had paid the poor-rates in respect of the premises as required by the 13 & 14 Vic. cap. 69, sec. 5, but no further evidence of occupation was given; Held, that that was sufficient *prima facie* evidence to sustain the claim, and that it lay upon the objector to meet the same with proof of disqualification. *Moore's case*, 7 Ir. Jur. 59, Reg. C.

Where a party has been erroneously designated in the rate-book as "John M," and it was proved to the satisfaction of the Revising Barrister that no such person as "John M" in fact existed, but that the premises in question were, and had for a long period been occupied by "James M," and had been rated in that name, until the making of the rate immediately preceding. Held, that, under these circumstances, he was justified in retaining the name of "James M" on the list, the error in the rate being a technical one within the 13 & 14 Vic. cap. 69, s. 108. *Moroney's case*, 7 Ir. Jur. 60, Reg. C.

RELEASE.

By a deed of 1827, R P covenanted with his son, D P, that after the decease of R P P, the estate, which should thereafter descend to or vest in R P, should be conveyed to certain uses. R P P was found a lunatic; but in 1820 he had made a will under which, if valid, G P took an estate tail. In 1830, the lunatic being dead, R P, in violation of his covenant, conveyed the estate to R H P. In 1832 an ejectment was brought by those claiming under the will of the lunatic, at the trial of which R P and R H P disputed the will. The conveyance of 1830 was set aside by a decree of the House of Lords, by which D P and his children were declared entitled, as against R P and R H P, to the benefit of the deed of 1827, and it was referred to the Master to settle a conveyance. The Master, by his report in 1843, found that D P had not laid before him any conveyance. In 1841, R H P being in possession, a compromise was entered into between him and G P, and two deeds were executed, by one of which G P released all right and title to the estate to R H P, in consideration of a conveyance of a portion of the estate which was made by

the other deed. A supplemental bill having been filed by D P, and his children, to carry the decree of the House of Lords into execution against R H P and G P, who was not a party to the original suit, Held, first, that though the plaintiffs had not availed themselves of their right of having a conveyance under the decree, they had not forfeited their right to the benefit of it, as R H P had by the deeds of 1841 disabled himself from conveying the legal estate; secondly, that the first deed of 1841 being a release, and not a conveyance, was an acknowledgment of the estate by descent in R H P, and operated to confirm that estate, and, therefore, that the plaintiffs were entitled to have the Lord's decrees enforced against G P, (as claiming under R H P,) although he was not a party to the original suit. *Persse v. Persse*, 3 Ir. Chan. R. 196, C.

REMITTER, *See* FINE AND RECOVERY.

RENEWAL, *See* LEASE.

RENEWABLE LEASEHOLD CONVERSION ACT.

Where the landlord is seized in fee simple of the reversion, he is entitled to compensation under the 5th section of the statute for the conversion of the estate in the reversion to an estate in the fee farm rent. *Ex parte Knox*, 3 Ir. Chan. R. 57, R.

Semble, that an appeal lies to the House of Lords in cases under the Renewable Leasehold Conversion Act. *Ib.*

Where a landlord is seized in fee simple of the reversion, expectant on a lease for lives renewable for ever, and is not likely to suffer any special loss by the conversion of his tenant's interest into a perpetuity, the renewal fine being nominal, he is not entitled to compensation under the 5th section of the Renewable Leasehold Conversion Act. *In re Lawless' Estate*, 7 Ir. Jur. 13, P. C.

Ex parte Knox, (3 Ir. Chan. R. 57,) overruled. *Ib.*

Where one of several owners of the reversion of a renewable lease is out of the jurisdiction, it is not necessary in every case to have an order of reference to the Master. *In re Coates*, 7 Ir. Jur. 220, R.

There were six owners of the reversion, and one was out of the jurisdiction; the fee farm grant had been executed by the other five owners. The interest in the lease was small, and the right to the renewal was not disputed. The court directed the Master to execute the fee farm grant for the absent owners (it having been handed in at the time and endorsed by the register) without a reference as to whether it was a proper grant, or whether the right of renewal existed; but this was done upon the responsibility of the petitioner, and to save expense. *Ib.*

RENT, *See* LEASE.

REPLEVIN, *See* DISTRESS.

REPRESENTATION, *See* EVIDENCE.

RETURN, See PRACTICE. SHERIFF.**REVERSION, See LEASE. RENEWABLE LEASEHOLD CONVERSION ACT.****REVIVOR, See PRACTICE.****SALE, See PRACTICE. VENUE AND PURCHASER.****SALVAGE.**

A ship having been stranded on a bank near D, A, as receiver of droits, and also acting as Lloyd's agent, assisted in getting the vessel off the bank, and employed tug boats and men for that purpose; to enable the vessel to be moored a portion of her cargo was placed on board a tug boat, and conveyed to D. On the arrival of the goods at D, A detained them under a claim for salvage, and also until he was paid fees claimed by him as receiver of droits; for the time the goods were in his custody; which fees B, as agent for the shippers, paid under protest. Held, that an action was maintainable by B to recover back the money so paid, he having been dealt with by A as principal, and having paid the money out of his own pocket. *Conterworth v. Walsh*, 2 Ir. C. L. R. 93; s. c. 5 Ir. Jur. 253, Q. B.

Held also, that as receiver of droits, A was not entitled to the fees claimed, such fees having been only payable to him for his services while employed in saving the vessel, and could only be claimed as against the owners of the vessel, and that he had no lien on the goods for them. *Ib.*

Held also, that A was entitled to a set off for his services and expenses, incurred by him as a salvager, under the statute 9 & 10 Vic. c. 99. *Ib.*

SATISFACTION OF JUDGMENT. See JUDGMENT.

An attorney, being the assignee of a bankrupt, cannot enter satisfaction on the judgment without a warrant of attorney. *Hodder v. Kift*, 3 Ir. C. L. R. 22, Q. B.

Where a judgment had been paid by the representatives of the co-defendant to three out of four trustees, in whom it was vested, the fourth being resident out of the country, the court refused to permit satisfaction of the judgment to be entered under the 143rd section of the 16 & 17 Vic. c. 113. *Kelly v. Blake*, 3 Ir. C. L. R. 110, C. P.

SAVINGS BANK.

The plaintiff was a depositor in the savings bank at T, and had given notice of withdrawal of his deposit. Before the notice expired the bank failed, but a large sum of money came to the hands of the treasurer, who was also the principal acting trustee, for the purpose of paying off deposits for which notices of withdrawal were given. An action was brought in this court against the treasurer. Held, that there was no appropriation in law of the money received by the treasurer to the account of the de-

positor who had given notice of withdrawal, which would be grounds for maintaining an action for money received to the plaintiff's use. *Fitzgerald v. Rowan*, 7 Ir. Jur. 499, C. P.

Held also, that under the Savings Bank Acts the defendant, as trustee, was not liable, as he was not guilty of any default. *Ib.*

Held also, that the proper course for a depositor was to refer the whole matter to arbitration, as directed by the Savings Bank Acts. *Ib.*

SCIRE FACIAS, See PLEADING. PRACTICE.**SECURITY FOR COSTS, See PRACTICE.****SEPARATE ESTATE, See MARRIED WOMAN.****SERVICE OF PROCESS, See PRACTICE.****SET OFF, See COSTS. PLEADING.**

Cross demands, arising in different rights, cannot be made the subject of set off. *Baldwin v. Baldwin*, 3 Ir. Chan. R. 303, R.

The court will not, without evidence and from the mere nonpayment of any sum by either party, presume an agreement that one demand should be set off against another. *Ib.*

A was tenant for life of an estate on which B had a charge; B was indebted to A by judgment, and in a sum for contribution. No interest was paid by A to B from 1830, for ten years, during which time A continued in possession of the estate, nor was any sum paid by B to A during that time. Held, after the death of both—first, that there could be no set off of one demand against the others, as A was not personally liable for the interest, and the demands were of a different nature; secondly, that the court would not, in the absence of direct evidence, presume an agreement for a set off. *Ib.*

[SETTLEMENT, See RISE AND RECOVERY. MARRIAGE SETTLEMENT.**SETTING ASIDE PROCEEDINGS, See PRACTICE.****SHERIFF.**

With respect to the operation of an order for suspending the execution of a writ of *fi. fa.*, so as to give priority to one subsequently lodged, and the liability of the sheriff, who had paid the first creditor, to an action for money had and received at the suit of the second, see *Kirwan v. Jennings*, 3 J. C. L. R. 48; s. c., 5 Ir. Jur. 196, Ex. Cham.

The order of the Exchequer, under which the sheriff had acted, held to be no answer to the action, the plaintiffs not having been parties to that order. *Ib.*

Where a sheriff's return to a writ of *fi. fa.* is so informal as to be calculated to deprive the plaintiff

of the fruits of his execution, or severely embarrass him in bringing an action against the sheriff, the court will, on motion, compel him to amend it. *Harris v. Meagher*, 8 I. C. L. R. 129, E.

When a return is good upon the face of it, the court will not compel a sheriff to amend his return, but will leave the complainant to his remedy by action, if the matters suggested in the affidavit be triable by that form of procedure. *Channing v. —*, 3 I. C. L. R. 428, Q. B.

With respect to the liability of the sheriff to an action under the Statute of Anne, at the suit of the landlord, for not satisfying a year's rent, where the tenant, pending the seizure, had committed an act of bankruptcy, and the sale took place before the issuing of the commission, see *Gill v. Wilson*, 3 I. C. L. R. 544; s. c., 6 Ir. Jur. 132, Q. B.

To a writ of execution the sheriff made the following return—that by virtue of a former writ to him directed, and which issued out of the Court of Queen's Bench, tested the 29th of May in the seventeenth year of the reign, and returnable to the said court on the 7th of June, 1854, he had seized certain chattels of the execution debtor; and that, by virtue of another writ of execution, issued out of the Court of Queen's Bench, tested the 22nd day of July, in the eighteenth year of the reign, and returnable into the said court on the 22nd of August, 1854, to him directed, and also of another writ, (stating the dates as before,) he advertised the sale of said property for the 6th of August, 1854, and that it was set up for sale, but that the sale was adjourned, for want of bidders, and that it still remained upon his hands, and he proceeded as follows: "I further certify that the said G M hath not any more goods and chattels in my bailiwick whereof I can cause to be made the said debt and costs, as within I am commanded." Held, that the return should have stated that the execution creditor had not, at the time of the delivery of the writ to the sheriff, or at any time since, any goods, &c., and that it was not sufficient to return that he "hath not" any goods, &c. *Williams v. Murphy*, 7 Ir. Jur. 32, E.

Semble, it is also necessary, where the return refers to former writs of execution, to state the parties issuing such writs, and the sums named therein. *Id.*

On a sheriff applying for an interpleader issue where a claimant to the goods under seizure had served a notice appraising the sheriff that the defendant had, by deed duly executed and gazetted, assigned all his goods and chattels to him, in trust for himself and other creditors, the court, before making the order, required the claimant to make an affidavit stating the deed to have been duly made and executed without collusion, &c. *Campbell v. Conway*, 7 Ir. Jur. 260, E.

SHIPPING, See SALVAGE.

A contracted with B by charter party to carry from X to Y a cargo of goods, at the rate of 15s. per ton of 20 cwt., "the said charterers thereby agreeing to pay for 240 tons whether that weight should be shipped or not, the said freight to be

paid in cash on sight delivery of the cargo." It was alleged in the declaration that said cargo was shipped on board the vessel at X and conveyed to Y, and that A there made a right delivery of the cargo. A stated for £33 0s. 9d., which was the balance, after giving credit for a payment on account of the freight on 240 tons. The defendant, by his plea, admitted the contract as alleged; that the vessel only received on board and carried to Y 194 tons; that it could have received and carried 35 tons more, but that the captain of the said ship, acting on behalf of B, refused to receive more than 194 tons, and that the money credited by A was sufficient to satisfy the freight on 194 tons. Held, that this defence was a good answer to the action, inasmuch as the readiness and willingness of A to carry the entire 240 tons was a condition precedent to his right to recover dead freight up to that amount, and the defence showed that freight had been paid for the quantity actually carried. *Clements v. Russell*, 7 Ir. Jur. 102, Q. B.

SOLICITOR, See ATTORNEY AND SOLICITOR.

SPECIAL JURY, See JURY. PRACTICE.

STAYING PROCEEDINGS, See PRACTICE.

STOP ORDER, See PRACTICE.

SUBSTITUTION OF SERVICE, See PRACTICE.

SUGGESTION, See PRACTICE.

SUGGESTION OF BREACHES.

A bond conditioned for payment of £200, subject to a proviso that if the obligor or his heirs, &c., should pay to the obligee £100 at the times mentioned in a defeasance on a warrant of attorney thereto annexed, without delay, the obligation to be void, otherwise to remain in force. The times and manner of payment specified in the defeasance were, that the £100 should be paid by instalments of £10 on the 29th December following the date of the bond, and £10 on the 29th of every succeeding four months, and if default were made, the obligee was to proceed for whatever sum remained due. Held, that execution could not issue on such bond without a suggestion of breaches. *Hannington v. Case*, 3 I. C. L. R. 87, Q. B.

SUMMONS AND PLAINT, See PRACTICE.

SURETY, See EXECUTION. RECORDS.

TAXATION, See COSTS.

TAXES, See REGISTRY.

**TENANT, See LANDLORD AND TENANT.
FINE AND RECOVERY.**

TIMBER, See INJUNCTION.

The question on a reference to inquire whether timber be essential to the possession and enjoyment of an estate is one partly of fact and partly of opinion and taste—the end of the inquiry being to ascertain whether, though in respect of its intrinsic value it may admit of pecuniary compensation, its adventitious value as an ornament to the estate be not so material, as that it may reasonably be supposed that without it the purchaser would not have entered into the contract at all. *Stewart v. The Marquis of Conyngham*, 3 I. Chan. R. 104, C.

Where the timber, the subject of the inquiry, grew on a comparatively small portion of the estate detached from the demesne, and not in view of the mansion house, pleasure grounds or avenue, and the Master reported that it was not essential to the possession or enjoyment of the estate, though there were conflicting affidavits as to whether it was ornamental or not, the Court (reversing the order of the Master of the Rolls) refused to send back the report to be re-considered on further evidence. *Id.*

TIME, (COMPUTATION OF,) See PRACTICE.

TITHE RENT CHARGE, See EVIDENCE.

In 1731 the lands of B and M, with so much of the tithes as were vested in the lessor, were demised for fifty-one years. In 1764 F became entitled to the interest in the lease, and so continued until 1782, when it expired. The lands of B, C, and M were demised to F for lives, with a covenant for perpetual renewal, in 1751. In 1766 the tithes of B, C, and M were demised for lives, with a covenant for perpetual renewal. In 1813 and 1832 renewals of the lease were granted, the interest of which was vested in A. In 1834 a tithe composition was made in the parish where the lands were situate, and the commissioners certified that a certain proportion of the tithes was payable to those claiming under the lease of 1766, and the remainder to the vicar. There was no evidence of payment of tithes for 60 years previous to 1834; Held, overruling objections to the Master's report, that the right of exemption from the payment of tithes, under the 1 & 2 Vic., cap. 109, sec. 18, was not established, the case falling within the exception in section 20, which is not to be deemed to be confined to the case of a demise of tithes to the owner or occupier of the lands in respect of which the tithes are payable. *Ellis v. O'Neill*, 3 Ir. Chan. R. 280, R.; s. c., reversed on appeal by Lord Chancellor, 3 Ir. Chan. R. 609, C.

A composition and applotment of certain tithes were made in 1834. It did not appear that any render of said tithes had been made for 60 years prior to said composition, but during all that time the tithes had been demised (originally by a lease of 1776, for lives renewable for ever, and which had been continually renewed,) to a party not the

owner or lessee of the land in respect of which they were chargeable, and the reserved rent paid to the tithe owner. Held, (Perrin, J., *dissentiente*,) that the above case came within the saving of the 20th section of the 1 & 2 Vic., cap. 109, and that the 60 years' non render was no bar to the recovery of the rent charge, for which the said tithes had been commuted by the statute. *Ellis v. O'Neill*, 7 Ir. Jur. 336, Q. B.

The 3 & 4 Wm. 4, cap. 27, applies to tithe rent charge, and therefore only six years' arrears of that species of property can be recovered by the tithe owner. *Ecclesiastical Commissioners v. Marquis of Sligo*, 7 Ir. Jur. 261, C.

In an action to recover money payable for rent-charge, in lieu of tithe-composition, the plaintiffs averred in their summons and plaint that an annual sum was duly applotted on certain lands in which the defendant was and still is, and, previous to the passing of the "Act to abolish tithe-composition in Ireland and to substitute rent-charges in lieu thereof," was, owner of the first interest, equivalent to a perpetual interest within the meaning of the said Act, under which, or derived wherefrom, there was not, at the time of the passing of the said Act, or since, any such estate or interest, no landlord having undertaken the payment of said composition under the provisions of the Act of the 2nd and 3rd years of the reign of King William the Fourth, relating to tithe-composition, whereby the defendant became liable to pay the annual sum, being three-fourths of the said composition. The defendant having demurred, on the ground that the plaintiffs did not, in their pleading, show "that the defendant had such an estate of inheritance, or such an estate at all, as would render him liable to pay tithe rent-charge, in the parcels of land, within the meaning of the 1st and 2nd Victoria; that the nature of the perpetual estate or interest of the defendant is not otherwise mentioned than in vague and general terms," it was held that the summons and plaint sufficiently set forth the estate of the defendant in the parcels of land. *Trench v. Cassidy*, 7 Ir. Jur. 399, E.

TRESPASS.

An action of trespass will not lie against a principal or his attorney, who act upon the order of a court of competent jurisdiction, and who are guilty of no irregularity, even though such order be wholly illegal. *Dickson v. Capes*, 7 Ir. Jur. 165, C. P.

TRIAL AT LAW, See PRACTICE.

TROVER, See CONTRACT.

**TRUST, See EXECUTOR AND ADMINISTRATOR.
POWER. PRACTICE.**

A fund was bequeathed in trust for the separate use of A for life, and that she should be at liberty to dispose of it by her last will and testament, provided the power should not be exercised in favour of B. A, having survived her husband, made a will

appointing the fund; Held, that the appointees were trustees for creditors of H, and the funds assets for payment of his debts. *Baile v. Babington*, 3 Ir. Chan. R. 568, R.

The rule, that where a general power of appointment is exercised in favour of a volunteer, he is a trustee for the creditors of the appointee, holds where the power is to be exercised by will only. *Id.*

A power is general, though there be a restriction against exercising it in favour of one person. *Id.*

The defendant had acted gratuitously as the agent of the plaintiff, transmitting to her the interest of charges to which she was entitled. One of the charges was paid to the defendant; which the plaintiff directed him to invest on a specified real security, which he was unable to do, but which, without her authority, he lent to L, for whom he was also agent, and who was indebted to him on the security of a bond and warrant of attorney to enter judgment. He enclosed the bond and warrant of attorney to her in a letter, in which he stated; contrary to the fact, that the money had been applied to pay off a charge on his estate. Afterwards, on his son's marriage, conveyed a part of the estate in trust to pay off charges on his estate, another part to the use of his son and his issue, and the lands of C in trust to secure his debt to the defendant. The defendant, in several letters, offered to give the plaintiff's claim priority over his demand in the lands of C. L being dead, leaving no assets to pay the plaintiff's claim, the court, on a bill filed by her, declared the plaintiff entitled to a specific performance of the contract contained in the letters, and that the defendant was a trustee for the plaintiff as to so much of his security on the lands of C as would be sufficient to pay her claim, and ordered that he should execute a deed declaring the trust. *O'Bairne v. Cornwall*, 3 Ir. Chan. R. 130, C.

Trustees of real estate, upon trust to sell for the payment of charges, are entitled to the costs of a suit out of the surplus only, after payment of the charges, and when the fund was deficient the court refused their costs. *White v. Villiers*, 3 Ir. Chan. R. 125, C.

The legal estate of a mortgagee was vested in two trustees, one of whom was out of the jurisdiction. The court, in order that the mortgage might be reconveyed to the mortgagor, pursuant to a decree in the foreclosure suit, made an order under the Trustee Act, that the mortgage should vest in the other trustees solely, and directed the costs of the petition to be costs in the suit. *Corker v. Ryan*, 3 Ir. Chan. R. 562, R.

The executor of a trustee, having been ordered to invest a certain sum in stock to the credit of a cause, and having neglected to do so for two years, during which the funds fell, Held, (affirming the Master's report,) that he was bound to pay the price of the same in stock on the day on which he was ordered to invest it, with interest at $3\frac{1}{4}$ per cent. only from that day. *Geraghty v. Geraghty*, 3 Ir. Chan. R. 414, R.

An estate was settled upon trust for the separate use of a married woman, "or for such other person or persons as she shall, by any writing under her hand, direct or appoint." Her husband, having in-

curred debts and borrowed the sum of £500, gave his bond and warrant of attorney for the penal sum of £1,000, conditioned for the payment of £500 and interest, which bond was also signed by his wife, and the latter gave to her husband's creditor a guarantee in the following words: "My dear Sir, You hold a bond, dated August, 1841, for £500 sterling, signed by my husband, T. K. Hannington, and myself. I hold myself accountable for the payment of this bond, with interest at 6 per centum, against the lands of, &c., and should Mr. Hannington die, or should I die, my son, James C. Hannington, whom I have made my heir, shall hold himself accountable to you for the amount of the bond of £500, and cause you to be paid, retaining you, or, in the event of your death, your son, J. C. Wilcocks, as agent to the lands of, &c., until said bond be discharged." Held, to be a valid declaration of trust sufficient to charge the separate estate. *Wilcocks v. Hannington*, 7 Ir. Jur. 281, C.

A testator by his will, after charging his real and personal estate, which consisted chiefly of slaves in Jamaica, with the payment of his debts, bequeathed to his executors the sum of £2,000, in trust to pay the interest thereon to his daughter, B M, (the petitioner,) for her life, and after her death the principal to go to her children; and he directed that the principal and interest should be raised out of the yearly profits of the estate, and that the person for the time being in possession of the property should pay the charge. Subject to this and some other legacies, he devised his estate to his son, T W S, and his assigns, for ever; and the latter entered into possession, and continued seised until his death, when he devised the property to his daughter, M K, still subject to the above legacy. The respondent, having married M K, became entitled to the estate in right of his wife, and wrote a letter to the petitioner on the subject of the legacy of £2,000, containing the following language: "The property owes you and your family £2,000 currency. So long as I am in possession you shall be paid your interest, and when the property yields it, the principal, as I wish never to pocket a farthing till every one is paid." Under the 3 & 4 Wm. 4, cap. 37, (the Slave Compensation Act,) the respondent had previously put in his claim for compensation, as owner of the estate in right of his wife, but not in any other character; no counter claims were lodged on behalf of the petitioner, or any person representing her charge, and a large sum of money was awarded to him as compensation. A petition having been presented for the purpose of establishing the charge of £2,000 upon the estate, and of rendering the compensation money liable in the hands of the respondent to this demand; Held, that the act of the Compensation Commissioners, in awarding this sum to the respondent, did not conclude the rights of the petitioner as against the sum granted to the respondent in lieu of the estate originally liable to that charge. *M'Kean v. Gray*, 7 Ir. Jur. 319, C.

Held also, that the letter written by the respondent to the petitioner amounted to a declaration of trust in reference to the rents and profits of the estate, and therefore that the respondent was liable

to satisfy the demand of the petitioner as to the legacy of £2,000 out of the sum awarded to him as compensation money. *Ib.*

—◆—
TRUSTEE ACT, *See* TRUST.

—◆—
USE AND OCCUPATION, *See* PLEADING.

—◆—
VARIANCE, *See* PLEADING.

—◆—
VENDOR AND PURCHASER, *See* INCUMBERED ESTATES COURT. RECEIVER. TRUSTEE.

A receiver was appointed over certain lands in the cause of *C v. C*; a portion of these lands was sold, and A became the purchaser; A was afterwards evicted from a small part by title paramount, there having been a misrepresentation as to the boundaries. Meanwhile a bill was filed by another party, E, against the defendant, C, to recover the amount of certain claims. The bill prayed that E might have the benefit of the proceedings in the cause of *C v. C*. The purchase money of the lands sold had been all allocated in the cause of *C v. C*, but there remained in court some of the rents of the unsold lands, and these had been transferred to the cause of *E v. C*. Held, confirming the decision of the Master of the Rolls, (6 Ir. Jur. 404,) that the purchaser should not be left to his action on the covenant, but was entitled to compensation, and that the funds liable to this claim in one cause were liable to it in the other after the transfer. *Cooper v. Cooper*, 7 Ir. Jur. 49, C.

Held also, overruling the decision of the Master of the Rolls, that the fund which had been transferred from the cause of *C v. C*, and which was in court in the cause of *E v. C*, though no part of the purchase money, was yet liable to the purchaser's claim for compensation. *Ib.*

An agreement had been entered into between A and B, by which the latter was to demise to the former three denominations of lands, R, S, and T, containing 400 acres, at an acreable rent of 14s. per annum, for a term of five years. B put A into possession of one of these denominations (R), but was unable to make out title to the others, and when about two years of the term had expired, B sued A for the rent due out of the lands of R, at the rate of 14s. per acre, which the latter paid. A then brought the present action against B, for having failed to fulfil his contract as to the other lands, but averring no special damage, and the jury found damages by their verdict for the plaintiff, acquitting the defendant at the same time of fraud or negligence as regarded the title to the lands. It was proved that R was not worth 14s. per acre, per annum. Held, that a contract for the sale or demise of lands does not *per se* contain a warranty of title as to the lands contracted to be sold or demised; but that inasmuch as the plaintiff had paid a certain sum as the annual rent of that portion of the lands into possession of which he had been put exceeding the yearly value, he was entitled to a verdict for the amount of the difference between the

actual value and the amount paid by him. *Fitzgerald v. Browne*, 7 Ir. Jur. 90, E.

A purchaser of lands by public auction agreed to pay the purchase money in March, 1852, and fulfil the conditions of sale, one of which was, that the purchaser should be entitled to the rents and profits from the 1st November, 1851, and if the completion of the purchase should be delayed "from any cause whatsoever" beyond March, 1852, that he should pay interest on the purchase money from November, 1851. The vendor agreed to furnish an abstract of title within four days, but it was not sent within the specified time, and the title was not completed until January, 1854. The purchaser had, previous to March, 1852, drawn the amount of the purchase money out of the funds, and lodged it in bank to be ready for payment, but received little or no interest upon it; and, in the beginning of the latter month, he sent an agent to the vendor, offering the money, and declining to pay interest upon it after that date, but the vendor refused to receive the principal until the title should be completed, and in the latter end of the same month the purchaser wrote a letter to the vendor, stating that if the abstract of title should be furnished within one week he was ready to complete the contract, provided that his right to the rents and profits should not be interfered with, and that he should not be asked for interest upon the purchase money. No direct reply was given to this letter, but negotiations were continued, and finally a petition having been filed by the vendor to compel the purchaser to complete the purchase, and pay interest upon the purchase money, Held, that the purchaser was not liable for interest upon the purchase money, the vendor having been in default. *Kellott v. Farrelly*, 7 Ir. Jur. 134, C.

Held also, that the purchaser was entitled to the rents and profits of the lands. *Ib.*

A, a jointress, having been offered a sum of money by B for her jointure, accepted the offer, and accordingly articles of agreement for the sale of it at a specified sum were prepared in duplicate, and engrossed, and one part was signed and witnessed in the ordinary way by A, and the other by B. The part signed by A was sent by her to her attorney, whom she had previously instructed to see that all necessary arrangements were made, and the part signed by B was left in the hands of his attorney. A's attorney, having discovered that B had made some misrepresentations as to the amount of his property, and apprehending that he would be unable to pay the purchase money, refused to interchange the parts of the instrument, so as to complete the contract, unless B gave him further security, which the latter refused to do, and for two months after the refusal of the other party to interchange the parts of the instrument, took no further steps towards the completion of the contract. A cause petition was then presented for the purpose of compelling A to a specific performance of the contents of the instrument, and dismissed upon the ground that under the circumstances no complete contract for the sale of her jointure had been entered into by A. *Beamish v. Vignoles*, 7 Ir. Jur. 261, C.

A being in treaty to obtain a lease of certain lands from B, the following memorandum of agreement was made with mutual consent: "31st March, 1852. Term 61 years. Rent, from the 1st of May, £75. Taxes and rates to be paid by (A), and allowed out of the first gale. Covenant to expend £300 in permanent buildings in two years. Covenant to give tenant the refusal in case of (B) selling." A entered into possession in the same year, and paid rent, and obtained receipts, but did not expend the sum of £300 in improvements upon the lands, and in the year 1854 he furnished a draft lease for approval to B, who refused to receive it, alleging that A had not entitled himself to a lease, having failed to expend the sum of £300 within the specified time. A cause petition having been filed by A to obtain specific performance of the memorandum of agreement; Held, that relief could not be granted under the circumstances, the petitioner having admittedly violated an essential portion of the agreement. *Williams v. Langley*, 7 Ir. Jur. 264, C.

A purchaser, discharged from his purchase on account of the title being bad, is entitled to be paid interest at 5 per cent. on his purchase money from the time of lodgment, and to be paid his costs thereby incurred; and if there be no fund in court, he is entitled to an order for payment thereof, and of his costs of the motion against the plaintiff in the suit, with liberty to the plaintiff to apply to be repaid out of any funds to be realized out of the estate. *Murphy v. Lynda*, 7 Ir. Jur. 305, R.

The plaintiff's costs of the motion made costs in the cause. *Ib.*

—◆—
VENUE, *See* PRACTICE.

—◆—
VESTING ORDER, *See* TRUSTEE.

—◆—
WRIT OF ERROR, *See* PRACTICE.

An injunction against felling timber having been obtained against the respondent, on a motion to dissolve it, the court directed an action to be brought. An action having been brought, and the respondent having obtained judgment in the Exchequer Chamber, the court dissolved the injunction, notwithstanding the pendency of a writ of error to the House of Lords, it not appearing that irreparable injury would be done to the petitioner by dissolving the injunction. *Mountcushel v. O'Neill*, 3 Ir. Chan. R. 455, R.

The Court of Chancery, on appeal from the order at the Rolls, held that the injunction ought to be continued. 3 Ir. Chan. R. 619, C.

—◆—
WAIVER, *See* PRACTICE.

—◆—
WARRANT OF ATTORNEY, *See* JUDGMENT. PRACTICE.

WILL, *See* LEGACY. LIMITATIONS (STATUTE OF.)

A testator having under his marriage settlement power to appoint £1,500 among his children (which was, in default of appointment, to be divided among them equally,) and having only two sons, H and W, appointed to his son H £1, and to his son W £1, and as to the residue, appointed the same to W, adding, "I request him to have the same invested on mortgage or on the purchase of lands, and settled on himself for life, with remainder to his child or children as he may appoint, with remainder to such child or children of my son H as he may appoint, with remainder to my own right heirs." Held, that W was bound to elect between his rights under the settlement, and those under the will. *Moriarty v. Martin*, 3 Ir. Chan. R. 26, C.

W having during his lifetime done acts which were held to amount to an election to take under the will, and having died without children; Held, that the precatory words contained in the will constituted a valid trust in favour of the children of H, although they were not objects of the power contained in the settlement. *Ib.*

Lands were devised by a will to D and J for their lives, remainder over, and by a codicil the testator, after revoking the remainders, devised the lands, after the deaths of D and J, or either of them, to the use of his nephews, W and H, and all and every the child and children of W, begotten or to be begotten, to be equally divided between them as tenants in common, and the respective heirs of their bodies, lawfully issuing, with cross remainders between them. W had two children, who were alive at the death of D. Held, that the children of W, who were in *esse* at the death of D, took as tenants in common with W and H, to the exclusion of any who should afterwards be born. *Murray v. Murray*, 3 Ir. Chan. R. 120, C.

Where a devise to a class is not immediate, but is postponed to a particular period or to a particular event, those only who answer the description at that period or on the happening of that event are entitled to take. *Ib.*

A testator by his will reciting that he was seised of a freehold estate in certain premises devised as follows: "I leave, devise, and bequeath to my said daughter M H all my freehold interest in North King-street, in the City of Dublin, upon trust to receive the rents and profits thereof for and during the term of her natural life, for her own sole use, &c., notwithstanding her coverture, without the control of her present or any future husband, &c., with power to my said daughter by any deed or will to dispose of, devise or bequeath the said freehold estate to and among her children, in such shares and proportions as she shall think fit and proper." After some bequests, a residuary clause followed in these words: "I do hereby give, leave, and bequeath to my said daughter M H all the rent, residue and remainder of my worldly substance, of what nature or kind soever, for her sole use and benefit, without the control," &c. Held, that M H took the absolute interest in the freehold estate; that the power was a naked one not coupled with a trust, and that no estate was given to the children

by implication from the words of the power. *Healy v. Donnelly*, 3 I. C. L. R. 213; s. c., 5 Ir. Jur. 305, E.

A sum of £8,000 was charged on lands of K by a marriage settlement as portions for children, to be shared and divided between them in such parts and proportions, and to vest and be paid to such children respectively as and upon such age, days, or times, and to be subject to such charges, provisions, and limitations, such charges and limitations being for the benefit of some one or more of them, and in such manner as W M, the younger, by any deed or deeds, instrument or instruments in writing, or by his last will, should direct or appoint, and in default of appointment, to be equally divided between or among such children, share and share alike, the share of sons to be paid at twenty-one, and the share of daughters to be paid at twenty-one, or marriage. W M by his will bequeathed a legacy of £2,000 to his wife, and the interest of the remainder of the money of which he might die possessed for her own use, and for the maintenance and education of his two daughters, and he charged her estate of K, as he was entitled to do by his marriage settlement, with £8,000, which, together with the residue of his fortune, he wished to be divided in equal shares between his two daughters, and he left the residue of his fortune and money, after paying the £2,000 to his wife, together with the sum of £8,000 charged upon the estate of K, to be equally divided between them, the entire to belong to either of his daughters, should the other not arrive at the age of 18 years. Held, that the will operated as an execution of the power under the settlement, and that the portions of the daughters vested at the testator's death, and bore interest from that date. *Murphy v. Murphy*, 3 Ir. Chan. R. 95, C.

In cases relating to the devise of real estates, the court intervenes only by reason of the existence of some impediment to proceeding at law, in order to have the right of the parties submitted by means of that intervention to a legal issue before a jury otherwise than by granting a new trial. *Rosborough v. Boyse*, 3 Ir. Chan. R. 489, C.

According to the earliest authorities the court would not bind the inheritance by one trial; but there is now no absolute rule requiring the court, as of course, to grant a second trial of an issue *devisavit vel non*, unless it is satisfied that a second trial may afford more satisfactory grounds for the final adjudication between the parties. *Ib.*

Where a judge, who tried the case, expressed himself not dissatisfied with a verdict in an issue, *devisavit vel non*, finding against the will, and the court concurred in the verdict, and no new evidence had been discovered, although some existed, which the party had not availed himself of, the court refused to grant a new trial. *Ib.*

Although, to sustain a case of fraud, and to show that a will has been made under coercion and influence, the evidence must be pointed at the very *factum* of the will, and directly show that the instrument, whose validity is disputed, was executed under pressure of coercion and undue influence, the jury may, from circumstantial evidence, or from

inference and presumption from such evidence, come to the conclusion that coercion and undue influence existed. *Ib.*

A testator by his will bequeathed annuities to each of his daughters, severally with power of appointment to their children, and in case they should die without leaving issue, then the annuity of the daughter so dying to go to his sons, to be equally divided between them; but in case of either of his sons dying before such event, then his proportion in such annuity to go to such issue as he should leave; and if any of his sons should die without issue, then to his other sons, except he or they should leave a widow or widows, and if so, to such widow or widows during her or their lives; and after to his sons or the issue of such sons as may have died. He then devised his freehold and leasehold property to his four sons, A, B, C, and D, in the following proportions: to A one-third, to B one-third, and the remaining one-third to be divided between C and D, after payment of the annuities, providing that in ten years after his death his "income" should be equally divided between his four sons, after payment of the annuities, with the following provision. "Having left to my eldest son, D, one-fourth of my income, to take place in ten years after my death, it is my will that then he shall have his choice either to take the one fourth of the income as mentioned above, or to take instead of one-fourth of the income the houses and demesnes of X and Y, subject to the marriage settlement of the said D, and subject also to a sum of £500, and interest at 6 per cent. on said sum of £500;" and after a bequest of his furniture, &c., "I appoint my executors residuary legatees in trust first with the produce of such property to pay each of my daughters (naming them) £5 each, and such further sum as shall be necessary for their maintenance until the first payment of annuity shall be made to them." He then named his sons, D and C, and his son-in-law, executors. In the following year he added a codicil, naming his son, C, as executor in place of D, with the following clause: "And with the view of removing any doubts that may exist as to the continuance of annuities to my daughters (naming them), it is my will, and so intended by me, that the same respectively be only payable during their respective lives, and in the event of their dying, leaving children, the share of such so dying to survive to their children, and subject to appointment as in my will named." Held, that the several annuities did not become extinct upon the death of each daughter respectively. *Stevell v. Stevell*, 7 Ir. Jur. 145, C.

Held also, that the lands of X and Y, (D having elected to take them in lieu of his one-fourth of the testator's income,) were exonerated from the payment of the annuities. *Ib.*

Held also, that the residuary legatees did not take a beneficial estate in the residue. *Ib.*

By a will executed before 1 Vic. c. 26, a testator devised certain freehold estates without words of limitation, and in the same sentence added, "with the stock and property of every denomination that I may be possessed of at the time of my decease." Held, (Ball, J. *dissentiente*,) that the whole interest

in the lands passed under the general word "property." *Casey v. Lamlor*, 7 Ir. Jur. 248, C. P.

A testator made the following bequest in his will: "I give and bequeath unto each and every of my servants, male and female, who shall respectively have been living in my service for the space of six calendar months immediately previous to my decease, the amount of one year's standing wages over and above any yearly salary or wages I may owe them respectively at my decease." Held, not to include a person who had lived in the testator's service as gardener, at the weekly wages of 12s. 6d. (although his service had been exclusively given to

the testator, in a cottage belonging to whom he resided, and by whom he was allowed yearly a certain quantity of coals,) upon the ground that the hiring was not a yearly one. *Breslin v. Waldron*, 7 Ir. Jur. 153, C.

—◆—
WITNESS, *See* ATTACHMENT. SUBPENA.

—◆—
WRIT, *See* EXECUTION. PRACTICE.

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